Riaroh & another v Owino & another (Commercial Miscellaneous Application E004 of 2023) [2024] KEHC 10193 (KLR) (15 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10193 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

COMMERCIAL MISCELLANEOUS APPLICATION E004 OF 2023

RE ABURILI, J

AUGUST 15, 2024

BETWEEN

CHRISTINE MARION ADHIAMBO RIAROH ..... 1ST PLAINTIFF

MASTERWORK COMPANY LIMITED ..... 2ND PLAINTIFF

AND

GRIFFIN ODHIAMBO OWINO ..... 1ST DEFENDANT

GUANGXI HYDROELECTRIC CONSTRUCTION BUREAU KENYA LIMITED ..... 2ND DEFENDANT

RULING

Introduction

1. This is an application by the applicants herein vide their Notice of Motion application dated 18th December 2023 in which they are seeking the following orders; -

    a. That the ruling of the taxing master, Hon. Gloria Baraza, delivered on 27th June, 2023 in respect of Kisumu Commercial Case E10 of 2022 on items 1, 24, 26, 30, 31, 55, 56, 57, 58 and 62 of the Defendant's Bill of Costs dated 12th May, 2023 be set aside and/or be varied.

    b. That the Honorable Court be pleased to re-tax or remit back to a different taxing officer the above bill of costs dated 12th May, 2023 for assessment and/or award as by law required with specific reference to the aforesaid objected items therein.

    c. That Costs of the application be provided for.

2. The application was based on the grounds therein as well as the supporting affidavit of Moses Munuang'o Advocate.

3. It was the applicant's case that the taxing officer erred in law and principle by failing to be guided by the provision of Schedule 6 of the Advocates Remuneration Order Revised 2015 thereby wrongful exercising her discretion.

4. The applicants averred that the amount of costs taxed of Kshs. 3,616,427 was excessive and unjustifiable as the nature of the case did not warrant such a high sum further that the taxing officer failed to appreciate the law and judicial precedents on the issue of instruction fees thus taxed the instruction fees at Kshs. 3,616,427 without reasons justifying the same.

5. It was further averred that the taxing master failed to appreciate that the matter was withdrawn before it was certified ready for hearing thus the applicant was entitled to 75% of the instruction fees; that the subject matter in this case is a derivative suit with no certain amount sought in the final prayers thus the instruction fees cannot be pegged on any specific amount.

6. It was further averred by the applicants that items 53 – 62 in the Bill of Costs dated 12.5.2023 are in the nature of special claim that require proof by way of receipts which the respondents failed to provide.

7. In response the respondents filed a replying affidavit deposed by one Dominic Ogega Mwale and sworn on the 19th December 2023.

8. It was deposed on behalf of the respondents that the main suit was dismissed at the instance of the applicants by this court on the 7th March 2023 with costs awarded to the respondents and that subsequently the respondents raised their party & party Bill of Costs dated 12.5.2023 and that despite notice issuing to the applicants, the Applicant's counsel raised no issue with the same.

9. It was further deposed that the instant application is misconstrued and contrived as a derivative action requires that the cause of action and locus standi be established prior to receiving leave of the court to continue with the suit, consequently the quantum of the subject matter can be discerned from the said application and the plaint proposed therein.

10. The respondents further deposed that the instant application failed to disclose the error of principle and fact on the part of the Taxing Master as well as the relevant factors that were disregarded so as to justify this Court' interference with the Taxing Master's decision thus the instant application ought to be dismissed with costs.

11. The parties filed written submissions to canvass the application/reference.

The Applicants' Submissions

12. It was submitted that on Item 1, Instructions Fees, the matter did not proceed to full hearing as the plaintiffs vide a Notice to withdraw a suit dated 26.1.2023 wholly withdrew the suit against the respondents prior to the 1st hearing of the suit.

13. The applicants submitted that it is well settled that the value of the subject matter for the purposes of taxation of a Bill of Costs can be determined from pleadings, judgments, settlement but if the same is not so ascertainable the taxing officer is entitled to use his own discretion to access the same as was held in the cases of Joreth Ltd v Kigano & Associates [2002] 1EA 62, Trade Bank Ltd (in liquidation) v LZ Engineering Construction Ltd & Another Civil Application No. 117 of 2000 (NBI CA) and Peter Muthoka & Another v Ochieng & 3 Others (2010) eKLR.

14. It was submitted that the amount claimed of Kshs. 3,585,463.13 is absurd, highly exaggerated, unreasonable and amounts to unjust enrichment and goes against judicial policy to keep the costs of the suit reasonable and primitive or discriminatory.

15. The applicants further submitted that the taxation master ought to have been guided by Schedule 6 of the Advocate Remuneration Order Paragraph *1* (b) which deals with instruction fees where a suit is reached prior to confirmation of the first hearing date of the suit shall be 85% and further that the taxing officer should have given reasons on how she arrived at the decision as was held in the case of Republic v Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna & 6 Others (2006) eKLR .

16. It wa thus submitted that the correct amount chargeable as instruction fees in this case would be 85% of the chargeable fee i.e. 85% of 75,000 thus amounting to Kshs. 63,750.

17. On items 24, 26, 30 and 31 on attendances it was submitted that the amount charged of Kshs. 7,100 was excessive as the attendances for mentions, rulings, judgements and taxations do not qualify as attendances for hearings and were thus attendances before the judge and ought to be charged at Kshs. 1,900 thus the amount of Kshs. 15,000 was excessive and should be scrapped off.

18. On disbursements in Items 53 – 62 it was submitted that the same ought to be taxed as drawn upon production of evidence of such as receipts.

19. It was submitted that the taxing officer's discretion ought to be exercised within reason, fairly as well as judiciously as was held in the case of Green Hills Investment Ltd v China National Complete Plant Export t/a Covec HCCC No. 572 of 2000.

The Respondents' Submissions

20. It was submitted 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 Taxing Officer erred in principle in assessing the costs.

21. On the instructions fees it was submitted that the Taxing Master could only ascertain the value of the subject matter from the pleadings, noting that no judgment or settlement was made in the matter.

22. It was further submitted that beyond the declaratory and injunctive orders sought by the Plaintiff in their Plaint dated 11th October, 2022, the Plaintiff also sought an order that the profits from the subcontract by GUANGXI HYDROELECTRIC CONSTRUCTION BUREAU KENYA LIMITED be utilized for the settling of pending taxes and dividends paid to shareholders thus it was plain and ascertainable that the core subject matter of the plaintiff's suit was the value of the contract from Guangxi Hydroelectric Construction Bureau Limited quoted in paragraph 13 of the Plaint as Kshs. 297,487,880.92/-; and the value of the outstanding taxes demanded from the 2nd Plaintiff by the Kenya Revenue Authority of Kshs. 7,886,620/- as quoted in paragraph 9 of the Plaint.

23. It was thus submitted that he quantum of the subject matter would therefore be Kshs. 305,374,500.92 and the amount taxed on instructions fees was Kshs. 3,585,463.13 thus it was taxed in line with the provision of 75% of the scale for fees as provided in Schedule 6 of the Advocates Remuneration Order and therefore the bill as taxed by the Taxing Master ought not to be disturbed by this Honorable Court

24. The respondents submitted that there was no error or deviation by the Taxing Master from the rules codified in the Advocates Remuneration Order or Schedule 6 of the same while taxing the Defendant's Bill of Costs dated 12th May, 2023 as provided in the case of Premchand Raichand Limited & Another v Quarry Services East Africa Limited [1972] E.A. 162 & Joreth Limited & Kigano and Associates (2002) 1 EA 92 as was cited in the case of Del Monte Kenya Limited v Kenya National Chamber of Commerce and Industry (KNCCI) Murang'a Chapter & 2 Others [2021].

25. It was submitted that contrary to the plaintiffs' allegations that an item for "Getting up Fees" was permissible, no such fee for Getting Up for trial was included in the Bill of Costs dated 12th May, 2023 nor awarded by the Taxing Master and thus the plaintiffs' submissions on the same should therefore be disregarded by this Honorable Court.

26. The respondents submitted that attendance is a matter of record and not assumption or conjecture and that their attendance was documented in the Court's coram and the Defendant's Bill of Costs dated 12th May, 2023 merely confirmed the same, further that no challenge was raised against fees claimed by the Defendant with respect to attendances so as to invite the Taxing Master's to consider the same nor was any of the issues put forth by the Plaintiff before the Taxing Master despite their active participation through attendance on proceedings and ample opportunity to tender their objections and thus this Honourable Court ought to disregard the Plaintiff's allegations and submissions relating to court attendance fees.

27. On disbursement charges it was submitted that the proof of expenditure can be found on the court records as all the pleadings and evidence are replicated in the court file and that the receipts for court fees and indeed the physical CD Rom evidence are indeed on the court file thus the Plaintiffs mere allegation that no expense was incurred does not warrant this Honorable Court to interfere with the awarded disbursement costs.

28. It was submitted that the Plaintiffs have not put any plausible grounds to demonstrate and justify any errors in principle committed by the Taxing Officer, so as to warrant this Court's interference with the decision of the Taxing Master as required in the case of Republic vs Ministry of Agriculture & 2 Others Exparte Muchiri W'njuguna & 6 Others [2006] eKLR.

Analysis & Determination

29. I have considered the record herein, the pleadings filed including the submissions. The principles that guide the High Court when considering a reference from the decision of a taxing officer are fairly settled through caselaw. In the case of Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR the Court of Appeal stated: -

> " The learned judge like the taxing officer was exercising judicial discretion when he allowed the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned judge acted on the wrong principles of law. The appeal to this Court from the decision of a judge on reference from a taxing officer is akin to a second appeal and should be governed by Section 72 (1) of the *Civil Procedure Act*. In our view, such an appeal can only be allowed on any of the three grounds specified in Section 72 (1) of the *Civil Procedure Act*, that is to say, if the decision is contrary to law or some usage having the force of law; or the decision has failed to determine some issue(s) of law or usage having the force of law or where there is a substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits."

30. Similarly, in the case of *Kamunyori & Company Advocates v Development Bank of Kenya Limited (2015) Civil Appeal 206 of 2006*, the court stated: -

> " 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 instructions fee is arrived at on the wrong principles, it will be set aside." (underlining mine)

31. Further, in the case of Peter Muthoka & another v Ochieng & 3 others [2019] eKLR, the Court of Appeal held: -

> " It is not lost to us ... that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in MBOGO -vs- SHAH (Supra), then the decision though discretionary, may properly be interfered with. See also *ATTORNEY GENERAL OF KENYA -vs- PROF. ANYANG' NYONG'O & 10 OTHERS, EACJ App. No. 1 OF 2009*."

32. The principles applicable when the High Court is invited to interfere with a Taxing Master's decision were well set out by G.V. Odunga J (as he then was) in the case of Republic v Competition Authority Ex Parte Ukwala Supermarket Ltd & Anor [2017] eKLR where he stated as follows:

> " 25. 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 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 practice 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 vs. Shah and Others [2002] 1 EA 64."

33. On the same subject, Mativo J (as he then was) in KANU National Elections Board & 2 others v Salah Yakub Farah [2018] eKLR held as follows:

> " 19. It is trite that the court will not interfere with the exercise of the taxing master's discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue."

34. The question that this court must answer is whether in determining the instruction fees, the subject matter of the suit subject of the referenced taxed costs was ascertainable and thus whether the taxing officer exercised her discretion correctly.

35. The applicants have argued that the taxing master ought to have been guided by Schedule 6 of the Advocates Remuneration Order Paragraph *1* (b) which deals with instructions fees where a suit is reached prior to confirmation of the first hearing date of the suit shall be 85% and thus the correct amount chargeable as instruction fees in this case would be 85% of the chargeable fee i.e. 85% of 75,000 thus amounting to Kshs. 63,750.

36. On the other hand, the respondents submitted that the quantum of the subject matter would be Kshs. 305,374,500.92 as the same was not merely limited to the declaratory and injunctive orders sought but also from the subject of the plaint and thus the amount taxed on instructions fees was Kshs. 3,585,463.13 thus it was taxed in line with the provision of 75% of the scale for fees as provided in Schedule 6 of the Advocates Remuneration Order and therefore the bill as taxed by the Taxing Master ought not to be disturbed by this Honorable Court.

37. Since the charging schedule is not in dispute and judgment was not entered in the Suit, what then is the value of the subject matter? In Peter Muthoka and Another v Ochieng and 3 Others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR, the Court of Appeal observed that:

> "It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason,

recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleading that form the basis for determining the subject value." [Emphasis added]

38. In the instant case, it is undisputed that the applicants withdrew their suit prior to the first hearing and thus the value of the subject matter from the terms of the settlement cannot be determined. It therefore follows that the value of the subject matter herein has to be determined from the pleadings.

39. Turning to the plaint itself, it is noteworthy that paragraph *9* states as follows:

> " 9. The 1st plaintiff as a shareholder and director holding 50% shares in the company was shocked when she received a letter dated 2/3/2022 from (Kenya Revenue Authority) KRA tax on account of work done in 2021 owing to Kshs. 7,886,620 a fact which the defendant never disclosed to the plaintiff.
>
> 13. The 2nd plaintiff has landed a sub contract with GUANGXI HYDROELECTRIC CONSTRUCTION BUREAU KENYA LIMITED. The sub contract amount is Kshs. 297,487,880.92 and the 1st plaintiff is apprehensive that the defendant will not declare profits and pay the 1st plaintiff dividends as well as pay the due tax to the Kenya Revenue Authority."

40. Can these paragraphs then be used as the basis for determining the value of the subject matter as submitted and advanced by the respondents? I do not think so. The aforementioned paragraphs are merely descriptive of the going ons between the parties. None of the funds anticipated in the pleadings ever crystallized as a loss or profit to either of the parties herein as to warrant compensation.

41. Accordingly, it is my view that this is a case where the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, and thus the taxing officer was permitted to use her discretion to assess instructions fees in accordance with what

she considered just, as was stated in the case of Peter Muthoka and Another v Ochieng and 3 Others (supra).

42. I am fortified on this by the very most recent decision of the Supreme Court in *Kenya Airports Authority v Otieno Ragot & Co. Advocates SCoK Petition E011 of 2023* rendered on 4/8/2024 where the apex Court in setting aside the Court of Appeal's decision which had enhanced earlier assessed costs of Kshs. 5 Million to Kshs. 196,044,750.50, held that a proper interpretation of the mode of taxation of advocate fees especially where the suit is determined in a summary manner and where the value of the subject matter has not been verified or ascertained in court, is that the taxing officer must exercise discretion in assessing the fees payable to the advocate.

43. The Court found that a Taxing Officer must take into account the amount of work done by an advocate, the interest of the parties, the general conduct of the proceedings including the time taken and all other relevant considerations. That the costs should be reasonable to a level where the charges should not impede access to justice by litigants.

44. The Supreme Court further found that the Taxing Officer's discretion in assessing Advocate-Client costs is not fettered to a mere arithmetic computation of increasing the instruction fees ascertained in the Party & Party costs by one-half. As a result, the earlier assessment of Kshs. 5 million was restored.

45. That Supreme Court decision is significant as it underscores the constitutional safeguard of the right of access to justice and the principle that costs should be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

46. Albeit the costs in the above case were between advocate and client, I find the principle enunciated to be very relevant to this case where the bone of contention was the instructions fees. This is because the Supreme Court discussed on interpretation of Schedule 6 of the Advocates Remuneration Order which provides for, in the first instance, party and party costs before moving onto the advocate/ client costs and how they should be assessed.

47. This is what the Apex Court stated:

> "(52) By dint of Rule 50 of the Advocates Remuneration Order, Schedule VI relates to the assessment/taxation of costs in proceedings before the High Court.
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> Schedule VI of the Advocates Remuneration Order is divided into two parts, that is, Part A which deals with Party-Party costs, and Part B with Advocate-Client costs. Of concern to this appeal, as we stated in the preceding paragraphs of this judgment, is the assessment/taxation of instruction fees of an advocate retained to act for a party in the High Court. Therefore, in interpreting Schedule VI we shall address the following sub-issues:
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> a. How should instruction fees under Schedule VIA of the Advocates Remuneration Order be assessed and/or taxed?
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> b. How should instruction fees under Schedule VIB of the Advocates Remuneration Order be assessed and/or taxed? Assessment/Taxation of instructions fees under Schedule VIA of the Advocates Remuneration Order
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> (53) Schedule VIA provides for Party-Party costs, that is, the manner in which costs awarded to a successful party as against another party therein should be assessed/computed/taxed. The essence of such costs is to ensure a successful

litigant/party receives a fair reimbursement/recompense for the costs/expenses he/she has had to incur on account of a suit. See *Outa vs. Odoyo & 3 Others, SC Petition No 6 of 2014*; [2023] KESC 75 (KLR).

(54) With regard to Schedule VIA, Paragraph 1 thereof commences with the assessment of instruction fees based on the value of the subject matter, the said paragraph provides in part as follows:

> "1. Instruction fees
>
> Subject as hereinafter provided, the fees for instructions shall be as follows—The fees 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 defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and –
>
> (b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and – ..." [Emphasis added]

(55) It is common ground that the subject matter of the suit in issue should be identified first, and then the value thereof determined. How is the value of the subject matter to be determined? Paragraph 1 of Schedule VIA is clear on this issue, and in point of fact stipulates that, "... where the value of the subject matter can be determined from the pleading, judgment or settlement of the parties". This means that the value of the subject matter can be determined from the pleadings or judgment or settlement of the parties. In that regard, the Court of Appeal in the case of Joreth Ltd. vs. Kigano & Associates [2002] 1 E.A. 92 expressed that-

> "We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) ..."

(56) Equally, the Court of Appeal in considering the issue of how the value of a subject matter can be determined in *Peter Muthoka & Another vs. Ochieng & 3 Others, Civil Appeal No. 328 of 2017*; [2019] eKLR, stated as follows:

> "It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on

> the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court. Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement."
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> We concur and approve of the foregoing findings by the Court of Appeal on the factors to take into consideration when determining the value of the subject matter.

(57) Whilst the determination of the value of subject matter from a judgment and settlement of the parties is quite straight forward, the determination from pleadings is not. The determination of the value of the subject matter, may be difficult, for instance, where the pleadings/suit is struck out at a preliminary stage, such as in this case, and the value can only be determined/ ascertained upon theconclusion of a trial. In considering this pertinent issue, we make reference to D. Njogu and Co. Advocates vs. Kenya National Capital Authority, HCMisc. Applic. No. 21 of 2003; [2005] eKLR, wherein the advocate therein acted for the respondent (who was the plaintiff) in a suit whose claim was for Kshs. 82,706,408.60, together with interest at 30% per annum from 18th October 2000.

On whether the value of the subject matter could be determined from the pleadings, Ochieng, J., as he then was, held that:

> "So, whilst I accept that the advocate may have been instructed to sue for not only the principal sum, but also for interest thereon, at a specific rate, that fact alone cannot mean that the claim would be successful. In other words, the court could dismiss the whole claim, or grant part of the principal sum. Alternatively, the court could grant judgement for the whole principal sum, but without interest, or even with interest at rates other than those claimed. Effectively, therefore the value of the subject matter of the suit would remain indeterminate until the court passed its verdict on the case." [Emphasis added

48. Thus, the appropriate clause of the Schedule 6 that ought to have been used by the taxing officer ought to have been 1 (b) which provides inter alia: -

> To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b)....
>
> Other Matters

To sue or defend in any case not provided for above; such sum as may be reasonable but not less than—

i. If undefended 45,000

ii. If defended 75,000

49. To this end, and based on the principles espoused in the above Supreme Court decision which binds all courts and tribunals, I am satisfied that the Taxing officer exercised her discretion wrongly and thus the instruction fees ought to be calculated as 75% of 75000 = 56,250.

50. On the attendances, being Items 21 – 31 on the impugned Bill of Costs, I agree with the Respondent that these are a matter of record and not assumption or conjecture and that their attendance was documented. I find no reason to deviate from the sums awarded by the taxing officer as despite the respondent pleading high amounts of Kshs. 7,100 during hearings or mentions, the same has not been allowed.

51. Finally, on Court Fees and Disbursements Being Items 53 – 62, I note that the taxing officer only awarded those proven by receipts, I find no reason to interfere with the same.

52. The upshot of the above is that I find that the taxing officer wrongly exercised her discretion when considering the Bill of Costs dated 12th May 2023 only in as far as the Instructions Fees are concerned.

53. I thus allow the reference to the extent that I set aside the ruling of the taxing master and certificate of costs dated 29th June, 2023 and issued on 12th July, 2023 in respect of Kisumu Commercial Case E10 of 2022 on instructions fees at item 1 only and substitute it with an award of Kshs. 56,250.

54. The Deputy registrar of this court being the taxing master is directed to re issue an amended certificate of costs in terms of the reduced amounts herein.

55. As the amount in dispute has been substantially reduced, I order that each party bear their own costs of the Reference. Mention on 19/9/2024 before the Deputy Registrar to confirm compliance with the orders herein.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE