



JM Njenga & Company Advocates LLP v Kimuri Housing Company Limited (Environment & Land Miscellaneous Case E129 of 2023) [2025] KEELC 2857 (KLR) (24 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E129 OF 2023**

CA OCHIENG, J

MARCH 24, 2025

BETWEEN

JM NJENGA & COMPANY ADVOCATES LLP ADVOCATE

AND

KIMURI HOUSING COMPANY LIMITED CLIENT

RULING

1. What is before Court for determination is the Applicant's Chamber summons application dated the 1st July 2024 where it seeks the following Orders:
 - a. That the taxation orders made on 19th June 2024 be reviewed and/ or set aside and the matter referred back to a taxing master for re-taxation of items 1 and 83.
 - b. That the costs of the application be provided for.
2. The application is premised on grounds on its face and on the supporting affidavit of VIVIANNE WACHANGA, Advocate sworn on 1st July 2024. She deposes that the Applicant acted for the Respondent in Nairobi ELC 189 of 2015. She explains that the Applicant filed its Bill of Costs dated the 14th November 2023 and vide a Ruling delivered on the 19th June 2024, the said Bill of Costs was taxed in the sum of Kshs. 4,964,330.48.
3. She avers that the Applicant is aggrieved by the impugned Ruling in respect to items 1 and 83. She points out that under item 1, a sum of ksh.24,204,000/= had been sought for, on the strength of a valuation report valuing the suit property at Kshs. 1,100,000,000/= but the Taxing officer held that she would be guided by a figure of Ksh. 45 million, which was the purchase price of the property in 2015. Further, that this was 10 years before the parent suit ELC 189 of 15, was filed. She argues that the value was inconsistent with the reality of a ten (10) acres prime property next to Safari Park Hotel, Nairobi. She insisted that failure to rely on a valuation report before her was an error in principle that resulted in her arriving at a greatly undertaxed item 1 to the Applicant's prejudice.



4. She contends that item No.83 which relates to Getting Up fees would have to be adjusted depending on the outcome of the amount allowed under item 1 and that item 174 relates to interest yet the Taxing Master's Ruling is silent on the issue, which amounts to a dereliction of duty and an error of principle.
5. The Respondent opposed the instant application vide Grounds of Opposition dated the 2nd October, 2024 where it insists that the Taxing Officer's discretion was properly asserted since there was no record of value of the suit land in the judgment/pleadings.
6. The application was canvassed by way of written submissions.

Submissions

7. The Applicant in its submissions contended that the Taxing Officer erred in principle by taking the term "value of the suit property" to mean value of the suit property dating to the time it was instructed/when suit was filed. Further, that the Taxing Officer failed to consider an undisputed valuation report of the suit property filed with her leave and other relevant circumstances, which she ought to have put into consideration like realities on the probable value of the subject matter, the issue that the subject land was not just vacant land bought in 2005 but had been subdivided into 103 subplots, which were sold and developed thus it was worth billions of shillings. It submitted that it had been denied a significant portion of fees thus the Taxing Officer failed to exercise her discretion judiciously. It reiterated that the undisputed valuation report had content that would have guided the Taxing Officer in coming up with a value of the subject matter and assisted her not to rely on guess work but hard facts. It argued that the Taxing Officer has a right to call for further information to assist him/her assess the true value of the subject matter for purposes of calculating the instruction fees. To buttress its averments, it relied on various decisions including: *Joreth Ltd v Kigano & Associates* (2002) eKLR; *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR; *Masore Nyang'au & Co. Advocates v Kensalt Ltd* [2010] eKLR; *Kamunyoru & Company Advocates v Development Bank of Kenya Limited* (2015) eKLR; *Muriu Mungai v New Kenya Cooperative Creameries Limited* (2008) eKLR; and *Tera Waigwa Waihenya & Another v Cooperative Bank of Kenya Ltd*.
8. The Respondent in its submissions contended that the burden of adducing supporting documents remain with the advocate to produce what he relied upon, to support his Bill of Costs and not for the Client to go out and hunt for the said documents. It argued that the pleadings or other documents relied on by the Advocate in the parent file being Nairobi ELC No. 189 of 2015 can only be relied upon when they form part of the record. It reiterated that this is a Court of record. It further submitted that in taxation matters where the value of the subject matter is not disclosed in the pleadings and judgement, the Taxing Officer is duty bound to use his /her discretion to assess instruction fees.
9. It reaffirmed that the Taxing Officer used the purchase price of ksh.45 million, which was quoted in the further amended Complaint as her guide in establishing the fees chargeable in the matter. Further, that she also considered other relevant factors including the complexity of the case, the fact that the Applicant had come on record seven (7) years after the parent suit had been instituted and the value has appreciated over time. To support its arguments, it relied on the following decisions: *Floris Pierro & Another v Giancarho Falasconi (As the Administrator of the Estate of Safuzza Billoti alias Mei Santuzzi)* (2014) eKLR; *Mwangi Njenga t/a Mwangi Njenga & Co. Advocates v County Government of Mombasa* [2020] eKLR; and *Haithar Haji Abdi Rahim Haithir Haji v Southdows Developers Limited* [2022] KEELC 1385 (KLR).



Analysis and Determination

10. Upon consideration of the instant Chamber Summons application including the respective affidavits and rivaling submissions, the only issue for determination is whether the Taxing Officer erred in awarding the Instruction Fees under item 1 and the Getting Up fees under item 83 vide her Ruling dated the 19th June 2024.
11. The Applicant contends that the Taxing Officer erred in principle by failing to rely on a Valuation Report filed pursuant to the Taxing Officer's leave, which valued the suit property at Kshs. 1.1 billion as opposed to Ksh.45 million contained in the pleadings. It relied on the case of *Masore Nyang'au & Co. Advocates v Kensalt Ltd* [2010] eKLR, where the court stated;

“Schedule 6 above, does prescribe how costs should be assessed ‘where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties’. The said schedule does not however explicitly prescribe what should be done, where the value of the subject matter is not in the pleadings, judgment or settlement. You could indeed have litigation where the value of the subject matter is not given in the pleadings, judgment or settlement. A common example is in land cases, where say, the plaintiff files suit to cancel the defendant's title claiming that the defendant acquired the title through fraud but the title rightfully belongs to the plaintiff. In such a case, all that may be given in the pleadings is the registration particulars of the said land and no more. Assuming the plaintiff in such a case succeeds, and the court orders the defendant's title to be cancelled, and in place, the plaintiff to be registered as proprietor, what would the plaintiff be entitled to as costs in respect of instruction fees since no actual value may be given in such a judgment?”

At the end of the day, costs will need to be pegged on the value of the subject matter, and my own view of the matter, is that the court is not precluded from asking for evidence so as to determine what the value of the subject matter may be for purposes of taxing costs, or refer to other documents provided in the course of the case, and which may point at the value of the subject matter. Such documents may include the sale agreement, valuation report, or the consideration noted in the transfer instrument or title.”

12. On award of Instruction Fees, an excerpt from Schedule 6 of the Advocates Remuneration Order 2014 provides that:

“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..’

13. On Getting up Fees, Schedule 6 Paragraph (2) (i) of the Remuneration Order provides as follows:

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition



to the instruction fee and shall not be less than one-third of the instruction fee allowed on taxation.

Provided that this fee may be increased as the taxation officer considers reasonable but it does not include work comprised in the instruction fees...”

14. In the case of *Joreth Limited V Kigano & Associates* [2002] eKLR the Court held inter alia
“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) 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 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.”
15. While in *Republic v Ministry of Agriculture and 2 Others: Exparte Muchiri W’Njuguna & Others* (2006) eKLR it was held as follows:
“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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant facts”
16. I note the Applicant’s main contention is the failure of the Taxing Officer to award a higher amount on the Instruction and Getting Up Fees in respect to their Bill of Costs. Upon perusal of the impugned Ruling, I note the Taxing Officer relied on the value of the subject matter as pleaded in the Amended Plaintiff, which was Kshs.45,000,000 indicated as purchase price, to calculate the Instruction and Getting Up fees. Further, it emerged that the Applicant sought to rely on a Valuation Report, which it filed later on. The Applicant in its submissions sought to rely on the decision of *Masore Nyangau & Co. Advocates V. Kensalt Ltd* (2020) eKLR by Hon. Justice Munyao Sila, which I opine is persuasive and not binding on this court.
17. It is trite that Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014 clearly provides on how the value of the subject matter should be determined while assessing instruction fees, which should be from the pleadings, judgment or settlement between the parties. In this instance, the Taxing Officer relied on the law and her discretion in Taxing the impugned Bill of Costs. I note the Applicant has argued that the value of the suit land had appreciated and the Taxing Master even failed to award Interest. I note the Court did not award interest in its Judgment.
18. Based on the facts as presented, while relying on the legal provisions I have cited and associating myself with the quoted decisions, I find that the Applicant has failed to demonstrate how the calculation of instruction fees and getting up fees was erroneous. To my mind, I find that the Taxing Officer did not err in principle by determining the instruction fees as claimed by the Applicant.
19. In the circumstances, I will proceed to uphold the determination of the Taxing Officer as regards the Item (1) and (83) of the Bill of Costs in respect to Instruction and Getting Up fees respectively.



20. It is against the foregoing that I find the instant chamber summons application unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24th DAY OF MARCH 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms Kimani for Applicant

Mutua Senior Counsel for Respondent

Court Assistant: Joan

