Chemmutut v Walker & 5 others; Doshi & another (Third party) (Miscellaneous Reference Application E032 of 2024) [2025] KEELC 3511 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3511 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

MISCELLANEOUS REFERENCE APPLICATION E032 OF 2024

EK MAKORI, J

APRIL 30, 2025

BETWEEN

HON JUSTICE CHARLES P CHEMMUTUT .... APPLICANT

AND

PETER WALKER .... 1ST RESPONDENT

MAUREEN JANET WALKER .... 2ND RESPONDENT

JACQUELINE JOSEPHINE WANJIKU .... 3RD RESPONDENT

MATABATU INVESTMENTS LIMITED .... 4TH RESPONDENT

NATIONAL LAND COMMISSION .... 5TH RESPONDENT

CHIEF LAND REGISTRAR .... 6TH RESPONDENT

AND

KETAN NAVINCHANDRA DOSHI .... THIRD PARTY

ATTORNEY GENERAL .... THIRD PARTY

RULING

1. This court delivered its judgment herein on 16 February 2023, where both the Plaintiff and the 2nd and 3rd Defendants were successful. As a result, the court awarded costs in the following manner:
    a. Costs of the suit to the Plaintiff against the Defendants;
    b. An order that the Third Party indemnifies the 1st and 2nd Defendants by refunding the purchase price of Kshs. 7,500,000 plus interest at the court rate and awarding costs to the 1st and 2nd Defendants.

2. The Plaintiff's Bill of Costs dated 7 December 2023 was taxed at Kshs. 955,458.33—by the taxing master (in this case, Hon. I. Thamara), a court-appointed official responsible for assessing and determining the costs of the case, in her ruling dated 31 July 2024, culminating in this Application by the Plaintiff.

3. The primary argument presented by the Applicant, which will serve as the foundation for this court's decision, is that the instruction fees determined by the taxing master are excessively low and do not accurately represent the value of the Plaintiff's claim; instead, they were derived from an erroneous assessment of the subject matter. Consequently, the ruling made by the taxing master is deemed incorrect, and the court is requested to support the Reference Application, annul the taxing master's decision in the ruling dated 31 July 2024, and to conduct a fresh reassessment and re-taxation of the Applicant's Party and Party Bill of Costs dated 7 December 2023.

4. The respective counsels for the parties presented thorough arguments, discussing the principles relevant to the taxation of a bill of costs. They particularly emphasized the foundational value of the subject matter, referencing pertinent judicial decisions on the matter. Their comprehensive arguments were duly considered and will be revisited where necessary.

5. The Applicant avers that Kshs. 20,000,000-, as stated by the Land Registrar, is the correct value of the suit property, Plot No. 432. Four properties are in question, each valued at Kshs. 20,000,000—as subdivisions of the same size; thus, the total value amounts to Kshs 80,000,000—for the four plots (20 million multiplied by four).

6. The Applicant submits that the taxing master made a factual error by finding and basing her taxation on the value of a third party, who had been ordered to pay the 1st and 2nd Defendants. This third party's value is not the subject matter of the Plaintiff's suit, which involves properties known as plots Nos. MN1X14X2, MN1114X3, MN1X14X4, and MN1X14X5, each valued at Kshs 20,000,000-. Therefore, the total value of Kshs. 80,000,000- is the figure the taxing master should have relied on when awarding instruction fees. Consequently, in granting the amount, the taxing master based her determination on an erroneous figure.

7. Furthermore, the Applicant was awarded costs of the Counter-claim, a separate claim brought by the 1st and 2nd Respondents against the Plaintiff, as mentioned in paragraph 124, page 35 of the judgment delivered on 16th February 2023, where the court stated:

> " I find that the counterclaim lacks merit and is dismissed with costs."

8. Equally, the Applicant contends that the taxing master failed to consider the costs awarded to the Applicant in the counterclaim, as this was not captured in her ruling. To this end, it is submitted that the taxing master's decision was erroneous, as she omitted the relevant facts and failed to factor them in despite the record being clear.

9. On the other hand, the Respondents contend that by the judgment delivered in the suit, the court conclusively determined the value of the subject matter as Kshs. 7,500,000.00-, which was rightfully relied on by the taxing master in assessing the instruction fees to scale.

10. On instruction fees on the main suit and the counterclaim, citing the decision in *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR, this is what the taxing master said in her ruling dated 31st July 2024:

> " The court, in its judgment, ordered the refund of the purchase price of Kshs. 7,500 000-.This is the proper value of the subject matter for purposes of taxation. The judgment does not

refer to the valuation report that the Plaintiffs state was produced in court. Further, since the judgment does not refer to the value of the subject matter, this court cannot resort to pleadings by the parties to arrive at the value of the suit property..................................

The court, at paragraph 124 of the judgment, dismissed the counterclaim with costs. The Plaintiff filed a defence to the counterclaim, but the counterclaim was not heard separately, and no directions were taken on the counterclaim. This item is taxed at Kshs. 200,000- Kshs 1,000,000- is taxed off."

11. Schedule 6-part A (1) (b) of the *Advocates Remuneration Order* states that in a suit, whether commenced by Plaint, Petition, Originating Summons, or Notice of Motion, if a Defense or denial of liability is filed, the instruction fee shall be determined from the pleading, judgment, or settlement between the parties.

12. In this case, the Plaintiff sought declaratory and injunctive orders through the Amended Complaint rather than a liquidated amount. Consequently, as correctly ruled by the taxing master and supported by the respondents' submissions, the value of the subject matter in the suit cannot be determined from the Plaintiff's pleadings.

13. However, the 1st and 2nd Respondents sought indemnity from the 1st Third Party7th Respondent in the amount of Kshs. 7,500,000.00-. This sum represented the purchase price of the properties held by the 1st and 2nd Respondents and is supported by an Agreement for Sale presented in court and annexed to the 1st and 2nd Respondents' Replying Affidavit in opposition to this Application.

14. As correctly submitted by counsels from both sides, the principle to be applied when assessing instruction fees in a suit is well settled through judicial precedents. In *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR, the Court of Appeal outlined the principle as follows:

> "We would at this stage point out that the value of the subject matter of a suit for the purpose 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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. Furthermore, the Court of Appeal in *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR (a decision relied on by the taxing master) expounded on the principles in *Joreth Ltd v Kigano & Associates* (*supra*), setting forth the proper basis for taxing the instruction fees 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."

16. Consequently, I see no error in principle misapprehended by the taxing master in assessing instruction fees. There is no basis to demonstrate any complexity through the nature of the claim or at the hearing

and subsequent judgment rendered by the court. The claim before the court was a matter of two competing titles, procedurally procured by the Plaintiff and the 1st Third Party.

17. Taking all of this into account, and noting that the 1st and 2nd Defendants acquired their properties- Subdivision Number 4XX0 (Original Number 4XX31) Section IXI, Mainland North; 4XX1 (Original number 4XX32) Section IXI, Mainland North; and 4402 (Original number 43941), Section III Mainland North- for a total amount of KShs 7,500,00-, as mentioned in the Defence and Third Party Claim and as recognized in the judgment and decree in this case, I assert that the taxing master did not commit any principle error in evaluating the Instruction Fees, Getting Up Fees, and Instruction Fees concerning the counter-claim that was heard concurrently with the main suit.

18. The taxing master, drawing from the *Advocates Remuneration Order 2014*, provided clear and thoughtful justifications for addressing unjustified items or significant calculation errors. The taxing master wisely taxed these items to scale.

19. Therefore, the Reference Application dated 13 August 2024 has been dismissed, and costs will be awarded to the Respondents who participated in this Reference.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 30TH DAY OF APRIL 2025.

E. K. MAKORI

JUDGE