



Kenya Commercial Bank Limited v Okere (Environment and Land Appeal 1 of 2017) [2023] KEELC 20302 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 1 OF 2017**

E ASATI, J

SEPTEMBER 28, 2023

BETWEEN

KENYA COMMERCIAL BANK LIMITED APPLICANT

AND

THOMAS RAILA OKERE RESPONDENT

RULING

Introduction

1. This ruling is in respect of the Chamber Summons dated September 7, 2021, brought under Certificate of Urgency pursuant to the provisions of Rule 11 of the *Advocates Remuneration Order*. The matter is a Reference from the ruling of the Taxing Officer Hon Shimenga, Deputy Registrar ELC Kisumu, delivered on September 2, 2021 on the taxation of the Respondent's Bill of Costs dated September 9, 2020. The substantive prayer in the Reference is prayer No 4 that;

“the court be pleased to review, vary and/or set aside the ruling of the Learned Taxing Officer delivered on September 2, 2021 particularly items 1 and 2 of the Bill of Costs dated September 9, 2020 or in the alternative, the Respondent's Bill of Costs dated September 9, 2020 be remitted back for taxation before the same or another taxing officer, with appropriate directions on questions of assessment”.

The Appellant also prayed for costs of the Reference.

2. The brief background of the Reference is that the Respondent herein filed a suit in the lower court namely; Kisumu Cmcc No 341 of 2013, the subject matter whereof was a parcel of land known as Kisumu/Kasule/3468. Before the suit could be heard, the applicant raised a preliminary objection on the jurisdiction of the court to hear the case. The court dismissed the preliminary objection and being dissatisfied with the ruling, the applicant proffered an appeal which appeal was later withdrawn and



costs awarded to the Respondent. The Bill of costs the subject matter of the Reference herein relates to the costs of the appeal.

3. The record shows that the Reference was heard by Hon Justice Ombwayo who delivered his ruling on March 11, 2022 dismissing it. The record further shows that the Applicant filed an application for review of the court ruling of March 11, 2022 which application was allowed vide the ruling by Hon Justice Ombwayo on November 24, 2022, who set aside the ruling dated March 11, 2022 allowed the Applicant herein to file and serve written submissions on the Reference within 14 days from the date of ruling and hence re-opened the reference for hearing.

Submissions

4. The reference was heard by way of written submissions.
5. The Applicant filed its written submissions dated March 1, 2022 through the firm of Owiti, Otieno & Ragot Advocates. Counsel submitted that in her ruling dated September 2, 2021, the Taxing Officer relied on a valuation report dated January 3, 2007 which stated that the open market value of the suit property was Kshs 2,000,000/-, to award the sum of Kshs 140,000/= as instructions fee. That this position taken by the Taxing Officer was flawed because the Preliminary Objection was not about the pecuniary jurisdiction of the subordinate court but jurisdiction to handle land matters at the time when the Environment & Land Court had been established under the [Constitution of Kenya, 2010](#). And that the appeal did not raise the issue of pecuniary jurisdiction at all. That furthermore, the nature of the prayers in the plaint as filed by the Respondent were of a non—monetary nature.
6. Counsel submitted further that the appeal was withdrawn on November 29, 2017 before the court could conduct a full hearing as envisaged under paragraph 6(3) of the [Advocates Remuneration Order 2014](#). That the appeal was not heard to conclusion and that the Judge did not certify the appeal as one that was proper for consideration of getting up fees. That hence, the taxing officer erred in awarding getting up fee of kshs 46,666.70.

That the Respondent in his Bill of Costs did not pray for getting up fees for appeal but pleaded for getting up fees for trial. That no amendment was done to the Bill of Costs and hence the court ought not have awarded the same as the Respondent is bound by his pleadings. Counsel prayed that the Reference be allowed.

7. The Respondent filed written submissions on February 21, 2023 through the firm of Mwamu & Company Advocates. Counsel submitted that the value of the subject matter ought to be determined for purposes of taxation of a Bill of Costs. That the value is determined from the pleadings, judgement or settlement. That in this case, the valuation report being one of the documents attached to the pleadings guided the decision of the taxing master. Counsel relied on the case of [Joreth Limited – vs- Kigano & Associates](#) (2002) IEA 92 of 99. Counsel submitted further that the Taxing Officer was rightfully guided by the valuation report to compute the instructions fee. Counsel relied on the case of [Paul Ssemogerere & Olum –vs Attorney General](#) – Civil Application No 5 of 2001 and [Republic –vs- Ministry of Agriculture & 2 Others Ex parte Samuel Muchiri W’Njuguna](#) to support the submissions.
8. On whether the Taxing Officer erred in awarding fee for getting up on trial, Counsel for the Respondent submitted that getting up fees in an appeal is governed by Rule 3 Schedule 6 which specifically relates to and provides for appeals filed in the High Court from a judgement of the subordinate court on the basis of a certificate issued by a Judge trying the appeal. That the Taxing Officer rightfully awarded the getting up fees.



9. Counsel submitted that costs are awarded having regard to such factors as; the difficulty and complexity of the issues, the length of the trial, value of the subject matter and other factors which may affect the fairness of an award of costs.
10. Relying on the case of *Kipkorir, Titoo & Kiara Advocate –vs- Deposit Protection Fund Board* Nairobi Court of Appeal Civil Appeal No 220 of 2004 [2005] eKLR Counsel submitted that 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. That the Taxing Officer in this case has given satisfying reason on how she arrived at the taxed figures, that she used her discretion to award the costs. Counsel prayed that the Reference be dismissed with costs.

Determination.

11. The Reference is brought pursuant to the provisions of the Rule 11 of the *Advocates Remuneration Order 2014*. Rule 11 provided for objection to the decision on taxation and appeals to the Court of Appeal. The items objected to by the Applicant are items 1 and 2 of the Taxing Officer’s ruling.
12. Item 1 of the Taxing Officer’s ruling was about instructions fee. In the Respondent’s Bill of costs, the subject of taxation, the Respondent had claimed for Kshs 500,000/-. The Ruling of the Taxing Officer on item 1 was that;

“Item 1: Instructions fees as observed in the case of Joreth Limited –vs- Kigano and Associates Civil Appeal No 66 of 1999 is ascertained from the pleadings, judgement or settlement (if any). I have had a chance to peruse the record. I have noted the valuation report dated January 3, 2007 which stated that the open market value of the property herein was Kshs 2,000,000, 1,000,000 = 120,000,
2% of 1,000,000/= 20,000.
Instructions fees is assessed at Kshs 140,000/=.

It is clear the Taxing Officer relied on the value of the subject matter as shown in the valuation report in the record, as the basis to determine the instruction fees.

13. As a general rule, the High Court will not interfere with the decision of a Taxing Officer unless there exists an error in law or in principle in taxation. In *Kipkorir, Titoo & Kiara Advocate –vs- Deposit Protection Fund Board* Nairobi Court of Appeal Civil Appeal No 220 of 2004 [2005] eKLR the Court of Appeal held:

“on reference to a Judge from 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”.

14. It was the Applicant’s case that the Taxing Officer erred by relying on the valuation report while the claim and the prayers were not monetary claims. I have perused the pleadings and observed that indeed the claim was non-monetary. The valuation report is not a pleading but part of the Plaintiff’s bundle of documents as listed in the Plaintiff’s list of documents dated June 12, 2013 awaiting to pass the admissibility test and production as evidence. The Preliminary objection the subject of the appeal was not on the monetary jurisdiction of the trial court.
15. It is clear from the submissions that both parties concede that the value of the subject matter is determined from the pleadings, judgement or settlement (if any). Perusal of the pleadings reveals that the



value of the suit land is not disclosed therein. Counsel for the applicant submitted that the instructions fees should have been computed under 6 (A) 1 (c). That the taxing officer should therefore have assessed the instructions fees on the basis of unquantifiable claims. To this extent I find that the Taxing Officer erred in relying on the value of the property stated in the valuation report. The objection by the applicant on the award on item 1 is therefore valid.

16. The other item challenged in the Reference is item 2 which was getting up fee. The Respondent in the Bill of Costs claimed for Kshs 250,000/= under the heading “getting and preparing for trial.” The Taxing Officer in her ruling stated “item 2 is assessed as 1/3 of 140,000 = 46,666.70.”
17. The applicant contends that there is no such thing as getting up fee for trial in an appeal and as parties are bound by their pleadings, the item should be disallowed. Secondly the applicant contends that getting up on appeal is only due after hearing of the appeal and after the judge has certified.
18. The Respondent contends that getting up fee on appeal becomes due on the basis of a certificate issued by a judge of the High Court- trying the appeal. The applicable law is paragraph 3 of schedule 6 which provides

In any appeal to the High Court in which a respondent appears at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee.”

19. Hence, in order for getting up fees on appeal to be payable there has to be certification by the judge hearing the appeal after the hearing of the appeal and the certification will be based on the extent and difficulty of the work after the appeal is lodged. The judge will have to certify that the case is a proper one for consideration of getting up for appeal fee.
20. In the present case firstly, the appeal was not heard but withdrawn and secondly, there was no certification by the judge as envisaged in the Advocates Remuneration Order. I find the objection on this item valid.
21. Relying on the case of *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board*(*supra*) where the court stated that:

“ And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – D’Sonza v Ferrao [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires.”

22. The upshot is that I find merit in the Reference and allow it as follows:
 - a. the ruling by the taxing officer, made on September 2, 2021 in respect of items 1 and 2 of the Bill of Costs dated September 9, 2020 is set aside.
 - b. Item 2 of the Bill of Costs (getting up fees) is hereby disallowed.
 - c. The said Bill of Costs is remitted back to the same Taxing Officer for taxation of item 1 a fresh with the following directions;



- i. As the value of the subject matter of the appeal cannot be determined from the pleadings, judgment or settlement, the instruction fees in the Applicant's bill is not taxable under Schedule 6 paragraph 2 (b). of the [Advocates Remuneration Order 2014](#).
 - ii. 2. The taxing officer shall exercise her discretion to assess instruction fees as she considers reasonable taking into account all the circumstances of the case.
 - iii. The taxing officer shall compute the total costs payable to the Applicant afresh.
- d. Each party to bear own costs.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 28TH DAY OF SEPTEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Oduor for the Appellant/Applicant.

Machuka for the Respondent.

