



**Lubullelah & Associates Advocates v Gilbi Construction Company Limited  
(Miscellaneous Application E010 of 2021) [2022] KEHC 15953 (KLR)  
(Constitutional and Human Rights) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15953 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
MISCELLANEOUS APPLICATION E010 OF 2021**

**M THANDE, J  
NOVEMBER 25, 2022**

**BETWEEN**

**LUBULLELAH & ASSOCIATES ADVOCATES ..... APPLICANT**

**AND**

**GILBI CONSTRUCTION COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. Before me for consideration is a reference by way of chamber summons, dated March 17, 2022 (the reference) in which the applicant seeks the following orders:
  1. That the court be pleased to enlarge the time fixed by paragraph 11(1) of the [Advocates Remuneration Order](#) for the applicant to file a notice of objection to taxation against the taxing officer's decision rendered herein on the March 1, 2022, and the notice of objection to taxation annexed herewith be deemed as duly filed.
  2. That the reasons for the taxing officer are ostensibly already contained in the ruling, the court be pleased to proceed to determine the reference against taxation on the grounds of objection set out hereunder, and does proceed to set aside the taxing officer's ruling and taxation on items 1, 2, 49 & 50 of the advocate/applicant's bill of costs dated June 25, 2021.
  3. That the costs of this application be provided for.



2. The reference is premised on the grounds that the advocate/applicant is aggrieved by the ruling of March 1, 2022 (the ruling) in respect of his advocate-client bill of costs dated June 25, 2021 specifically the assessment of the instruction fees and the consequential total.
3. The bill of costs relates to the advocate/applicant's representation of the client/respondent in Constitutional Petition No 585 of 2014. The advocate/applicant stated that the filing of the notice of objection was delayed by 2 days and now seeks enlargement of time in respect thereof so that the challenge on the assessment on instruction fees may be determined on merit.
4. The advocate/applicant further averred that the taxing officer erred by awarding the basic instruction fees and failed to take into account and consider all relevant factors for increasing the basic instruction fees and the principles set out in the case of *Ramesh Naran Patel v Attorney General & another* [2012] eKLR. The advocate/applicant further faulted the taxing officer for disregarding the advocate/applicant's submissions and abdicated her judicial duty to consider the said factors and exercise her discretion to increase the instruction fees.
5. In his replying affidavit sworn on May 18, 2022, Harish Gopal Vekaria, the managing director of the client/respondent stated that the taxing officer in her ruling taxed the bill of costs at Kshs 353,767.79. Further that the assessment of instruction fees is a matter of discretion and that the taxing officer did not exercise her discretion on wrong judicial principles. He further stated that the taxing officer, being guided by schedule 6(1) (j)(ii) of the *Advocates Remuneration Order* (ARO) and decided cases, found the instruction fees of Kshs 100,000/= to be reasonable. The client/respondent further asserted that the taxing officer considered all factors including the care and labour required by the advocate, the number and length of papers to be perused, the nature and importance of the matter, the value of the subject matter where ascertainable, interest of the parties as well as the complexity and novelty of the matter. In light of this, the client/respondent was of the view that the application lacks merit and urged that that the same be dismissed with costs.
6. The court has considered the written submissions filed by the parties together with the authorities cited. In spite of having been served advocate/applicant did not attend court to highlight his submissions.
7. It was submitted that the taxing officer committed a grave error in principle, by her decision that the advocate/applicant was only entitled to the basic minimum instruction fees plus 50%, without taking into account trite factors for its increase. The advocate/applicant submitted that the petition in question was 74 pages long and was complex and time consuming. Further that the response filed by the advocate/applicant was over 403 pages long and in 2 volumes, thus demonstrating the complexity of the matter. Further that the matter involved a mixture of private/contractual/employment rights in the guise of a constitutional petition and was accordingly dismissed. Also considered, was *inter alia* the application of the bill of rights to private member institutions. It was further submitted that the value of the subject matter was clearly discernible from the pecuniary reliefs sought in the petition, the total value of which exceeded Kshs 5.3 million. Additionally, the responsibility placed on the advocate/applicant was fairly arduous given that they were able to simplify the intricate and twisted plot narrated in the petition therein resulting in its dismissal. Further that the conduct of the proceedings was professional, efficient and effective. The foregoing factors taken together warranted an increase of the minimum instruction fees.
8. For the client/respondent, it was submitted that the claim in the petition was not a liquidated claim but declaratory in nature. Further that the matter did not proceed to trial as the petition was dismissed pursuant to a preliminary objection. It is the client/respondent's further contention that increase of instruction fees is not an automatic right and that a taxing officer must be guided by rules and principles



of law, according to what is fair in the circumstances. Additionally, the client/respondent submitted that the taxing officer explained her decision in detail using authorities and that the advocate/applicant has not demonstrated how the taxing officer improperly exercised her discretion. It was further submitted that there was no exceptional dispatch or complexity in the matter and the advocate/applicant was merely discharging the duty required of an advocate upon instructions by a client.

9. The record shows that the matter herein arises out of a bill of costs filed by the advocate/applicant in respect of constitutional petition No 585 of 2014, *Isaac Aluoch Polo Aluochier v Kenya National Commission of Human Rights & 2 others*. The client/respondent was the 2<sup>nd</sup> respondent therein and was represented by the advocate/applicant.
10. The remuneration of an advocate of the High Court by his client in constitutional matters and the taxation thereof is provided for in paragraph 1(j) of schedule 6 of the ARO 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 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 be reasonable but not less than 100,000
  - iii. ...
11. As regards advocate and client costs, schedule 6 provides that the instruction fees shall be the fees prescribed above, increased by 50%. Thus, the instruction fees in a contested constitutional matter, such as the one in respect of which the bill of costs in question was taxed, is Kshs 100,000/=, increased by 50%. The instruction fees stipulated, is the minimum fees.
  12. It is trite law that a taxing officer has the discretion to increase instruction fees. That discretion must however be guided by known principles. This was the holding of Ojwang, J. (as he then was) in the case of *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others* [2006] eKLR where the learned judge stated:

From the foregoing analysis it is clear that I am not of the opinion that the taxing officer was properly guided when she conducted the taxation which has been challenged in the two applications – and certainly not, with regard to the item on advocate's instruction fees. Her exercise of discretion was, in my view, and with much respect, done perfunctorily and as a mere formality. It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs.



13. The advocate/applicant submitted that the taxing officer was at fault in failing to apply the principles for increase of fees set out in the case of Ramesh Naran Patel v Attorney General & another [2012] eKLR. In that case, Emukule, J. stated:

From the above case, the court may draw the conclusion that the guidelines or principles to be applied by a taxing officer in exercise of his discretion to increase the instruction fee are clear. He must demonstrate in his ruling the reasons for increase of fees -

- (i) care and labour required by the advocate,
- (ii) specify the number and length of the papers to be perused,
- (iii) the nature and importance of the matter,
- (iv) the value (where ascertainable) of the subject matter,
- (v) interest of the parties,
- (vi) complexity of the matter,
- (vii) novelty of the matter.

Each of these elements must however be broken down cogently with specificity (and not generalizations), as stated in the cases cited above and in particular, *Republic v Minister For Agriculture, ex parte Samuel Muchiri W'Njuguna*(supra).

14. In the present case, the advocate/applicant is irked by failure by the taxing officer to increase the instruction fees from the minimum of Kshs 100,000/= plus 50%. In her ruling, the taxing officer found that the amount of Kshs 500,000/= sought by the advocate/applicant was excessive. She stated:

I have carefully considered the factual and legal issues with a view to gauge complexity of issues, importance of the matter, the amount involved perusal of entire paperwork, studying and preparing for the matter, responsibility shouldered based on the nature and importance of the subject matter...My further analysis of the petition has not shown anything in the said petition to have risen at all above the workaday chores of legal practitioners. It follows, in my view that the responsibility entrusted to counsel in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field.

15. The learned taxing officer went on to state:

On the question of the increase of the aforesaid basic fee and this being an advocate/client bill of costs, I am of the view that Kshs 100,000/= is reasonable instruction fees taking into account the time taken in this matter, scope of the work done and the nature of the dispute herein. The court is not satisfied that the mixture of contractual law and employment law that underscored the petition determine the complexity of the matter.

16. Courts have often been called upon to consider the issue of increase of instruction fees. In the case of First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR, Ringera, J. (as he then was) had this to say on the subject:

As regards the increase of the instruction fees, I accept that is a matter for the discretion of the taxing master. However the decision must be exercised rationally. Now the only reason



given by the taxing officer here to increase the fees is that the defendants had done some research on the law and they had put in well researched defences. That, to my mind, is not one of the factors for taking into account in increasing the instruction fees. I am of the view that, if a defendant does research before filing a defence and then puts a defence informed by such research, he has done no more than expected. It is nothing extra ordinary. The research is not necessarily indicative of the complexity of the matter. It may well be indicative of the advocate's unfamiliarity with basic principles of law. Such unfamiliarity should not be turned into an advantage against the adversary. The latter would appear to be precisely the case here as the action was based on simple contracts of guarantee. It was a straight forward matter involving application of the facts to basic principles in contracts of guarantee. In that, I can see noting which would have led the taxing officer to increase the instruction fees here.

17. I have considered the case of *Benson Ambuti Atega & 2 others v Kibos Sugar and Allied Industries Ltd & 4 others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party)* [2022] eKLR cited by the advocate/applicant where Ombwayo, J. stated that:

Schedule 6 (1) (j) (ii) of the Advocates Remuneration Order clearly provides for a reasonable sum but not less than Kshs. 100,000/=. Based on this provision and the complexity of the matter, this court finds that the taxing officer was fair in awarding Kshs 3,000,000/= as basic instructions fees and Kshs 1,000,000/= as getting up fees.

18. It is noted that the client/respondent through the advocate/applicant opposed the petition in question, on the ground that the court lacked jurisdiction, given that there was a clear procedure for the redress of the petitioner's claim which ought to have been strictly followed. Further that the amount claimed by the petitioner therein was the subject of a pending dispute. The court agreed with this position and proceeded to dismiss the petition.
19. After a careful analysis of the judgement I am in agreement with the taxing officer that there is nothing that the advocate/applicant did that was above the workaday chores of legal practitioners. The responsibility entrusted to counsel in the petition was quite ordinary. It called for normal diligence. Indeed, there is nothing novel about challenging the jurisdiction of the constitutional court on grounds that a remedy is available in ordinary civil law. Further, the challenge to the petition on the grounds set out by the advocate/applicant was not, in the words of Ojwang, J. (as he then was), so greatly time-consuming, so research-involving, so skill-engaging as to justify an enhanced award of "instruction fees". (See *Samuel Muchiri W'Njuguna case* (supra). In view of the foregoing, I am of the view that there was nothing in the petition in question that would have led the taxing officer to increase the instruction fees.
20. It is well settled that this court should not interfere with the exercise of the taxing officer on the question of quantum. In the case of *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR, Odunga, J (as he then was) had this to say concerning the interference of the exercise of discretion by a taxing officer:

Further it has been held that the court should not 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;

21. Indeed, courts have taken the position that the award of the taxing master may only be interfered if it thinks the award so high or so low as to amount to an injustice to one party or the other. In the case of



*Samuel Muchiri W’Njuguna* (supra), Ojwang, J (as he then) cited the following words of Spry, V-P in *Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd & another* [1972] EA 162:

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, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.

22. Further the Court of Appeal in *Joreth Limited v Kigano & Associates* [2002] eKLR cautioned against interference with the assessment of costs by the taxing master unless on a matter of principle. The court had this to say:

What the learned judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.

23. In the present case, the taxing officer after considering the aforesaid well settled principles on increase of instruction fees was of the view that there was nothing in the petition to warrant an enhancement of the minimum instruction fees provided for in the ARO. I agree.
24. Having considered the foregoing, I do find that the taxing officer properly exercised her discretion in awarding the minimum instruction fee and then added 50% as provided for in the ARO. In this regard, I follow the holding by Odunga, J. (as he then was) in the *Nyangito case* (supra) and opt not to interfere with the decision of the taxing master in questions solely of quantum as that is an area where the taxing master is more experienced and therefore more apt to the job.
25. The foregoing analysis leads me to draw the conclusion that the advocate/applicant has not laid sufficient basis upon which the court can interfere with the decision of the taxing master. In the result, this reference dated March 17, 2022 is found to be lacking in merit and the same is hereby dismissed. The client/respondent shall have costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2022**

**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the Advocate/Applicant**

.....**for the Client/Respondent**

..... **\*\*Court Assistant**

