



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gulf Badar Group (K) Limited v More Than Conquerors Company Limited  
(Civil Case 92 of 2017) [2023] KEHC 2912 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2912 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 92 OF 2017  
DKN MAGARE, J  
MARCH 30, 2023**

**BETWEEN**

**GULF BADAR GROUP (K) LIMITED ..... PLAINTIFF**

**AND**

**MORE THAN CONQUERORS COMPANY LIMITED ..... DEFENDANT**

**RULING**

1. This matter is for Ruling on a reference dated July 25, 2022. Application raised objections on several items. The parties filed submissions and relied on several authorities of the Court of Appeal and High Court. I have considered the authorities, most of which are persuasive.
2. The Applicant filed Submissions on February 17, 2023 and the Respondent filed on March 3, 2023. The parties relied on similar authorities but gave them their own touch. I shall be equally guided by those authorities, which I will set out in the analysis.

**Analysis**

3. A reference is not a re-taxation. It is process where the discretion of the taxing master is reviewed. It is a strong thing to differ with the exercise of discretion by the taxing master. Although strictly not an appeal, the exercise of discretion is viewed in the same way as the issue of damages. In *Mbogo & Another v Shah* [1968] EA 93, the Court, (Sir Newbold, P) stated at page 96:

'A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been injustice.'



4. Regarding taxation, the court, Ringera J (as he then was) addressed this succinctly in *First American Bank of Kenya vs Shah and Others [2002] 1 EA 64* at 69 where he stated as follows;

' First, I find that on the authorities, this 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 so manifestly excessive as to justify an interference that it was based on an error of principle'.

5. This was recently echoed by the, High Court sitting in Eldoret, in *Vincent Kibiwott Rono v Abraham Kiprotich Chebet & another [2022] eKLR*, where Justice Nyakundi, had this to say:-

' I associate myself with the reasoning of the court in *Bernard Gichobi Njira v Kanini Njira Kathendu & another [supra]* where the court was of the opinion that the paragraph only grants an aggrieved party in a case chance to ventilate his grievance(s) only on the itemized bill. I do not find the failure of the magistrate to give these reasons fatal to the reference as the same would be more or less a duplication of the ruling. In *Ahmed Nassir –Vs- National Bank of Kenya Ltd [2006] EA* the court held: -

Although Rule 11(1) of the *Advocates Remuneration Order* stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.'

6. Therefore, it is advisable that where the ruling has reasons, the party aggrieved by the taxing master's ruling and it has reasons, they should file reference within 14 days of Ruling.

7. As stated earlier, the duty of the court is not to retax the bill. It is to review for legality and proper exercise of discretion. Effectively, the court cannot deal with items not raised in the reference. In the case of *Joseph Kiplangat Cheruiyot v M/S Weldon Ngetich & Co Advocates [2021] eKLR*, the court stated: -

' 16. In *Joreth Limited Vs Kigano & Associates [2002] 1 EA 92* at 99 where the Court of Appeal held that the value of the subject matter 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) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done.'



8. This was further buttressed by a decision referred in the same case of Joseph Kiplagat Cheruiyot (supra) which held as doth: -

' In *Republic Vs Minister for Agriculture & 2 others Ex Parte Samuel Muchiri W'njuguna (2006)* eKLR Ojwang, J (as he then was) expressed himself inter alia as follows:

'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 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. 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.'

9. I now turn to the reference itself, having settled on principles.

### **Instructions fees**

10. The subject matter of the case was a sum of Kshs 20,911,016.63 (at exchange rate of 101.39) but pleaded as USD 206,444. The sum therefore differs depending on the exchange rate. There was no dispute as to the exchange rate at the time of filing. The Court therefore adopted the exchange rate provided. I have counter checked for the exchange rate and I am satisfied on the exercise discretion by the Taxing master.
11. The next question is whether the Court was right in applying 75% of the instruction fees (As apparent from the record) instead of 65% as posited by the Applicant. Secondly whether to treat this matter as falling within paragraph 1(a) of 1(b) of schedule 6 of the Advocates (Remunerations) (Amendment Order, 2014).
12. In the court of appeal decision of *Otieno, Ragot & Company Advocates v Kenya Airports Authority [2021]* eKLR, the court stated as doth: -

As to whether the taxing officer was obliged to apply the instruction fees discerned in the party and party bill or to exercise her discretion to arrive at the instructions fees for the bill before her, requires that I turn to the Advocates Remuneration Order 2009, which is the relevant version of the Order, for guidance. The Order was later amended in 2014, although the contents of Schedule 6 largely remained the same. Schedule VI of the Order, which is the applicable provision is divided into two sections; Part A which provides for party and party costs, while Part B deals with Advocate and client costs.

Under Part A it is provided that;

'Subject as hereinafter provided, the fees for instructions shall be as follows—

- (i) To sue in an ordinary suit in which no appearances is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a) where the value of the subject matter is in excess of Kshs 3,000,000.
- (ii) 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) where the value of the subject matter is in excess of Kshs 3,000,000.



- (iii) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule.
- 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—'
13. In That case the of of Otieno, Ragot & Company Advocates (supra) the court proceeded as doth: -
- As pertains to party and party costs, the role of the taxing officer was clearly spelt out by this Court, the case of *Peter Muthoka & another vs Ochieng & 3 others [2019] eKLR* thus;
- '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.'
14. Paragraph 1(a) of schedule 6 applies where there is no appearance and no application for leave to appear or defence is made. In this case, the Defendant entered appearance and sought leave to defend the suit. There was an order for deposit made on June 22, 2018. A notice of Appeal was made and as a result an application was made and dismissed.
15. The case here was determined in a summary manner in terms of paragraph 1(b) of the Advocates(remuneration) (amendment) order, 2014. Therefore, the instruction fees should be 75% of the amounts under paragraph 1 (b). The reduction does not apply to paragraph 1 (a) of the of the Advocates(remuneration) (amendment) order, 2014. The fees chargeable under Item 1 as instruction fees is, 75% of instruction fees made up as hereunder: -
- a. Instruction fees @ 75% of 513,665=385,248.75
16. The Court awarded Kshs 388,665,9 difference of 3,416. This amount cannot be said to be so high or so was to be an erroneous estimate of costs. Consequently, the reference in respect of item is 1 dismissed.
2. VAT
17. There is no supplied relationship established between the parties. Consequently, the of VAT has no basis in law and in fact. Therefore, the sum of 62,186.144 as Vat was erroneously awarded.
18. The court has no power to award vide as provided under section 6(1) of the *VAT Act*. This was also stated by the Court in *Shreeji Enterprises Limited v John Munga Chai [2022] eKLR*, where Justice Sm Githinji stated as follows:-

' Having stated the above and noting a proper reading of Section 6 (1) of the VAT Act, I am persuaded that a Party and Party Bill of Costs does not attract an aspect of taxable supply as



an Advocate Client Bill of Costs would. The Court of Appeal in *Joreth Limited –V- Kigano & Associates*, Civil Appeal No 66 of 1999 (2002) EA, 92 (2002) eKLR held that unless the taxing officer has misdirected himself on a matter of principle, a Judge sitting on a reference against the assessment ought not to interfere with the findings. I agree with the Applicant and particularly the authority cited where JL Onguto stated a taxing Master can only award VAT if the Bill is an Advocate- Client.'

### **Disbursements**

19. The Defendant also objected several Items under, disbursements that is item numbers: - 5,6,10,13,14,15,16,18,23,27,28,29,30,31,40,41, 44, 46, 48, 49, 50, 51, 52 53, 54, 55 and 57 of the bill dated February 24, 2020.
20. The award of disbursements is discretionary. It is not purely a mathematical issue. In the court of Appeal case of *Kipkorir, Titoo & Kiara Advocates V Deposit Protection Fund Board Civil Appeal No 220 of 2004; (2005) eKLR*, the learned Appellate Judges held inter alia:

' On a reference to a Judge from the taxation by a taxing master, the judge will not normally interfere with the exercise of discretion by the taxing master unless the taxing master, erred in principle in assessing the costs.'
21. I have perused each of the items Vis-à-vis, the record and I am unable to find a place where there is an exaggeration or an improper exercise of discretion. There are no deviations that warrant this court's intervention.
22. In the circumstances this court finds that other than the issue of VAT, the rest of the bill of costs was properly taxed by the taxing master. and the taxing master properly exercised her discretion.
23. There is no for requirement for the taxing matter to regurgitate the entire bill with this Ruling. The consequence is that the taxation herein is upheld save the removal of the item on VAT, thus reducing the amount of costs from Ksh 576,551.69 is taxed at Ksh 514,365.25

### **Determination**

24. I therefore make the following orders: -
  - a. The Item on VAT is removed from the taxed costs.
  - b. The taxed costs are retained at Kshs 514,365.25 after reduction of VAT.
  - c. Each party to bear their costs.
25. Given that the charges are minimal, each party will have their own costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30<sup>TH</sup> DAY OF MARCH, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**HON. MR. JUSTICE DENNIS KIZITO MAGARE**

**JUDGE OF THE HIGH COURT, MOMBASA**

In the presence of:

Tindika for the Applicant

Wafula for Miss Khisa for the Respondent



