



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MISC. APPLICATION CASE NO. 136 OF 2014

**OCHIENG ONYANGO KIBET &
OHAGA ADVOCATES.....APPLICANT/RESPONDENT**
VERSUS
PETER MUTHOKA.....RESPONDENT/APPLICANT

RULING

1. This ruling relates to a Chamber Summons Application dated 7th October 2015, brought under the provisions of Section 1A, 1B, 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 50 Rule 6 of the Civil Procedure Rules, 2010, Rule 11(2) of the Advocates (Remuneration) Order 2009 and all other enabling provisions of the law.
2. The Application was filed by the Respondent/Applicant (herein “the Applicant”) seeking for orders that the Honourable Court be pleased to vacate and set aside in its entirety the Ruling and reasoning of Honourable Sandra Ogot, Deputy Registrar, dated and delivered on the 22nd September 2015, taxing the Amended Advocate-Client Bill of costs dated 13th October 2014, at Kenya Shillings Nineteen Million, Two Hundred and Twenty Six Thousand, Four Hundred and Fifty One and Twenty two Cents (Kshs.19,226,451.22) and refer the matter for fresh taxation before a Taxing Master. That the costs of the Application be provided for.
3. The Background facts of this matter are that, the Honourable Deputy Registrar, Sandra Ogot, on 22nd September 2015, taxed the Amended Advocate-Client Bill of costs filed by the Applicant/Respondent (herein “the Respondent”) dated 13th October 2014, at Kenya Shillings Nineteen Million, Two Hundred and Twenty Six Thousand, Four Hundred and Fifty One and Twenty two Cents (Kshs.19,226,451.22). The Applicant being aggrieved by the said Ruling and reasoning in its entirety and has filed this Application.
4. The Application is based on the grounds on the face of it and an Affidavit sworn by Peter Muthoka dated 7th October 2015. He averred that the Ruling as it stands is causing him hardship and prejudice. That, the Honourable Deputy Registrar misdirected herself in law at arriving at a decision that was not only unreasonable in the circumstances but legally untenable. That, the Honourable Deputy Registrar also misdirected herself by exercising her discretion on the grounds that are both unclear, unreasonable and legally untenable, in awarding the requisite instruction fee as kshs.16,702,075.00. The instruction fee as ruled was baseless in law and against the principle that costs should not be awarded as a punitive measure against a losing litigant. That the Honourable Deputy Registrar took into consideration issues that she

shouldn't have and failed to consider issues she ought to have in the circumstances. To give effect to the intention of the Honourable Deputy Registrar the said errors of law and fact ought to be corrected without the need to remit the Bill of costs back to the Deputy Registrar for taxation afresh. That no prejudice will be occasioned to the Respondent if the orders sought herein are granted. To the contrary, if the orders are not granted, he will suffer irreparable and substantial loss. It is therefore in the interests of justice and fairness that this Honourable Court grants the prayers sought herein.

5. The Application was opposed based on the grounds of opposition and a Replying Affidavit sworn by James Ochieng' Oduol, a Senior Partner and Head of Litigation and dispute Resolution in the law firm of Ochieng', Onyango, Kibet and Ohaga Advocates, both dated 23th October 2015. He deposed that the Amended Bill of costs dated 13th October, 2014 was heard inter-parties and taxed with the full participation of the Applicant's Advocate and therefore it cannot be set aside as sought. He averred that the Bill of costs was drawn to scale as stipulated under the Advocates Remuneration Order taking into account all the relevant circumstances of the case as by law requires.

6. That, the Application is incompetent and defective as it does not comply with Rule 11(1) of the 2009 Advocates Remuneration Order in relation to a reference and an objection to taxation. The Respondent submitted that on 25th September 2015, the Applicant filed a Notice of Objection of even date as against the Respondent's Amended Advocate-Client Bill of costs dated 13th October, 2014. The said Notice did not as is required by Rule 11(1) of the 2009 Advocates Remuneration Order give notice in writing to the Taxing Master of the specific items of taxation to which the objection was taken. Therefore this Application is misconceived and erroneous in law. This is so, as it does not correctly invoke the jurisdiction of the Honourable Court since it seeks to set aside the Ruling of the Honourable Court in its entirety as is evident at prayer 1 of the Application.

7. The Respondent reiterated in the grounds of opposition that the Application is incompetent on the following grounds:

(a) The Application does not set out the specific items towards which the objection is filed as by law required, yet the Applicant did not challenge all the items in the Amended Bill of Costs dated 13th October, 2014 before the Taxing Master. A reference to a Judge on taxation can only be in relation to specific items that are objected to and an omnibus request to set aside the entire ruling and its reasoning is wrong in law, untenable and is an abuse of the court process.

(b) The Application fails to elaborate the grounds upon which the Taxing Master erred in law and both the Application and the supporting affidavit allude to the same in generic terms. No nexus is made between these generic terms and the decision of the Taxing Master.

(c) The Honourable Court cannot on its own motion assume the responsibility of re-taxing the Bill of Costs as a whole.

8. The Respondent averred that it is well established in binding judicial precedent, that a taxation by the Taxing Master cannot be disturbed unless it is shown that the Taxing Master's decision was based on an error of principle of law and not merely because the Judge would have awarded a higher or lower amount.

9. At the conclusion of filing the respective responses, the Parties agreed to dispose of the Application by filing written submissions. Subsequently, the submissions were highlighted by the learned Counsels representing the respective parties. The Applicant invited the Court to determine the issues as to whether, the Honourable Court can interfere with a Taxing Master's decision or whether the Honourable Court has the jurisdiction to tax a Bill of costs. The Respondent on its part raised the following issues for determination:

- ***Whether the Taxing Master judicially exercised her discretion.***
- ***Whether the Application conforms to Rule 11 (1) of the Advocates Remuneration Order 2009;***
- ***Whether the Application is an abuse of the court process.***

10. I shall condense the issues for determination as follows:

- *Whether the Application conforms to Rule 11 (1) of the Advocates Remuneration Order 2009 or it's an abuse of the court process.*
- *Whether the Taxing Master judicially exercised her discretion.*
- *Whether this Honourable Court can interfere with a taxing master's decision or whether this Honourable Court has the jurisdiction to tax a Bill of costs.*

11. I shall first deal with the issue of whether the Application complies with or offends Rule 11(1) of Advocates Remuneration Order 2009. The provisions thereof provide that:

(1) "Should any Party object to the decision of the taxing officer, he may within fourteen days after the decision give Notice in writing to the taxing officer of the items of taxation to which he objects. (emphasis mine).

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all parties concerned, setting out the grounds of his objection".

12. The Respondent argued that, the Rule clearly sets out the manner in which a Reference ought to be filed and the form it should take. It requires the Applicant to specifically state the items in the decision on Taxation to which he or she objects and the reasons therefore. The Respondent relied on the case of ***Charles Nyaga Njeru – Vs – Independent Electoral and Boundaries Commission (2015) eKLR***, where Hon. J. A. Makau stated as follows:

"The Applicant has not in his Application demonstrated that he issued notice to the Deputy Registrar/Taxing Master within 14 days of the decision on the items of the taxation to which he was objecting nor has he demonstrated that any reasons were issued on taxation. This Court was not told what items the Applicant is objecting to... This Court in my view cannot on its own motion assume the responsibility of retaxing the bill of costs without there being specific objection on itemized items or comment on items to which the objection has been raised. The Applicant is obligated to lay basis as to why he is aggrieved by taxation of particular item.... A party cannot in my view move the Court as he deems fit without complying with the provisions of Order 11 of the Advocates Remuneration Order, I am therefore of the view that this Application as drawn and filed is incompetent for failure to comply with Order 11 of the Advocates Remuneration Order".

13. The Respondent therefore argued that, the Application is incompetent, as the Notice of objection issued herein and the Application itself do not state the specific items of Taxation to which the objection is taken. I have noted that the Applicant's did not respond to this issue of compliance with Rule 11(1) and (2) of Advocates Remuneration Order 2009 in their submissions.

14. However, I have perused the Court file and note that the law firm of Ahmednassir, Abdikadir & Co. Advocates sent a Notice of objection dated 25th September 2015, to the Deputy Registrar's raising an objection to her decision on Taxation. That notice is issued pursuant to Rule 11 of the Advocates (Remuneration) Order 2009. It states that:

"The Respondent Peter Muthoka objects to the Deputy Registrar's decision dated 22nd September 2015 on the Applicant's Amended Advocates Client Bill of Costs dated 30th October 2014, as it relates to the contested items of the said Bill". (Emphasis mine).

15. My reading of the above quotation clearly indicates that, the notice of objection did not expressly specify the contested items. However, it made reference to the items that were contested in the said Bill. To identify these items, regard will be made to the Ruling of the Deputy Registrar. Upon perusal thereof, I find that, the items in contest were mainly two; the Instruction fees, and the Getting up fees. It therefore

follows that the Applicant was referring to these two items. In that regard, I shall not hold that the Application herein is incompetent due to non-compliance with Rule 11 of the Advocates Remuneration Order, 2009. I also find that the Court has a legal duty under Article 159 of the Constitution of Kenya, 2010, to uphold the substantive justice as against breach of procedural requirements and technicalities. However, this does not mean that the Court is promoting disregard of procedural requirements. Procedures are made to serve a purpose and must always be adhered to and upheld.

16. Having found as above I also find that the issue raised by Respondent's counsel to the effect that the Court cannot vacate or set aside the Deputy Registrar ruling in its entirety is well founded. The Applicant did not contest all the items in the Bill of costs and therefore cannot seek to set aside the entire Ruling. All in all, I find that the Respondent will not suffer prejudice if I do not declare the Application incompetent for non-compliance as aforesaid as prayed.

17. The other issue raised is that, the Notice of objection did not elaborate the grounds upon which the Taxing Master erred in law. That the grounds were given in generic terms with no nexus is made to the decision of the Taxing Master. However, the plain reading of Rule 11(1) of the Advocates (Remuneration) Order, 2009, does not require that the notice given elaborates on the grounds of objection. The Rule simply requires the aggrieved party to "give notice in writing to the Taxing Officer and of the items of taxation contested within fourteen (14) days of the decision. In that regard, I shall not find the Application incompetent as prayed.

18. I shall now deal with the second issue on whether the Application is an abuse of the Court process. The Respondent submitted that the conduct of the Applicant's Advocate, the Learned Senior Counsel, Ahmednasir Abdullahi amounts to abuse of the Court process. He referred to the landmark case of Ahmednasir, Abdikadir & Co. Advocates Vs National Bank of Kenya Limited (Misc Civil Application No. 195 of 2004), where the Learned Senior Counsel allegedly fiercely argued that: "***It was the taxing master's unfettered discretion to increase or decrease instruction fees***". Yet in this matter he has taken a completely different view, where he seeks to denounce the very principles of taxation he succinctly agitated for before the Taxing Master when it suited his interests, at least at that time.

19. The Respondent referred the Court to the decision in the case of Mitchell & Others Vs D.P.P & Another (1987) LRC where Haynes P. J. A while dismissing an Appeal for being an abuse of the court process stated as follows;

"In a civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly. It can be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral purpose or to gain some collateral advantage, which the law does not recognize as a legitimate use of that process. But the circumstances in which abuse of process can arise are varied and incapable of exhaustive listing.... But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and it's duty to intervene and stop the proceeding, or put an end to it"

20. The Respondent therefore submitted that the conduct displayed by the Applicant's counsel amounts not only to professional misconduct but also an abuse of the Court process by an officer thereof. That by virtue of Article 163(7) of the Constitution, it is now a constitutional imperative that Courts are bound to follow judicial precedent so as to create consistency, predictability, equality, to eliminate arbitrariness and personal whims of litigants, the equivalent of the Applicant and his counsel herein. The Respondent submitted that this position was affirmed in the case of Evans Kidero Odhiambo & 4 others Vs Ferninard Waititu & 4 others (2014) e KLR, where the Supreme Court held as follows:

"The learned Judges perhaps failed to recognize that the overall integrity of the democratic system of governance is sealed on a platform of orderly process, of which the Judiciary is the chief steward, and in which the course of justice already charted by the Superior Courts is to be methodically nurtured"

21. The Respondent further submitted that the Application is nonchalant, as it seeks to depart from binding precedent. There is no merit upon which the Application is seeking to set aside the entire ruling of the Taxing Master. Thus, the Application is not only incompetent but also seeks to vex the Respondent so that it does not enjoy payment for the legal services it rendered. Such an Application disturbs the very system of administration of justice and places doubt on the mind of the reasonable man as to the true motive of pursuing some causes/remedies available in law. Reference was made to the case of; **Mitchell & Others Vs DPP & Another** (Supra) where the Court stated as follows:

“This inherent power has been used time and again to.....stay as an abuse of process, proceedings which were frivolous and vexatious; and in Jowitt’s Dictionary of English Law (2nd Edition 1977) it is stated that a proceeding is said to be vexatious when the party bringing it is not acting in good faith and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result”.

22. I have considered submission filed by Applicant and find that they did not address this issue relating to the Application and/or the conduct of the Learned Senior Counsel being an abuse of the Court process. Be that as it may, in my opinion, if the Learned Senior Counsel has taken a different view or line of argument, in this matter from what he argued in the other matter stated herein, that does not per se amount to an abuse of the Court process. In my mind, it simply shows change of position by the Counsel on the same issue(s) argued at different times and in different matter. Whatever informs the same is only within the knowledge of that Counsel. I believe it is simply putting a foot forward in argument of a Client’s case. However, the Respondent’s Counsel is in order to point out these divergent views by the same counsel. I will however, hesitate to find that the alleged conduct of the counsel and by extension the Application amounts to an abuse of the Court process.

23. I shall now turn to the third issue as to whether the Taxing Master judicially exercised her discretion. This is the key issue herein. The Applicant dwelt heavily on this issue in his submission. He submitted that the decision of the Taxing Master was based on erroneous principles of law, as the instruction fees awarded was exorbitant, unreasonable and very excess considering the value of the whole subject matter in **HCCC No. 503 of 2011 CMC Holdings Limited & Another Vs Andy Forwarders Service Limited & 2 others.** That since the total value of the subject matter was not specifically disclosed in the pleadings, it cannot form the basis of a claim. The case was compromised before full hearing and a settlement deed executed by the Parties. The Deed of settlement dated on 7th February 2013, confirmed that the Parties had in good faith decided to negotiate, settle and agree on the terms of the settlement.

24. The Applicant relied on the case of **Moronge & Company Advocates Vs Kenya Airports Authority** where the Court held that:

“Where there has been an error in principle the Court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will intervene only in exceptional circumstances. An example of such exceptional case is that of Haiders Bin Mohamed and Others Vs Khadija Binti Ali bin Salim (4) 1956, 23 EACA 313 in which an instruction fees of 9,000/- was considered so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles”.

25. The Applicant also cited the case of **Kipkorir Titoo & Kihara Advocates Vs Deposit Protection Fund Board Civil Appeal No. 220 of 2004 (2005) eKLR,** where the court held that:

“We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA, (1) that would be an error in principle. 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 Vs Ferrao (1960) EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (No.2) [1978] KLR 243”.

26. The Applicant invited the Court to use its discretion to assess the instruction fees which it considers just, in order to reduce the total amount to a reasonable figure, taking into account the subject matter contained in the further amended Plaintiff.

27. However, the Respondent opposed the submissions by the Applicant and argued that the Taxing Master's ruling was founded on well-established legal principles and that the discretion of the Taxing Master was judicially exercised. The Respondent argued that the Court to be guided by the legal principles in the case of; **First American Bank of Kenya Vs Shah & Others (2000) LLR No. 1486 (CCK)**, where the Court stated that:

“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 inference that it was based on an error of principle... And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the Trial judge”.

28. The Respondent further submitted that the Instruction fees were properly computed by the Taxing Master and she clearly set out the reasons and the manner in which she ascertained the value of the subject matter. That at Paragraph 2 of page 9 of the Ruling, the Taxing Master held as follows:

“Based on the aforementioned then it becomes clear that the value of the subject matter can be ascertained from the pleadings. The Plaintiffs were seeking reimbursement of Kshs.1,563,000,000.00 from the Defendants. This is therefore the figure the Taxing Master shall use in determining instruction fees”.

29. That the Taxing Officer then went ahead to apply the said Remuneration Order in allowing and taxing off items in the Bill of costs. This is clearly set out at page 10 of the Ruling. Therefore, she correctly applied the scale against the value of the subject matter which was Kshs.1,563,000,000.00 and determined that the basic instruction fees was Kshs.19,649,500.00 which was the same amount claimed by the Respondent. The Respondent further submitted that the Taxing Master legally and properly executed her role including the judicial discretion conferred upon her by Rule 16 of the Advocates Remuneration Order, 2009, which is key to assessing the Instruction fees based on the value of the subject matter as disclosed in the pleadings and not to investigate or prod into the propriety of the pleadings.

30. That in the proper exercise of her discretion, the Taxing Master has indicated at page 14 of the Ruling and determined that the Instruction fees shall be Kshs.16,702,075.00 and not Kshs.19,649,500.00 as prayed by the Respondent. Thus she based the finding on the provisions of Schedule V1 A paragraph 1 (iii) having declined to award the Getting Up Fees and noting that settlement having been reached prior to confirmation of the first hearing date of the suit, the instruction fee shall be 85% of the fee that would have been chargeable as instruction fees.

31. In response to the Applicant's submissions on reduction of the Instruction fees, the Respondent referred the Court to the case of **First American Bank of Kenya Vs Shah & Others** where the Court held as follows:

“The other general principle is that it is within the discretion of the Taxing Officer to increase or decrease the instruction fees and that the amount of the increase or reduction is discretionary”.

32. I have considered the rival arguments by the respective learned counsels, on the issue of whether the Taxing Master judicially exercised her discretion. To address this issue, I shall have recourse to the Ruling delivered by the Honourable Deputy Registrar. I note therefrom that, only two items were in dispute. The Instruction fee and Getting up fees. At page 14 thereof, she finds as follows:

“In light of the aforementioned I therefore tax off item 2 in its entirety”.

33. That finding put to rest the issue of Getting up fees and left the issue of Instruction fees for consideration. At page 8 of the ruling, the Honourable Deputy Registrar makes the following findings on the Instruction fee:

“In this instance, I have understood paragraph 17C that is referred to in prayer (b) of the Plaint to mean that the Plaintiffs actually held the Defendants, not just the 1st Defendant, but all Defendants liable for the loss occasioned by the Plaintiffs and were seeking to be reimbursed Kshs.1,563,000,000 being the amount that the 1st Defendant charged the 1st Plaintiff. My reading of it, is that the Plaintiffs are aware that the 1st Defendant charged that amount but they hold all the Defendants liable for that loss. In their prayers they go further to state that the same is jointly and severally”.

34. The Taxing Master went on to state at page 9 of the ruling as follows:

“The Plaintiffs were seeking reimbursement of Kshs.1,563,000,000 from the Defendants. This is therefore the figure that the Taxing Master shall use in determining the Instruction fees”.

35. At page 14 of the ruling the Taxing Master states as follows:

“Since getting up fees has(sic) been denied and the Applicant has submitted that the matter was settled without going to the full trial, vide a settlement deed dated 8th February 2013, then it follows therefore that the provisions of schedule VI A paragraph 1 (iii) shall kick in which provides:

“In a suit where settlement is reached prior to the confirmation of the first hearing date, if the suit is finalized(sic) the fee shall be 85% of the fee chargeable under item 1(b) of this schedule”.

The Instruction fee is therefore calculated as:

85%* Kshs.19,649,500 = Kshs.16,702,075”

36. In my considered opinion, the issues to determine are whether the value of the subject matter herein can be ascertained from the pleadings and whether the Instruction fees awarded to the Respondent is reasonable or exorbitant. The law on assessment of the Instruction fees is now settled. In the case of ***D. Njogu & Co. Advocates Vs Panafcom Engineering Ltd (2006) eKLR***, Azangalala J. quoted the Court of Appeal decision of ***Joreth Vs Kigano & Another EA 92*** and stated as follows:

“By the first ground thereof the Respondent states that instructions fees is an independent and static item(sic) is charged once only and is not affected or determined by the stage of the suit has reached. In principle that is correct” (Emphasis mine).

37. Similarly, in the case of ***Joreth Ltd Vs Kigano & Associates,(supra)***, the Court held:

“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, judgement 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 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, and direction by the trial judge and all other relevant circumstances”. (Emphasis mine).

38. Based on the legal principles stated above, it is clear that the value of the subject matter can only be ascertained from pleadings, judgement or a settlement if any. In the instant case there was no judgement. I however note that there is a Deed of Settlement executed by the Parties dated 7th February 2013 annexed to the supplementary Affidavit sworn by Peter Muthoka dated 10th June 2016. He avers in the said

Affidavit that the Deputy Registrar erred both in law and facts in failing to consider that there was a settlement reached between the parties. What is not clear to the Court is whether at the time the Honourable Deputy Registrar was dealing with this matter, this Deed of settlement was brought to her knowledge. I have noted that on 22nd September 2015 she delivered her ruling on two Bills of costs herein. That is of course after the Deed had been executed. I have looked at the Court file and note that the initial Bill of costs herein was filed in Court on 2nd April 2014 and the Amended Advocate-Client Bill of costs dated 13th October 2014 filed in Court on 14th January 2015. The Honourable Deputy Registrar heard the parties on the Bill of costs on 18th March 2015. I have gone through the submissions made by the Parties before the Honourable Deputy Registrar, and I cannot see where the Parties brought this Deed of settlement to the knowledge of the Deputy Registrar. To the contrary, the Parties have heavily referred to the pleadings.

39. In the given circumstances, the only factor to consider in determining the value of the subject matter will be the pleadings. The Taxing Master has at pages 6 and 7 of the Ruling reproduced the prayers in the Amended Plaintiff. She has referred to prayer (b) that states that: ...the Plaintiffs pray for judgement against the Defendants jointly and severally for:

(b) “The sum of Kshs.1,563,000,000 together with interest thereon at the rate of 36% per annum in the terms of paragraph 10 and 17C above”.

40. The Taxing Master has at page 7 of the Ruling made reference to paragraph 10 and 17C of the Amended Plaintiff, under which the Plaintiffs were claiming reinstatement in the above said sum and interest. I have considered the submissions by the Applicant’s Learned Counsel that the said prayer (b) is directed to the 1st Defendant only and who was not represented by the Respondents herein. Therefore the sum of Kshs.1,563,000,00 plus interest at 36% per annum cannot be a basis of assessing the value of the subject matter for purposes of determining Instruction fees. I have noted that this argument was considered by the Honourable Deputy Registrar at page 8 of the ruling where she states that prayer (b) of the Plaintiff was directed at all Defendants and not just the 1st Defendant as supported by paragraph 17C of the Amended Plaintiff as argued by the Applicant’s counsel. I have noted from that paragraph 17C the Plaintiff pleads that:

“The Plaintiffs aver that the Defendants clearly breached their statutory and fiduciary duties to the Plaintiffs and are therefore liable for the losses occasioned to the Plaintiffs. The Plaintiffs therefore claim restitution in the said sum of kshs.1,563,000,000.00 plus interest thereon at the rate of 36% per annum being the rate that the 1st Defendant used to charge the Plaintiffs for outstanding amounts in respect of disbursements”.

41. It is clear to me if the Plaintiffs were to succeed in the suit, they would enforce prayer (b) thereof, not just against the 1st Defendant, but against all the three Defendants jointly and severally as prayed. This is informed by the fact that the Plaintiff states in the Amended Plaintiff that they are seeking for judgement against the Defendants jointly and severally for the said sum. The Honourable Deputy Registrar deals with the concept of joint and several liability at page 9 of her ruling. I am inclined to agree with the findings of the Taxing Master that the value of the subject matter can be ascertained based on the pleadings.

42. Even if the Court were to find otherwise, the law is now settled that a Court will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer erred in principle in assessing the costs. An example of such an error of principle is where the costs allowed are so manifestly excessive to justify an interference. This was the holding in the case of ***Arthur Vs Nyeri Electricity undertaking 1961 EA 497***. Therefore questions solely of quantum are regarded as matters which the Taxing Officer are particularly taxed to deal and the Court will not normally interfere with issues of quantum.

43. The Respondent referred the Court to the case of ***Orion East Africa Limited Vs Permanent Secretary Ministry of Agriculture & Another (2013) eKLR*** where the Court held that ***“and the Learned Deputy***

Registrar examined the value of the subject matter and considered it, she would have come to a different conclusion". I however find that in the instant case, the learned Taxing Master has explained clearly how she arrived at the value of the subject matter. I am not able to find an error of principle which she committed in assessing the costs.

44. The Applicant have conceded that the successful litigant should be fully reimbursed the costs he has incurred. But laments that the costs awarded herein were manifestly excessive and the Courts should interfere and reduce the same. First and foremost, as already said this is an issue of quantum and therefore even though the Court has the discretion to intervene, it will not do so on an issue of quantum. It will only do so if the justice of the case requires. Secondly, the Court will still be guided by the principles in the case of Joreth in assessing what is reasonable amount to award as instruction fees. Thirdly, it would have been in the interest of the Parties and justice if the Applicant suggested what they deem to be reasonable fees in the given circumstances.

45. I think I have said enough, but before I pen off, I realize from the ruling of the Honourable Deputy Registrar at page 4 that the Applicant's counsel informed the Court that the Applicant herein and one Joseph Mumo Kivai who is an Applicant in Misc. No. 190 of 2014 have both paid Kshs.10,000,000 as advocate fees in these two matters. If this payment was made, then one would be looking at a situation where this amount would be taken into account against the sum awarded. Similarly, there was an argument that a single statement of Defence filed for both Defendants would have been sufficient. This issue was not addressed by the Honourable Deputy Registrar neither has it been raised before this Court, I only picked it from the oral submissions made before the Honourable Deputy Registrar. It would also be important to consider whether the Costs awarded herein would be recovered jointly and severally from the Defendants. Be it as it were, two different Misc. Applications have been filed, addressed and orders made. Unless it is shown that an error of principle was made, the Court is not inclined to interfere with the findings of the Deputy Registrar.

46. For the reasons stated above, it is my view that the Honourable Deputy Registrar took into consideration the principles set out and summarized in the cases referred to above, in exercising her discretion and gave reasons thereof. I therefore find no merit in the Application dated 7th October 2015 and hereby dismiss it with costs to the Respondent.

47. It is so ordered.

Dated, signed and delivered on this 31st day of May 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In open Court in the presence of:

Mr. Ochieng Oduor for the Applicant/Respondent

Ms. Hannan for Mr. Ahmednasir, Senior Counsel for the Respondent/Applicant

Teresia – Court Assistant