Mbugua Atudo & Macharia Advocates v Nairobi City Water & Company Limited (Miscellaneous Application E133 of 2022) [2024] KEHC 3022 (KLR) (Judicial Review) (17 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E133 OF 2022

J NGAAH, J

MARCH 17, 2024

BETWEEN

MBUGUA ATUDO & MACHARIA ADVOCATES ..... ADVOCATE

AND

NAIROBI CITY WATER & COMPANY LIMITED ..... CLIENT

RULING

1. This is a reference by the client against the taxation by the taxing officer of an advocate/client bill of costs drawn by the advocate. The reference is by way of chamber summons dated 4 May 2023 and it is expressed to be brought under Article 159 of the *Constitution*, section 1A and 3A of the *Civil Procedure Act* cap. 21 and paragraph 11 of the *Advocates Remuneration Order*.

2. The respondent seeks the following orders:

> " 1. That the ruling by Hon. E.C. Chelule deputy registrar delivered on 20th April 2023 of this court(sic) on the taxation of the advocates-client bill of costs dated 7th November 2020 to be set aside and/vacated as relates to items 1, 2 and 3 on the said bill of costs.
>
> 2. That the Deputy registrar be restrained by an order of this Honourable Court issuing a certificate of costs and if one has been executed the same be expunged from the record.
>
> 3. That this Honourable Court be pleased to assess the said items 1, 2 and 3 of the respondent's bill based on schedule 6 (1) (j) of the *Advocates (Remuneration) Order* and in accordance with the precedents of superior courts on the same issue.

4. Based on the value of the of the(sic) and in the instructions to the respondent, the feast taxed is inordinately high.

5. That the taxing officer failed to consider the applicant's submissions dated 15th February 2023.

6. That this Honourable Court do (sic) make any additional orders as the demands of justice dictate.

7. That the costs of this application be provided for."

3. The application is supported by the affidavit of Mr. Magaju Koome who is an advocate of this Honourable Court and practices law in the firm of M/s Kiruki & Kayika Advocates. He has sworn that on 20 April 2023, the Honourable Court delivered a ruling on an advocate/client bill of costs which was itself dated 7 November 2022. The rest of the "depositions" in this affidavit appeal to me to be more or less legal arguments against the taxation and which would properly have been canvased in submissions rather than in an affidavit.

4. Be that as it may, the client's case is that the taxing officer failed to consider the applicant's submissions on record apparently filed against the bill of costs. The taxing officer is said to have also failed to consider the provisions of schedule VI (I)(j) of the *Advocates Remuneration Order* 2014.

5. The taxation is also impugned on the ground that the taxing officer misapprehended and misapplied the law on the principles of taxation in the nature of the suit giving rise to the taxation and failed to apply correctly the principles and formula provided for assessing instruction fees increase in accordance with schedule VI(B) and getting up fees.

6. The taxing officer is said to have arrived at an improper determination on the value of the subject matter of the suit in assessing instruction fees. Additionally, she failed to take into account the following factors:

(i) nature and importance of the suit giving rise to the taxation

(ii) interest of the parties

(iii) value of the subject matter

(iv) public interest in the subject matter

(v) importance and complexity of the matter

(vi) conduct of the proceedings

(vii) labour expended and the responsibility undertaken by the applicant

7. The ruling of the taxing officer is also faulted because the taxing officer is alleged to have misapprehended and grossly misdirected herself on the principles of law enunciated in the authorities cited by the parties or misapplied them in the taxation and thereby arrived at an erroneous decision.

8. Mr Kaman Mbugua opposed the application and filed a replying affidavit to that effect. He has sworn that is the managing partner of the advocate's firm of advocates. The affidavit is fairly short. Counsel acknowledges that advocate/client bill of costs was taxed at Kshs. 4,678,760/- but denies that there was an error in principle in the manner the taxing officer taxed items, 1,2 and 3. According to him, the fees was enhanced because of the complexity of the matter, responsibility by counsel, time spent, and the skill deployed by the counsel.

9. The reference is also said to have been filed out of time under paragraph 11 of the *Advocates Remuneration Order*. There does not seem to be any basis on this last point because the record shows that the ruling was delivered on 20 April, 2022 and the reference was filed on 4 May 2022 which, I suppose, was the fourteenth and the last day by which the reference ought to have been filed.

10. In their submissions parties have largely repeated what they have stated in their respective affidavits.

11. Being an advocate-client bill of costs, the scale of instruction fees chargeable would be as prescribed in schedule 6 B (a) of the *Advocates Remuneration Order*, 2014 which reads as follows:

> B — Advocate and Client Costs
>
> As between advocate and client the minimum fee shall be—
>
> (a) the fees prescribed in A above, increased by 50%; or
>
> (b) the fees ordered by the court, increased by 50%; or
>
> (c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.

12. Paragraph A to which reference has been made in paragraph 6 B (a) relates to party and party costs and the particular sub-paragraph relevant to the advocate's bill of costs is sub-paragraph is 1(j) (ii) because the suit out of which the bill arose sought prerogative orders or judicial review reliefs. It reads as follows:

> " (j) Constitutional petitions and prerogative orders
>
> To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—
>
> (i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
>
> (ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000."

13. The items in the bill of costs that are in contention are1, 2 and 3 and they have been particularized as follows:

> " 1. Towards instructions to defend the suit taking into consideration the interests of the parties where the value of the subject matter was Kshs. 543, 189,691 as per schedule VI, B of the *Advocates Remuneration Orde*r, 2014
>
> 2. The fees increased by 50% as provided by schedule VIB (a) of the *Advocates Remuneration Order*, 2014.
>
> 3. Getting up fees".

14. The advocate asked for Kshs. 8,347, 845.37 on item 1, Kshs. 4,173,923.00 on item 2 and 2,782,612.21 on item 3. He also asked for Kshs. 1,335,655.20 as VAT.

    Naturally, items 2 and 3 would be a function of the item 1 because the fees in item 2 is 50% of the fees charged in item 1. Item 3 which is getting up fees is, at least, a third of the instruction fee allowed in a taxation (see schedule 6(A) paragraph 2).

15. It follows that if the item 1 was to be set aside or varied for any reason, items 2 and 3 will be set aside too or varied accordingly. This is why when the taxing officer reached the conclusion that the fee allowable under item 1 was Kshs. 2,000,000/=, she inevitably held that the fee under item 2 was Kshs. 1,000,000/=. In the same breath, she found that the getting up fees in item 3 was Kshs. 1,000,000/= being a third of the instruction fees which, at that point, totaled Kshs. 3,000,000/=.

16. It is apparent from the ruling of the learned taxing officer that, in her assessment of the instruction fees, she rightly made reference to schedule VI(B) and VI(i)(j) of the *Advocates Remuneration Orde*r, 2014.

17. The taxing officer then laid out the principles of taxation and the factors to consider in exercising discretion to enhance or reduce the instruction fees. She relied on the decisions in *Premchand Raichand Ltd versus Quarry Services of East Africa Ltd (No. 3)* (1972) EA 162, and *Republic versus Minister for Agriculture & 2 Others, ex parte; Samuel Muchiri Wa Njuguna & 6 Others* (2006) eKLR.

18. In the former decision, the following were outlined as principles of taxation:

    (a) That costs should not be allowed to rise to a level as to confine access to justice as 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 and,

    (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.

19. The learned taxing officer also cited the cases of *Joreth Limited v Kigano & Associates* (2002) eKLR and *Republic versus Nyeri County Government, ex parte Central Kenya Coffee Mill Limited* (2017) eKLR. She then concluded as follows:

> " Having perused the bill of costs and the submissions before (sic) I do note that the applicant seeks a huge increase of the instruction fee from the minimum of Kshs. 100,000/= to the amount sought at Kshs. 8,347,845.37/=. I am of the considered view that the value of the subject matter is not the only factor that should be used in determining the instruction fees, it must be related to the value of the work done by an advocate as well as other factors including the time taken to complete the suit, the interest of the parties in the suit and the volume of the documents involved.
>
> Advocates should be fairly, appropriately and justly rewarded for their fees bearing in mind the skill they exercised. This should not however be used as a way to punish the opposing party but should seek to fairly compensate the advocate for the time and industry employed in the matter.
>
> The court has discretion to enhance instruction fees as provided under schedule VI (I)(j) of the *Advocates Remuneration (Amendment) (No.2) Order* 2014 considering the complexity

> of the matter, the responsibility by counsel, time spent, reason done (sic) and skill deployed by counsel. The court must ensure that the advocates instructions fees is to seek (sic) and has more and no less than reasonable compensation for professional work done.
>
> Bearing in mind all the aforesaid factors the reasons herein as well as the parties' submissions and in exercise of the discretion vested in me, I am fully convinced that the amount sought by the applicant is inordinately high and not commensurate to the amount of work employed by the counsel. The amount involved is not the sole determinant when it comes to costs. Judicial review suits are not money suits as they merely seek declaratory reliefs and orders.
>
> The suit was filed on 31st of July 2018 and judgement was entered in less than one year on 10th of April 2019. Having perused the file and looked at the volume of the documents therein I am not convinced that the applicant has demonstrated sufficient reasons to convince me to increase the instructions fees from the minimum of Kshs. 100,000/= as provided under the ARO to the amount sought. I do note however the great interest of the parties in the suit noting the value of the subject matter, the volume of documents which is large, as well as the entities involved. There is no specific complexity that has been drawn to my attention on any issue of novelty that had to be addressed in the said application different from any other judicial review proceedings.
>
> On the question of increase on the aforesaid basic fee, I am of the view that Kshs. 2,000,000/= is reasonable instruction fees taking into account the time taken in this matter, the importance of the matter, the interest of the parties, the volume of the pleadings, scope of the work done and the nature of the dispute herein as stated above."

20. On the face of it, the learned taxing officer may appear to have 'reduced' the instruction fees considering that the advocate asked for Kshs. 8,347, 845.37 but the taxing officer scaled it down to Kshs. 2,000,000/=. However, strictly speaking, the fees was increased from the minimum Kshs. 100,000/= to Kshs. 2,000,000/=.

21. The base figure from which to determine whether fees has been enhanced in exercise of the discretion of the taxing master is not the figure proposed by the advocate, in case of advocate/client bill of costs. It is the fee that has been prescribed in the *Advocates Remuneration Order* as the minimum fee which is Kshs. 100,000/- where the matter is contested.

22. Since Kshs. 100,000/- has been prescribed as the minimum fee, I dare say that the discretion with which the taxing officer is clothed is either to retain the minimum fee or to enhance it. I understand the words employed in paragraph 1(j) (ii) to be to this effect. That paragraph reads as follows:

> To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion...
>
> (i) ...
>
> (ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000." (Emphasis added).

23. The words "increasing", "enhancing" or "decreasing" fees do not appear anywhere in this paragraph but since Kshs. 100,000/- has been set as the minimum fees, it can only be assumed that the taxing officer's discretion is either to retain the minimum fees or to enhance it; he cannot reduce it.

24. So where, as in the instant case, the instruction fees was assessed at Kshs. 2,000,000/=, the taxing master increased it from the minimum Kshs. 100,000. It follows that the advocates instruction fees

was increased twenty-fold or by 1000%. No doubt, this was steep rise and the question to consider is whether the learned taxing master properly exercised her discretion in reaching this figure.

25. In answering this question, I must start by stating that it is trite that question of quantum of fees is strictly within the discretion of the taxing officer. This has been stated by the Court of Appeal in *Kipkorir, Titoo & Kiara Advocates versus Deposit Protection Fund Board* (2005) eKLR where the court said:

> " On a 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 taxing officer, erred in principle in assessing the costs."

26. In saying so the Court followed the decision of the Court of Appeal of East Africa in *Arthur versus Nyeri Electricity Undertakin*g (1961) EA 497 where the court had noted:

> " where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".

27. In the rather lengthy excerpt of the taxing officer's ruling which I have reproduced earlier in this ruling, the learned taxing officer held that the matter in which the advocate offered his services was an ordinary judicial review application that did not warrant high instruction fees. In this regard the learned taxing officer noted as follows:

> " ...I do note that the applicant seeks a huge increase of the instruction fee from the minimum of Kshs. 100,000/= to the amount sought at Kshs. 8,347,845.37/=... I am of the considered view that the value of the subject matter is not the only factor that should be used in determining the instruction fees... I am fully convinced that the amount sought by the applicant is inordinately high and not commensurate to the amount of work employed by the counsel.... The amount involved is not the sole determinant when it comes to costs... Judicial review suits are not money suits as they merely seek declaratory reliefs and orders... The suit was filed on 31st of July 2018 and judgement was entered in less than one year on 10th of April 2019. ... I am not convinced that the applicant has demonstrated sufficient reasons to convince me to increase the instructions fees from the minimum of Kshs. 100,000/= as provided under the ARO to the amount sought... There is no specific complexity that has been drawn to my attention on any issue of novelty that had to be addressed in the said application different from any other judicial review proceedings.

28. In my humble view, these statements would be inconsistent with the learned taxing officer's conclusion to increase the instruction fees twenty-fold or by 1000%. I would conclude that, in the circumstances, the amount of Kshs. 2,000,000 assessed instruction fees is inordinately high. In reaching this conclusion, I am not wading into the area of quantum which, as the authorities show, is an issue that should be left to the taxing officer but because the increase of the instruction fees from Kshs. 100,000 to Kshs. 2,000,000 betrays the taxing officer's own findings on the nature of the suit out of which the bill of costs arose and the extent of services provided by the advocate to his client, among other factors.

29. It is worth noting that while the judge to whom a reference has been made may not interfere with quantum of fees assessed as instruction fees, that exercise of discretion by the taxing officer in this regard will be disturbed if the taxing officer erred in principle in assessing costs. An award of an inordinately

high figure as instruction fees is, in itself, an error of principle. This was so held in *Kipkorir, Titoo & Kiara Advocates versus Deposit Protection Fund Board* (supra) where the court noted:

> " An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles".

30. Despite the learned taxing officer's reservations about the extent and nature services provided by the advocate she, nevertheless held as follows:

> " I do note however the great interest of the parties in the suit noting the value of the subject matter, the volume of documents which is large, as well as the entities involved".

31. No details have been given of what "the great interest of the parties" entailed. Apart from what the advocate stated in his bill of costs as the value of the subject matter, it is not clear from the learned taxing officer's ruling whether she verified what was presented in the bill of costs as the value of the subject matter. The assertion that the learned taxing officer noted "the volume of documents which is large as well as the entities involved" is also ambiguous and, in my humble view, it cannot have formed the basis of the learned taxing officer's assessment.

32. The learned taxing officer was enjoined to provide more details and demonstrate, for instance, the value of the subject matter from the pleadings in the suit which is the background of the bill of costs. She had to demonstrate the nature of interest that, in her view, was the "great interest" as to justify the enhancement of the fees to the levels she found reasonable. If the volume of documents was "large", how large was it in terms of folios; and, if the "entities involved" were crucial to the assessment of fees it would be necessary to demonstrate what these entities were and how their status influenced the learned taxing officer's decision to enhance the instruction fees.

33. The point is this: It is not sufficient to simply lay out the principles of taxation, the factors to consider in taxation and conclude, for instance, that. "I am of the view that this or that sum is reasonable instruction fees taking into account the time taken in this matter, the importance of the matter, the interest of the parties, the volume of the pleadings, scope of the work done and the nature of the dispute herein as stated above." The taxing officer has to demonstrate the "time taken", "the importance of the matter" "the interest of the parties", "the volume of the pleadings", "the scope of the work done" and "the nature of the dispute".

34. In *Republic versus Minister for Agriculture & 2 Others, ex parte; Samuel Muchiri Wa Njuguna & 6 Others* (2006) eKLR, it was held that it is not enough for the taxing master to generally state the complexity of the matter, the time spent on it, the research done or the skill deployed. The court noted as follows:

> " The complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute, the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry, necessitated the deployment of a considerable amount of industry and was inordinately time consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be clarified, assessed and simplified, the details of such initiative by

counsel must be specifically indicated apart of cause from the need to show if such works have not already been provided for under a different head of costs."

35. I must not be mistaken to be saying that the taxing officer should reproduce the parties' pleadings as filed in the primary suit or their submissions. A summary of such aspects of taxation as the "time taken", "the importance of the matter" "the interest of the parties", "the volume of the pleadings", "the scope of the work done" and "the nature of the dispute", that is detailed enough, at least to the extent of the parties, and the judge to whom reference has been made, appreciating these features would suffice. This was not done in the taxation in issue.

36. For the reasons I have given, I have to reach the inevitable conclusion that the assessment of the instruction fees at Kshs. 2,000,000/= was an exercise of discretion based on an error or principle. I hereby allow the applicant's reference in terms of prayers 1 and 2.

37. Prayer 3 is allowed on terms that the advocate/client bill of costs is hereby remitted for re-taxation by the taxing officer different from the one whose ruling has been impugned in this reference. For the avoidance of doubt, the re-taxation will be limited to items 1, 2 and 3. The client will have costs of the reference. It is so ordered.

SIGNED, DATED AND POSTED ON CTS ON 17 MARCH 2024.

NGAAH JAIRUS

JUDGE