



Owino Kojo & Co. Advocates v Sifa Insurance Brokers Limited (Miscellaneous Application E379 of 2022) [2023] KEHC 24591 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E379 OF 2022**

MN MWANGI, J

JULY 28, 2023

BETWEEN

OWINO KOJO & CO. ADVOCATES ADVOCATE

AND

SIFA INSURANCE BROKERS LIMITED CLIENT

(A reference from the decision of Hon. Stephany Bett, Deputy Registrar, dated 27th October, 2022, arising from taxation of an Advocate – Client bill of costs dated 14th May, 2022)

RULING

(A reference from the decision of Hon. Stephany Bett, Deputy Registrar, dated 27th October, 2022, arising from taxation of an Advocate – Client bill of costs dated 14th May, 2022).

1. The Advocate/applicant filed a Chamber Summons dated 11th November, 2022 brought under the provisions of paragraph 11 of the [Advocates \(Remuneration\) Order](#) and all other enabling provisions of the law. The applicant seeks the following orders -
 - i. That the decision of the Taxing Officer on item numbers 1, 2, 11 and 67 of the Advocate-Client bill of costs dated 14.05.2022 be set aside and the items be allowed as drawn;
 - ii. That in the alternative to prayer number 1 above, the Taxing Officer’s decision in respect of item numbers 1, 2, 11, and 67 of the Advocate-Client bill of costs dated 14.05.2022 be set aside and the bill of costs be remitted to such other Taxing Officer as the Court might direct for exercise of his/her discretion and reassessment of the aforementioned items ab initio;
 - iii. That the Certificate of Costs dated 08.11.2022 be set aside and the same be replaced with a certificate of costs for Kshs.2,380,806.56; and



- iv. That the costs of this application be granted to the applicant.
2. The application has been brought on the grounds on the face of the Summons and is supported by affidavits sworn on 11th November, 2022 and 5th April, 2023, by Owino Kojo, learned Counsel for the applicant. In opposition thereto, the respondent filed a replying and further affidavit sworn on 16th March, 2023 and 5th May, 2023, respectively, by Paul Gogo, a former director of the respondent.
 3. The application was canvassed by way of written submissions. The applicant's submissions were filed on 7th April, 2023 by the law firm of Owino Kojo & Company Advocates. The respondent's submissions were filed by the law firm of Prof. Tom Ojienda & Associates on 20th March, 2023.
 4. Mr. Kojo, learned Counsel for the applicant cited Schedule 6, Part A, Paragraph 1(a) of the Advocates (Remuneration) Order and submitted that the instruction fees charged in this matter were in particular, based on the instructions received from the client, the pleadings and the plaint. He stated that the value of the subject matter was Kshs.23,352,779.44, a fact which was also admitted by the respondent in its application dated 24th June, 2022, which means that the Taxing Officer erred in taxing item No. 1 at Kshs.75,000. He also stated that the respondent has argued in its submissions that only an Advocate who draws a plaint is entitled to full instruction fees. Counsel contended that if the respondent is allowed to keep changing Advocates at will, and without reason, but is exempted from paying the Advocates, then the subsequent Advocates will be prejudiced.
 5. Counsel stated that it is not true as stated by the Taxing Officer that the applicant was instructed to reinstate the suit since as at the time they received instructions to take over the matter from the law firm of Ojienda & Co. Advocates, the respondent was not aware that the suit had been dismissed, as the said information only came to light after the Court file was retrieved following an application for reconstruction of the file vide Misc. Cause No. E894 of 2020. He submitted that instructions to reinstate the suit, namely, HCCC No. 460/2007, were issued more than a year later and were effectuated by the applicant through a Notice of Motion application dated 8th March, 2021. He submitted that based on the said fact, item No. 1 should be allowed at Kshs. 550,291.69 as drawn.
 6. Mr. Kojo contended that the Taxing Officer erred in law and fact in taxing off item No. 2 in utter disregard of the provisions of Schedule 6, Part A, Paragraph 2 of the Advocates (Remuneration) Order and holding that that the Advocate was not entitled to getting up fees since the suit had been dismissed. He indicated that a statement of defence was filed in the suit giving rise to the taxation herein and that the said suit had been prepared for trial in compliance with Order 11 of the Civil Procedure Rules, 2010 before the Court file was misplaced. He further indicated that dismissal of the suit for want of prosecution did not change the fact that a denial of liability had been filed, and in any case, the respondent was still keen on prosecuting the matter, hence the filing of an application to reinstate the suit.
 7. It was submitted by Counsel that the Taxing Officer erred in taxing off item No. 11 yet several copies of the documents listed therein were made and the same were even supplied to the Court. He claimed that she further erred by holding that there was no need for making copies. He explained that the said copies were necessary for making the application to reconstruct the Court file and in reconstructing the said Court file. He stated that the Taxing Officer could not have allowed item No. 10 on perusal of the listed documents without the actual documents. He submitted that the legal service of making necessary copies is provided for under Schedule 6, Part A, Paragraph 5(e) of the Advocates (Remuneration) Order and a receipt is not one of the requirements under the said provisions of the law.
 8. Mr. Kojo referred to Paragraph 7 of the Advocates (Remuneration) Order and stated that it gives discretion to the Advocate to elect whether or not to charge interest. He further stated that the



applicant served an invoice upon the respondent on 10th December, 2019, service of which was acknowledged by the respondent despite the fact that it stamped the applicant's copy with the stamp of its subsidiary company, Bell Estate Agency Limited. He submitted that the applicant is entitled to interest at 14% per annum from 10th December, 2019 as sought in its bill of costs dated 14th May, 2022.

9. Counsel for the applicant contended that the respondent in its replying affidavit alleged that it was wound up on 3rd November, 2010 but it had not attached any Winding Up Order to prove the said allegation, and as such, the applicant and the Court are not in a position to confirm the veracity of the said allegations or to even know the type of liquidation the respondent is alluding to. He stated that it was not true that if the application herein is allowed, the Court will have made an order in vain, as the respondent has an office, owns property, operates businesses, all of which the applicant has knowledge of. Mr. Kojo explained that the applicant also has an option of recovering its debt from the Directors of the respondent company, which action is sanctioned under Section 509 of the [Insolvency Act](#).
10. He submitted that the respondent cited Section 432(2) of the [Insolvency Act](#) which requires that legal proceedings against a company under liquidation be commenced only with approval of the Court and stated that the respondent has omitted Sub-Section 3 which states that an order for liquidating a company operates in favour of all the creditors and of all contributories of the company as if made on the joint application of all of them.
11. Mr. Kojo further submitted that the respondent's liquidation order was not registered with the Registrar of Companies as required under Section 432(1) of the [Insolvency Act](#), which explains why a search of the company reveals that it is duly registered, is actively trading, and does not disclose that it was liquidated. Counsel relied on the provisions of Section 444 of the [Insolvency Act](#) and stated that in the event the respondent company was liquidated in the year 2010 and the respondent has been actively trading and litigating, then the respondent and its Directors are guilty of various criminal offences under the Act, since they are not qualified to act as Insolvency Practitioners under the provisions of Section 6 of the [Insolvency Act](#).
12. He stated that Section 485 of the [Insolvency Act](#) requires a company in liquidation to state that it is in liquidation in all its letters, invoices and other communication, but the respondent has never stated in any of its communication or pleadings that it is in liquidation. He pointed out that since the year 2010, the respondent has sued and has been sued in over twenty (20) cases and the issue of liquidation has never been raised.
13. Ms. Msando, learned Counsel for the respondent submitted that the respondent company does not exist as it was wound up and a Winding Up Order issued on 3rd November, 2010 in Winding Up Cause No. 31 of 2009, hence proceedings cannot ensue against it without leave of the Court. She cited Section 432(2) of the [Insolvency Act](#) and the case of [Michael Kadowe Karisa v African Safari Club \(In liquidation through its Liquidator, Official Receiver\) Interested Party UAP Provincial Insurance Co. Ltd](#) [2019] eKLR. She stated that the applicant had not sought leave of any Court to institute the reference application herein against the respondent company, which has since been wound up.
14. Counsel for the respondent cited the case of [Kenyariri & Associates Advocates v Salama Beach Hotel & 4 others](#) [2014] eKLR and stated that an Advocate should only be remunerated for work done and in this case, the applicant is not entitled to full instruction fees as he only instituted an application to reinstate the suit, and for the said reason, the Taxing Officer was right in finding that the instruction fees were derived from the Notice of Motion application filed by the applicant seeking to reinstate the suit, which formed the subject matter of the taxation. Counsel referred to the provisions of Schedule 6(2) of the [Advocates Remuneration Order](#), 2014 and further stated that getting up fees is chargeable by an Advocate for preparing for trial and since the applicant only instituted an application and not a suit



which required him to prepare for trial, he is not entitled to getting up fees. To this end, Counsel relied on the case of *Republic v National Environment Tribunal Ex Parte Silverste N. Enterprises Limited* [2010] eKLR.

15. Ms. Msando stated that the applicant did not provide any receipts to prove that copies of the documents listed under item No. 11 were made, and in addition, the said documents were not served on the respondent or the Court hence it does not make sense as to why the applicant claims to have made copies. She cited Paragraph 7 of the *Advocates (Remuneration) Order*, 2014 and the case of *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR.
16. She submitted that item No. 67 of the applicant's bill of costs was taxed off since the applicant did not provide proof that he had demanded the amount in the bill of costs as required by law for him to be entitled to the additional 14% interest.

Analysis and Determination.

17. I have considered the reference filed herein, the grounds on the face of it and the affidavits filed in support thereof, the replying and further affidavit by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the respondent company exists; and
 - ii. If the certificate of costs should be set aside and the bill of costs dated 14th May, 2022 be subjected to re-taxation.
18. The applicant in its affidavit in support of the reference deposed that the Taxing Officer erred in law and fact in her taxation of item Nos. 1, 2, 11 and 67 of the Advocate-Client bill of costs dated 14th May, 2022. He averred that the decision to tax item No. 1 on instruction fees at Kshs.75,000/= when the value of the subject matter was Kshs.23,352,779.44 was unlawful, wrong and unfair to the applicant since the amount taxed at Kshs.75,000/= is less than the remuneration prescribed by the *Advocates (Remuneration) Order*.
19. It was stated by the applicant that when it was clear that the Court file of the suit which forms the subject matter of the taxation was missing, the respondent instructed the applicant to reconstruct the file and it was only after the file was retrieved that the applicant advised the respondent that the said suit had in fact been dismissed for want of prosecution. The applicant stated that for the said reason, the respondent could not possibly have issued instructions (for reinstatement) which were not available, when it instructed the applicant to take over and prosecute HCCC No. 460/2007 on its behalf in the year 2020.
20. The applicant contended that the Taxing Officer failed to take into account the fact that the respondent did not oppose item Nos. 2, 11 and 67 and proceeded to tax them off and that she erred by finding that there was no need for making copies, yet the copies were necessary for making the application to reconstruct the Court file, reconstructing of the Court file and proving to the Taxing Officer that the listed documents were indeed submitted to the Advocate and that he perused them. Based on the foregoing, the applicant asserted that the Taxing Officer erred in taxing the Advocate-Client bill of costs dated 14th May, 2022 at Kshs.168,919.00.
21. The respondent in its replying affidavit deposed that the respondent company does not exist since it was wound up and a Winding Up Order issued on 3rd November, 2010 in Winding Up Cause No. 31 of 2009; In the matter of Sifa Insurance Brokers Company Limited. It averred that the ruling which forms the basis of the applicant's reference clearly established that the applicant was only instructed to reinstate the suit being HCCC No. 460 of 2007 which had been dismissed for want of prosecution.



22. It averred that it may not have been particular on the nature of instructions, but the only action undertaken by the applicant after instructions were issued was the filing of an application to reinstate the suit. It contended that the value of the subject matter was to be derived from the Notice of Motion seeking to reinstate HCCC No. 460 of 2007 and not from the entire suit. The respondent deposed that the applicant was lucky to have been awarded Kshs.75,000/= under item No. 1 of its bill of costs for instituting an application to reinstate a suit.
23. It was stated by the respondent that in as much as it did not oppose item Nos. 2, 11 and 67, the Taxing Officer actually enjoys discretion to tax off items where need be. It further stated that in the event the instant application is allowed, it will be allowed in a vacuum and contrary to the provisions of the law. In addition, it stated that the applicant will be in possession of orders that cannot be executed since the respondent is in fact “deceased” having been wound up in the year 2010.
24. The applicant in its supplementary affidavit deposed that in as much as the respondent claims that it was wound up in the year 2010, it issued instructions to the applicant to represent it in the year 2021 and never indicated that it was wound up. The applicant averred that in opposition to the bill of costs, the respondent filed a Notice of Motion application dated 24th June, 2022 seeking to have the bill of costs struck out for lack of jurisdiction but in the affidavit in support of that application, the respondent did not mention that it had been wound up.
25. The applicant stated that on 14th July, 2014, the deponent of the respondent’s replying affidavit recorded a statement stating that he was the Executive Chairman of the respondent company, which company is now alleged to be “deceased”. That on 9th October, 2017, the respondent company filed a suit, being HCCC No. 417 of 2017 without seeking leave of the Court or even mentioning that it was “deceased”.
26. The applicant averred that in the said plaint, the respondent company stated at paragraph 1 that it is a limited liability company incorporated and registered pursuant to the provisions of the [Companies Act](#), and has its office and principal place of business in Nairobi within the Republic of Kenya. The applicant also averred that the respondent executed a joint venture agreement with Kings Developers Limited on 26th March, 2012, owns buildings, has tenants and has a subsidiary company.
27. The applicant deposed that in the year 2017, the respondent sought authority of the Nairobi City County Government to install storage water tanks to its tenants and to lay water pipes at its premises, which authority was granted on 3rd October, 2017. The applicant contended that on 9th October, 2017, the deponent of the respondent’s replying affidavit swore an affidavit and recorded a statement stating that he was a director of the respondent company.
28. That the respondent also filed a statement of defence in HCCC No. 417 of 2017 stating inter alia that it was not paying service charge due, in respect of the premises which it occupies which confirms that the respondent was actively doing business in the year 2017.
29. The applicant asserted that the respondent cannot be allowed to trade conveniently when it stands to gain and to allege that it does not exist when it is obligated to pay service providers to which it is indebted.

Whether the respondent company exists.

30. The respondent averred that it ceased to exist as at 3rd November, 2010 in Winding Up Cause No. 31 of 2009; In the matter of Sifa Insurance Brokers Company Limited, when the Court issued a Winding Up Order against it. In support of this allegation, the respondent exhibited a copy of the said Order which states that the respondent company was wound up and the Official Receiver of the Republic of Kenya



was appointed as the Receiver and Manager of the respondent company, and the Official Receiver was to file a report of the said company within ninety (90) days.

31. From the foregoing, it is evident that indeed the respondent company was wound up on 3rd December, 2010. It is trite that once a Winding Up Order is issued against a Company, the provisions of Section 432 of the *Insolvency Act* come into play. The said provisions state as follows-

- “(1) Within seven days after a liquidation order is made in respect of a company, the company shall lodge a copy of the order with the Registrar for registration and also lodge a copy of it with the Official Receiver.
- (2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.
- (3) An order for liquidating a company operates in favour of all the creditors and of all contributories of the company as if made on the joint application of all of them.”

32. After the respondent company was wound up on 3rd November, 2010, it was expected that any suit brought against the respondent company could only be validly undertaken with leave of the Court and any suit brought on behalf of the respondent company could only be filed through its Official Receiver. The Court of Appeal in the case of *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR held as follows-

“It has been held consistently by the courts over the years that a company that has been dissolved cannot maintain an action and conversely that no action can be brought against it simply because it does not exist in the eyes of the law. This principle was emphasized as long ago as 1923 by Bankes L.J in *Banque Internationale De Commerce* (supra), which was subsequently in 1959 cited with approval by Templeton, J of then Supreme Court of Kenya in *Fort Hall Bakery Supply Co. v Fredrick Muigai Wangoe* (1959) EA 474, who said:

“The party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence..... A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed.....

Since a non-existent plaintiff can neither pay nor receive costs there can be no order as to costs”.

33. Based on the foregoing, this Court finds that after 3rd November, 2010, the respondent company was not in a position to maintain an action on its own, no action could be brought against it without leave of the Court. The applicant in its supplementary affidavit has demonstrated instances where and when the respondent has filed suits in its own capacity as a limited liability company and has also engaged in business activities as a duly registered limited liability company. The applicant also averred that the said Winding Up Order issued on 3rd November, 2010 was not registered with the Registrar of Companies as provided for under Section 432(1) of the *Insolvency Act*, hence a search of the respondent company in the Companies’ Registry reveals that it is duly registered and actively trading.



34. The said allegations made by the applicant were not disputed and/or contested by the respondent in any way whatsoever, the respondent did not even attempt to offer an explanation as to why it was engaging in business and/or filing suits in its own capacity while at the same time alleging that it does not exist pursuant to a Winding Up Order issued on 3rd November, 2010 in Winding Up Cause No. 31 of 2009. It was stated by the applicant, a fact which was not disputed by the respondent that when it was instructed to represent the respondent in HCCC No. 460 of 2007 sometime in the year 2019, the respondent did not disclose and/or inform it that it was wound up in the year 2010.
35. In addition, when the applicant filed a bill of costs dated 14th May, 2022, the respondent did not oppose it or seek for it to be dismissed on the ground that the applicant had not sought leave of the Court before filing it. Instead, the respondent challenged the said bill of costs on grounds that the relationship between it and the applicant was governed by an agreement on legal fees. It is trite that a company in liquidation has a duty to disclose its liquidation status in all its letters, invoices and other communication as provided for under Section 485 of the *Insolvency Act*.
36. The reference herein is an appeal against the decision of the Taxing Officer in taxation of the applicant's bill of costs dated 14th May, 2022. My finding is that since the respondent did not challenge the said bill of costs on grounds that it was wound up in the year 2010 thus it does not exist and that any suit brought against it has to be brought with leave of the Court, it is estopped from raising the said defence at this point in time, as the same can be equated to introducing new evidence on appeal. The respondent was all along aware of the Winding Up Order issued on 3rd November, 2010 but chose not to disclose its existence or its liquidation status to the applicant at the time it gave instructions, and to the Court when the bill of costs dated 14th May, 2022 was filed.
37. Section 107 of the *Evidence Act* provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The respondent had a duty of proving that it was wound up thus no suit could be brought and/or sustained against it without leave of the Court but it failed to discharge this duty since the applicant demonstrated that the respondent had been engaging in business activities, maintaining a physical office and filing suits in its own capacity after the said Winding Up Order was issued.
38. I therefore hold that the respondent cannot now rush to Court waiving a Winding Up Order so as to escape from its liability of paying legal fees to the applicant whom it instructed to represent it in HCCC No. 460 of 2007. Based on the respondent's conduct as demonstrated by the applicant and as explained herein above, this Court finds that the respondent company exists hence it is properly before this Court.

If the certificate of costs should be set aside and the bill of costs dated 14th May, 2022 be subjected to re-taxation.

39. A Court can only interfere with the Taxing Officer's decision where there has been an error in principle and not solely on questions of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. I am bound by the Court of Appeal decision in *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR where it held as follows–

“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.”

40. The applicant submitted that the Taxing Officer erred in law and fact in her taxation of item Nos. 1, 2, 11 and 67 of the Advocate-Client bills of costs dated 14th May, 2022. In respect to Item No. 1



on instruction fees, the applicant contended that it was instructed by the respondent to represent it in HCCC No. 460 of 2007 and recover Kshs. 23,352,779.44 hence the value of the subject matter for purposes of calculating instruction fees was Kshs. 23,352,779.44. The Taxing Officer in her ruling stated that the applicant came on record after the suit had been dismissed for want of prosecution and filed an application dated 8th March, 2021 seeking to reinstate the suit. In taxing instruction fees at Kshs. 75,000/=, she held that an Advocate should be paid for work done and found that the value of the subject matter can be derived from the application seeking reinstatement of the suit.

41. I agree with the Taxing Officer and the respondent that an Advocate should only be paid for work done. In this case, it is not disputed that the applicant took over the conduct of HCCC No. 460 of 2007 in the year 2020 from another firm of Advocates who actually instituted the said suit on behalf of the respondent. The respondent alleges that the applicant was instructed to reinstate the said suit since it had been dismissed for want of prosecution. The respondent further stated that it may not have been particular on the nature of instructions, but the only action taken by the applicant after instructions were issued was the filing of an application to reinstate HCCC No. 460 of 2007.
42. The applicant on the other hand averred that it was instructed to represent the respondent in the said suit and recover Kshs.23,352,779.44. In support of this averment, the applicant annexed to its affidavit in support of the instant reference, a copy of the respondent's affidavit filed before the Taxing Officer in support of an application to have the applicant's bill of costs struck out where the respondent acknowledged to have instructed the applicant in HCCC No. 460 of 2007 to recover Kshs.23,352,779.44. On perusal of the pleadings before me, it is clear that it is only after the applicant had filed an application to reconstruct the file in the said suit, that parties found out that the suit had been dismissed for want of prosecution.
43. Accordingly, there is no way the respondent could have instructed the applicant to file an application to reinstate HCCC No. 460 of 2007 when it had no knowledge of the fact that the said suit had been dismissed for want of prosecution. The question this Court now has to answer is whether the applicant is entitled to full instruction fees despite the fact that it did not draw the plaint in the said suit. I agree with the findings by Majanja. J in *Mumias Sugar Company Limited v Tom Ojienda & Associates Advocates* [2021] eKLR where in answering a similar question held the following-

“Although the Deputy Registrar accepted the Company's position, the preponderance of authority including the case cited by the learned Judge support the position that an advocate is entitled to full instruction fees once instructed. In *Mayers & Another v Hamilton & Others* [1975] EA 13 Spry Ag. P. held set out the position as follows:

I accept that the moment an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee but it is only necessary to look at the concluding words of the particulars of the instruction fee in the bill of costs now in issue - “considering most difficult and conflicting case-law on the matter” - to realise that an advocate will not ordinarily become entitled at the moment of instruction to the whole fee which he may ultimately claim. Suppose, for example, that within a few minutes of receiving instructions to defend a suit, an advocate was informed that the Plaintiff had decided to withdraw. The advocate, as I see it, would be entitled to claim the minimum instruction fee but he could not properly claim in respect of work he had not done. The entitlement under the instruction fee grows as the matter proceeds.



Waweru J., elucidated the same position in *Kenya Tea Development Agency Limited v J. M. Njenga & Co., Advocates* ML HC Misc. Appl. No. 6161 of 2006 [2008] eKLR as follows:

[A]n advocate can charge only for the work he has done. He cannot charge for the work done by a previous advocate in the matter.

But having said that, a new advocate coming onto a matter somewhere in the middle of the proceedings in the High Court will be entitled to the full instruction fee prescribed in Part A of Schedule VI of the Order subject to the taxing officer's discretion to increase or (unless otherwise provided) reduce it, and as augmented by the formula in Part B (increase by one-half). A client who changes advocates in the High Court therefore can expect to pay the full instruction fee as many times as he pleases to change advocates, notwithstanding that he can recover only one instruction fee in a party and party taxation, unless there is a judge's certificate for more than one counsel.

44. In the premise, I find that an Advocate is entitled to full instruction fees upon taking over the conduct of the matter from another Advocate. However, in calculating instruction fees, the Taxing Officer ought to have considered the value of the subject matter from the pleadings (plaint) and not just the application to reinstate the suit. The Court of Appeal in the case of *Joreth Ltd v Kigano & Associates* [2002] 1 EA 92, held 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) 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 the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

45. My finding is that the Taxing Officer made an error in principle in her taxation of item No. 1 on instruction fees by holding that the value of the subject matter can be derived from the application seeking reinstatement of the suit instead of the main claim.

46. On whether the applicant was entitled to getting up fees, the Taxing Officer struck off the said item on the ground that at the time the applicant came on record, the suit had been dismissed. The respondent submitted that getting up fees can only be charged by an Advocate for preparing for trial and since the applicant only filed an application and not a suit which required him to prepare for trial, he could not be entitled to getting up fees. Schedule 6 Part 2 of the *Advocates Remuneration Order* provides that –

“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 be not less than one-third of the instruction fee allowed on taxation:

Provided that —

“(i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

(ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee



allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;

(iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.”

47. The applicant cited the provisions of Schedule 6 Paragraph 2(iii) of the *Advocates (Remuneration) Order* and submitted that it is on record that HCCC No. 460 of 2007 had been prepared for trial before the Court file was misplaced and that parties had complied with Order 11 of the *Civil Procedure Rules* and that the respondent’s Counsel had requested the Court for a hearing date when it occurred that the Court file could not be traced. It is worth noting that the applicant acknowledged the fact that it is the respondent’s former Advocates on record who had prepared for trial since the applicant only came on record for the respondent after the Court file had been misplaced hence the need to file an application to reconstruct the file.
48. In addition, it is not in dispute that at the time of filing the bill of costs dated 14th May, 2022, HCCC No. 460 of 2007 had not yet been confirmed for hearing. For this reason, pursuant to the provisions of Schedule 6 Paragraph 2(ii) of the *Advocates (Remuneration) Order*, I find that the applicant was not entitled to getting up fees hence the Taxing Officer did not err in law in taxing off item No. 2 on getting up fees.
49. On item No. 11 on the applicant’s bill of costs, it was submitted by the applicant that it was necessary to make the said copies for making the application to reconstruct the Court file, reconstructing the Court file, and proving to the Taxing Officer that the listed documents were indeed submitted to the Advocate and that he perused them. The applicant contended that without the said documents, the Taxing Officer could not have allowed item No. 10 on perusal of the listed documents. It is noteworthy that before a file is reconstructed, the Court has to grant an order for reconstruction of the misplaced and/or lost file. As such, there was no need for an order for reconstruction of the Court file, since the Court file in HCCC No. 460 of 2007 was retrieved before an order was made for reconstruction of the said file hence there was no need for making copies for purposes of reconstructing the Court file. Making advance copies of the pleadings before an order has been made for reconstruction of a Court file would be tantamount to taking the Court for granted that the order sought would be granted.
50. The applicant submitted that the said documents were submitted to it for perusal, and no further copies were necessary. In the premise, I agree with the Taxing Officer that there was no proof that the documents listed therein were provided to Court and there was no need for the applicant to make copies of the said documents for the Court as they were already in the Court file. As a result, I find that the Taxing Officer did not err in taxing off item No. 11 of the applicant’s bill of costs dated 14th May, 2022.
51. In determining whether the applicant is entitled to item No. 67 which is interest at the rate of 14% per annum, this Court has to determine whether the applicant duly served the respondent with a fee note and/or bill demanding its legal fees from the respondent. This item was taxed off by the Taxing Officer on the ground that there was no proof that the applicant had demanded the amount in the bill of costs from the respondent. Interest is provided for under Paragraph 7 of the *Advocates (Remuneration) Order* which states as follows –

“An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his



bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”

52. The applicant asserted that it served an invoice on the respondent on 10th December, 2019 but the respondent stamped its copy with the stamp of its subsidiary company, Bell Estate Agency Limited thus the applicant is entitled to interest at 14% per annum from 10th December, 2019. It is noted that the respondent did not dispute being in receipt of the invoice dated 10th December, 2019.
53. I have perused the invoice dated 10th Decemebr, 2019 referred to by the applicant and I note that it is for the amount of Kshs. 232,000/= and not the total sum of the taxed costs. In light of the provisions of Paragraph 7 of the *Advocates (Remuneration) Order*, I find that the applicant is entitled to interest at the rate of 14% per annum on Kshs.232,000/= only from 10th January, 2020 since that is the only amount that was demanded from the respondent by the applicant. For this reason, the Taxing Officer erred in taxing off item No. 67.
54. The upshot is that the reference dated 11th November, 2022 is partly successful. It is allowed in the following terms -
- i. The Taxing Officer’s decision in respect of item Nos. 1 & 67 of the Advocate/Client bill of costs dated 14th May, 2022 are hereby set aside;
 - ii. The bill of costs is hereby remitted to another Taxing Officer in the Commercial and Tax division for exercise of his/her discretion and reassessment of the aforementioned items; and
 - iii. The Certificate of Costs dated 8th November, 2022 is hereby set aside; and
 - iv. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED AT NAIROBI ON THIS 28TH DAY OF JULY, 2023.

Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kojo for the Advocate/applicant

No appearance for the Client/respondent

Ms B. Wokabi – Court Assistant.

