



REPUBLIC OF KENYA



Gitobu Imanyara & Co Advocates v Maina & 3 others; Lloyd Masika Limited & another (Garnishee) (Miscellaneous Application E163 of 2018) [2024] KEHC 2873 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E163 OF 2018
JWW MONG'ARE, J
MARCH 18, 2024**

BETWEEN

GITOBU IMANYARA & CO ADVOCATES PLAINTIFF

AND

FRANCIS CHEGE MAINA 1ST DEFENDANT

JOSEPH MACHARIA MAINA 2ND DEFENDANT

JAMES KIHARA MAINA 3RD DEFENDANT

DEDAN MUTHAIGA MAINA 4TH DEFENDANT

AND

LLOYD MASIKA LIMITED GARNISHEE

COOPERATIVE BANK OF KENYA GARNISHEE

RULING

1. By a Chamber Summons application filed before this Honourable Court on 31st October 2022 under Rule 11(2) of the *Advocates (Remuneration) (Amendment) Order*, 2014 and Section 1A, 1B and 3A of the *Civil Procedure Act*, seeking the following orders:-
 1. That the Ruling and/or decision delivered on 17th October 2022 by the Honourable Taxing Officer (Hon. C. Wanyama) taxing the Advocate-Client's Amended Bill of Costs dated 19th June 2020 be set aside/vacated.



2. That the Amended Bill of Costs aforesaid be remitted back for taxation by a different Taxing officer.
 3. That costs of this Application be provided for.
2. The application is supported on the grounds set on its face and the supporting affidavit of Francis Chege Maina. The application is opposed and the Advocate filed Grounds of Opposition to the application. Both parties have filed written submissions which they seek to rely on.
 3. It is the Applicant's position that the Taxing Master erred in awarding Instructions Fees of Kshs.500,000/= without taking into account the actual work done by the Advocate in the matter and that there is no ruling/judgment that can be used to determine the value of the subject matter as the said ruling was set aside by the Court of Appeal. The Applicant further argues that the Taxing Master despite making a finding that a Bill of Costs is not a suit and that it should be taxed under matters not provided for in the *Advocates Remuneration Order*, 2014. The Applicant urges this court to find that the taxing master committed an error of principle and set aside and/or vacate the said ruling and allow the same to be taxed by another Taxing Master.
 4. On their part, the Advocate opposes this application. The Advocate argues that there is no dispute that he represented the client on several occasions in Nairobi HC Comm. Misc App. No354 of 2015 and having been so retained and instructed, he was automatically entitled to instructions fees. Further it is the position taken by the Advocates that the fees as taxed were not exorbitant but drawn to scale and that it took into consideration the subject matter in the parent file was a liquidated claim and therefore under the *Advocates Remuneration Order*, the relevant instructions fees could be calculated to the last cent. The Advocate urged the court to find that there was no error of principle on the part of the taxing officer and allow the taxation to stand.

Analysis and Determination

5. I have carefully considered the pleadings and the affidavit filed in support thereto. I have equally considered the rival submissions and I note that this called to determine whether the ruling of the taxing master delivered on 17th July 2022 should be set aside or vacated.
6. As stated above the fact that there was a retainer and that the Advocate rendered professional services is not in dispute. The client challenges the taxing of instructions of the item under instructions fees at Kshs.500,000/= as being irregular and unsupported by any judgment or decision where the value of the subject matter is ascertainable. The argument put forth by the Client is that the taxation of item on instructions fees although based on a judgement for Kshs.48,981,888.85/= in Nairobi HCCOMM Misc. App. No 354 of 2015- *J. M. Njenga & Company Advocates versus Francis Njenga*, was set aside by the Court of Appeal, which directed the same be re-taxed.
7. In their submissions before this court, the applicant has argued that the said item was wrongly taxed and the same should be send back for re taxation or the said item be reviewed to Kshs.300,000/=. This is quite contrary to the position taken by the Applicant in his affidavit where he argues under paragraph 7 thereof that the taxing master should have taxed item 1 on instructions fees at Kshs.75,000/= instead.
8. In *Joreth Limited vs. Kigano & Associates* (2002) eKLR the court stated as follows:-

“we would at this stage point out that the value of the subject matter of a suit for purposes of a taxation of a Bill of costs ought to be determined from the pleadings, judgment on settlement (if such be the case) but if such is not ascertainable the taxing Master is entitled to use his discretion to assess such instructions as he considers just taking into account,



among others matters the nature and importance of the case, the interest of the parties, general conduct of the proceedings, any directions by the trial judge and all other relevant circumstances”.

9. I note from the pleadings both parties accept that instructions to represent the client were issued and that as at the time of the said instruction, there was a claim for the sum of Kshs.53,135,605.46/= which pursuant to the professional services rendered by the Advocate the same was reduced down to Kshs.42,067,139.00/=. This figure, the Advocate maintains was the value of the subject matter upon which the item on instructions fees was taxed at Kshs.500,000/=. The Client maintains that the said decision having been appealed against it is difficult to ascertain the value of the subject matter and hence the taxing master should have applied the minimum fees allowed by law at Kshs.75,000/= or increase it to Kshs.300,000/= since in the clients’ view the sum of Kshs.500,000/= awarded is exorbitant.
10. I have considered the facts of this case and the issue at hand and I am satisfied that this is not a matter where the taxing master was called upon to use her discretion to determine the value of the subject matter. This is because the value of the subject matter is discernible from the pleadings as being the sum of Kshs.53,135,605.46/= which being in dispute between the client and his previous Advocates, the Advocate was retained to defend by the client, and did so successfully, leading to a reduction of the same to Kshs.42,067,139.00/=. The Advocate did his part diligently and is therefore deserving of the full instructions fees.
11. . I am therefore satisfied that the taxing master, in awarding the sum of Kshs.500,000/= as instructions fees, did not commit any error of principle and properly applied the *Advocates Remuneration Order* as required by law. I find therefore that the application before me by the client herein is without merit. The same is dismissed with costs to the Advocate.
12. Flowing from the above, the court notes that the ruling of this court dated 24th July 2023 ordered the retention of the sum of Kshs.1,022,218.00/= to be retained by the garnishee awaiting the outcome of this application. The Application having been dismissed, this court orders that the said sum of Kshs.1,022,218/= be released forthwith to the Advocate in settlement of their fees as per the certificate of taxation issued by the court on 6th December 2022.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MARCH, 2024

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

1. Mr. Wena for the Client/Applicant.
2. Mr. Njoroge for the Advocate/ Respondent.
3. Mr. Mwangi for the Garnishee.
4. Amos - Court Assistant

