



**Tom Ojienda and Associates v County Government of Nairobi  
(Miscellaneous Application E269 of 2020) [2024] KEHC 2796 (KLR)  
(Constitutional and Human Rights) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2796 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
MISCELLANEOUS APPLICATION E269 OF 2020  
LN MUGAMBI, J  
MARCH 20, 2024**

**BETWEEN**

**PROF. TOM OJIENDA AND ASSOCIATES ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF NAIROBI ..... RESPONDENT**

**RULING**

1. Through a Chamber Summons application dated 7<sup>th</sup> December 2021, the applicant challenged the ruling by the Taxing Master, Hon. Njeri Thuku's dated 9<sup>th</sup> November 2021 on Advocate – Client Bill of Costs dated 3<sup>rd</sup> September 2020.
2. In the application, the applicant sought the following reliefs against the respondent:
  - i. Spent.
  - ii. That the findings and Ruling of Hon. Njeri Thuku in Misc. Application No. E269 of 2020 taxation with regard to the applicant's Bill of Costs awarding a sum of Ksh.191,524 be varied and/or set aside in relation to Item No.1.
  - iii. That the Advocates Bill of Costs dated 3<sup>rd</sup> September 2020 be taxed afresh inter-partes and/or this Court proceeds to make a finding.
  - iv. That this Honourable Court be pleased to interrogate the applicant's Bill of Costs in light of the actual work done and adopt the applicant's proposal on taxation of the costs.
  - v. That costs and further incidentals to the application be provided for.



- vi. That such further or other relief as the Honourable Court may deem just and expedient to grant.

### **Applicant's case**

3. The application is based on the grounds set out on the face of the application and in the applicant's supporting affidavit of even date.
4. In a nutshell, he deponed that the Advocate – Client Bill of Costs arose from Petition No.174 of 2011 where he represented the respondent. The subject matter of the suit was the respondent's wrongful seizure of the petitioner's items of trade and loss of income during that period. The value of the subject matter was Ksh.96,332,157.75.
5. After the matter was heard and determined, the applicant filed a Bill of Costs dated 3<sup>rd</sup> September 2020 wherein he sought Ksh.14,023,487.60 against the respondent. However, Hon. Njeri Thuku taxed the Bill and awarded him Ksh.191,524 on Item 1 being instruction fees, hence taxing off Ksh.13,381,963.60.
6. The applicant is aggrieved by this finding and contends that the taxing master failed to adequately address herself on the nature and importance of the matter. He assails the ruling on the grounds that the taxing master did not consider the time expended in preparing and filing the substantial documents after the receipt of instructions from the respondent.
7. He contended that the taxing master erred in law by failing to award full instruction fees in disregard of the principles of taxation as governed by the Advocates (Remuneration) Order thereby taxing the Bill of Costs at fairly low and awarding an unreasonable sum.

### **Respondent's Case**

8. The respondent in opposing the applicant's Reference filed its grounds of opposition dated 25<sup>th</sup> July 2022 on the premise that:
  - i. The application is an affront to the clear provisions of Rule 16 of the *Advocates (Remuneration) Order*, 2014 which grants the taxing master discretion.
  - ii. The taxing master considered all the relevant factors in arriving at her decision.
  - iii. The taxing master took into account the principles of taxation in conformity with Rule 5 of the *Advocates (Remuneration) Order*.
  - iv. The application is misconceived.

### **Petitioner's Submissions**

9. The petitioner filed two sets of written submissions and a list of authorities dated 20<sup>th</sup> May 2022 and 3<sup>rd</sup> July 2023. In the first set of submissions, the applicant relied on the case of *Ochieng, Onyango, Kibet and Obaga Advocates v Adopt a Light Limited* [2007] eKLR where the Court held as follows:

“...the taxing master must consider the case and labour required in the matter, the nature or importance of the matter, moreso the amount or value of the subject matter involved the interest of the client in sustaining or losing the benefit and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental



importance to consider the value of the subject. And when the subject matter is unknown, the Court is empowered to make what is available as a point of reference...”

10. The applicant further stated that Schedule 6 of *Advocates (Remuneration) Order* provides that the value of the subject matter in litigation can be ascertained from the pleadings, the judgement or the from a settlement between the parties. Considering this, the applicant submitted that the value of the subject matter in the substantive suit (Petition No.174 of 2011) was ascertainable from the pleadings as Ksh.96,332,157.74 which the taxing master failed to consider in making her decision.
11. The applicant likewise submitted that the taxing master erred in principle and law and failed to apply her discretion judiciously in awarding an Instruction Fee that was not proportional to the value of the subject matter in Item 1. According to him had the taxing principles been applied properly by the taxing master, the accurate amount of the Instruction Fees after taxation would have been Ksh.2,144,982.37.
12. In the second set of submissions, the applicant submitted in that the taxing master failed to consider the written submissions on the Instruction Fees. Essentially, Counsel submitted that the taxing master failed to consider the principle of fair reimbursement in awarding Ksh.100,000 as Instruction Fees owing to the complex legal issues that pertained violation and denial of constitutional rights in the substantive suit. To buttress this point reliance was placed on the case of *Kipkorir, Tito and Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR where it was observed that:

“On reference to a Judge from the taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Officer, erred in principle in assessing the costs.”
13. The applicant moreover stressed that the taxing master did not consider the value of the subject matter in making her decision hence making an error by unreasonably reducing the Instruction Fee. He pointed out that the Court in the case of *Kamunyori and Compnay Advocates v Development Bank of Kenya Limited* [2015] Civil Appeal No. 206 of 2006 held that:

“... Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a judge will normally not interfere with the taxing officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If the instruction fee is arrived at on the wrong principles, it will be set aside.”
14. Comparable reliance was placed on the cases of *Joreth Limited v Kigano and Associates* (2002)1 EA 92, *Del Monte Kenya Limited v Kenya National Chamber of Commerce and Industry (KNCCI) Murang’a Chapter and 2 others* [2021] eKLR, *D. Njogu and Company Advocates v Panafcon Engineering Limited* [2006] eKLR and *Beatrice Kariuki and Associates Advocates v Gatoka Limited* [2017] eKLR to emphasize the issue on taxation of Instruction Fees.
15. The applicant also urged the Court to be guided by the principles for taxation of bill of costs as summarized in the case of *Premchard Raichand Ltd v Quarry Services of East Africa Ltd. (No.3)* [1972]EA 162 as cited in the case of *Brampton Investment Limited v Attorney General and 2 others* [2013] eKLR.



16. It is for this reason, he seeks to have this Court order that the impugned Bill of Costs be taxed afresh before a different taxing master so as to realize the rightful amounts owed to him for the services rendered to the respondent.

### **Respondent's Submissions**

17. The respondent through its Counsel, Amadi and Amadi Advocates filed written submissions dated 25<sup>th</sup> July 2022. Counsel begun by submitting that the substantive suit did not proceed to trial as the same was dismissed for want of prosecution on 14<sup>th</sup> June 2013 with no Orders as to costs. On this premise, Counsel submitted that the taxing master in making her decision in the applicant's Bill of Costs had considered the work done while relying on the *Advocates Remuneration Order*, 2006.
18. Counsel stressed that as a principle, this Court cannot interfere with the taxing master's discretion unless it appears that the same was not exercised prudently or was exercised improperly. That is to say, before interfering with such a decision the court must be satisfied that the taxing master's Ruling was outrightly wrong. He relied on the case of *Visser v Gubb* [1981] (3)SA 753 (C) 754H – 755C where the Court held as follows:

“The Court will not interfere with the exercise of [the] discretion [of the taxing master] unless it appears that the Taxing Master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he has failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The Court will also interfere where it is of opinion that the Taxing Master was clearly wrong but it will only do so if it is in the same position as, or a better position than, the Taxing Master to determine the point in issue.”

19. Counsel further submitted that principally the determination of quantum of the costs is determined by the taxing master as guided by the applicable principles which include the difficulty and complexity of the issues, the length of the trial, the value of the subject matter and other factors that may affect the fairness of an award of costs. To buttress this point reliance was placed on the case of *Republic v Ministry of Agriculture and 2 others Ex parte Muchiri W'njuguna and 6 others* [2006] eKLR where it was held that:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not therefore interfere with the award of a taxing officer particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low. It will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other...The Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle...”

20. Counsel thus submitted that the taxing master did not err in taxation of the Bill of Costs pointing that the taxation was proportionate to the work done by the applicant hence the Applicant's reference should be dismissed with costs.

### **Analysis and Determination**

21. Only one issue arises for determination, namely:



1. Whether the taxing Officer in her Ruling dated 9<sup>th</sup> November 2021 failed to apply the relevant principles of taxation in determining the Instruction Fees.
22. Rule 10 and Rule 16 of the *Advocates Remuneration Order*, 2009 defines the taxing officer for purposes of taxation and specifies the factors to be considered in the exercise of that authority which essentially is discretionary power. This Rules state thus:

Rule 10 - 'The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.'

Rule 16 - 'Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.'

23. The jurisprudence as to when a Court can interfere with the taxing master's decision is now well settled. In *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR, it was held thus:

"... The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are,

- (1) that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle;
- (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
- (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
- (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
- (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;



- (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
  - (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64."
20. Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants."
24. In making a taxation decision, the taxing master ought to be guided by the principles of taxation as laid out in the case of *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* (supra). The Court outlined the principles of taxation as follows:
- “(a) That costs should not be allowed to rise to a level as to confine access to justice to the wealthy.
  - (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.
  - (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession.
  - (d) so far as practicable there should be consistency in the award made and
  - (e) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”
25. It is also important that the taxing master in taxing the Bill of Costs to apply the applicable Schedule of the *Advocates (Remuneration) Order* to make a determination. The Ugandan Court of Appeal case of *Makula International v Cardinal Nsubuga & Another* [1982] HCB 11 was cited with approval in



the case of *Truth Justice & Reconciliation Commission v Chief Justice of the Republic of Kenya & another* [2014] eKLR in that regard in which the Court held as follows:

“ The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

26. Correspondingly, the Court in the case of *Republic v Minister of Agriculture & 2 others ex parte Samuel Muchiri W'njuguna* (*supra*) discussing the issue of instruction fees outlined the following principles:

- “ ... the taxation of advocates' instruction fees is to seek no more and no less than
- (ii) reasonable compensation for professional work done;
- (iii) the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
- (iv) so far as apposite, comparability should be applied in the assessment of advocate's instruction fees...”

27. Turning to the taxation reference now before this Court, the taxing officer had referred to the case *Royal Media Services v Telkom Kenya Limited and 13 others* [2010] eKLR in which the Court had applied the principles enunciated in *Premchand Rainchard Ltd & Another v Quarry Services of East Africa Ltd* [1972] E.A 162. The Taxing Officer reasoned that the instant suit, being a constitutional petition, the relevant schedule was Schedule VI under the applicable law at the time which was the *Advocates Remuneration Order*, 2006. In taxing off Ksh.13,831,964/- from the applicant's Bill of Costs which was Ksh.14,023,488/- the Taxing Officer justified that decision on the petition should not be made a preserve of the wealthy or be lead to impoverish litigation.

28. The reasons considered in making the decision for each Item in the Bill of Costs was particularized in detail by the Taxing Officer in the impugned Ruling. On Instruction Fees (Item 1), the Taxing Officer stated that the Item was taxed according to the Schedule VI of the *Advocates Remuneration Order*, 2006. This Order provided Ksh. 28,000/- as the minimum Instruction Fees but in her discretion she taxed Item 1 and awarded Ksh.100,000/- as instructions .

29. The *Advocates (Remuneration) (Amendment) Order*, 2006 under Schedule VI provided as follows on the issue of Instruction Fees:

#### Instruction Fees

The fee for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it:

- (a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defence or other denial of liability is filed; where the value of the subject matter can be determined from the pleading, judgement or settlement between the parties and –



Ksh	Ksh	Ksh
500000	28000	
500000	750000	35000
750000	1000000	49000
1000000	20,000,000 fees as for Shs.1,000,000 plus an additional 1.5 per cent	-
Over 20,0000,000	Fees as for 20,000,000 plus an additional 1.25%	-

30. The applicant contended that the substantive suit subject matter was Ksh.96,332,157,75. However, there was no judgement attached to this application to confirm that this was the value of subject matter. Further, the applicant did not dispute the assertion by the Respondent (client) that the matter was in fact dismissed for want of prosecution on 14<sup>th</sup> July 2013 by the Court. It is a matter that died naturally on its own. In addition, the applicant made assertion that the matter involved complex issues but made no attempt to demonstrate the name of complexity before this court or before the taxing master. As was held in the Ugandan case of *Mukula International v Cardinal Nsubuga & Anor* [1982] HCB 11 relied on *Truth Justice & Reconciliation Commission v Chief Justice of Kenya & Anor* (*supra*), what matters in determining what the appropriate amount to either increase or decrease basic fees provided is the fair value upon the work or responsibility involved. Going by the fact the Petition was not prosecuted, the value was not proved and complexity of the issues involved was not demonstrated. It is difficult to fault the decision of the taxing officer in taxing off a big chunk of the Kshs. 8,000,000/- which was sought as instruction fees. It is my finding that the Taxing Officer exercised her discretion judiciously and properly applied her mind in arriving at her decision.
31. The inescapable conclusion in view of the above reasons is that this reference fails and is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2024.**

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**L N MUGAMBI**  
**JUDGE**

