



Sinkeet (Suing as the Personal Representative of Benjamin Mapi ole Partimo (Deceased)) v Muntuke & another (Environment & Land Miscellaneous Case 1 of 2024) [2025] KEELC 3454 (KLR) (23 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3454 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND MISCELLANEOUS CASE 1 OF 2024**

MD MWANGI, J

APRIL 23, 2025

(REFERENCE ARISING FROM THE DECISION OF THE TAXING OFFICER, HON. EDWIN MULOCHI, DEPUTY REGISTRAR, DELIVERED ON 9TH MARCH 2022 IN KAJIADO ENVIRONMENT AND LAND COURT CASE NO. 777 OF 2017)

BETWEEN

**DICKSON MAPI SINKEET APPLICANT
SUING AS THE PERSONAL REPRESENTATIVE OF BENJAMIN MAPI OLE
PARTIMO (DECEASED)**

AND

**NAISENYU PARAGANA MUTUNKE 1ST RESPONDENT
MBUSERA AUCTIONEERS 2ND RESPONDENT**

(In respect to the reference by way of chamber summons dated 24th March 2022 seeking to set aside review and or otherwise vary the decision of the Taxing officer delivered on 9th March 2022 in respect to the party and party costs dated 24th August 2020 in Kajiado ELC 777 of 2017)

RULING

Background.

1. The chamber summons dated 24th March 2022 is expressed to have been brought pursuant to the provisions of Rules 2 & 11(1) and (2) of the Advocates Remuneration (Amendment) Order, 2014; and Section 3A of the *Civil Procedure Act*. The Applicant prays that the decision of the Taxing Officer, delivered on 9th March 2022 on the party and party bill of costs in Kajiado ELC 777/2017 be set aside,



reviewed and or otherwise varied and that this court exercises its inherent jurisdiction and taxes afresh the party and party bill of costs taking into consideration the Applicant's submissions.

2. The application is premised on the grounds on the face of it and on the supporting affidavit of Dickson Mapi Sinkeet sworn on 24th March 2022. The Applicant asserts that in taxing the bill at Kshs. 769,752/-, the Taxing Officer erred in law and in principle particularly in taxing the instruction fees by failing to apply the correct principles and factors after finding that the value of the subject matter of the suit could not be determined from the pleadings. The amount of Kshs. 500,000/- awarded as instructions fees according to the Applicant is manifestly excessive in the circumstances of the case as to manifest an error of principle. He avers that the Taxing Officer failed to appreciate that legal fees should not be unreasonable or excessive as to deter persons from accessing justice.
3. The Applicant further avers that the Taxing Officer erred in taxing the rest of the items in the party and party Bill of Costs by failing to apply schedule VI of the advocates remuneration order, 2014. It is the Applicant's case that the Taxing Officer disregarded the weight of the evidence on record, acted contrary to settled principles of law, misdirected himself on the principles of the law applicable and made a ruling in total disregard of the Applicant's submissions. He failed to consider the notion of reasonableness in the taxation of costs. It is therefore in the interest of justice that his application be allowed.

Response by the Respondent.

4. The Respondent responded to the chamber summons by way of a replying affidavit sworn on 4th May 2022. In the said replying affidavit, the Respondent who is the deponent deposes that the Applicant herein had filed a replying affidavit to his Bill of Costs dated 24th November 2020, where he had stated that he was not opposed to items 3, 8, 9, 10, 11, 12, 13, 14, 15, 15, 16, 18, 19, 21, 22, 23, 24, 25, 28, 19, 30, 31, 33, 35, 36, 37, 38, 57, 58, 59, 60, 61, 62 and 63. Paradoxically, in his chamber summons application he prays to have the same set aside or otherwise varied.
5. The Respondent further deposes that in principle, costs are awarded having regard to such factors as the difficulty and complexity of the issues, the length of the trial, the value of the subject matter and other factors which may affect the fairness of an award of costs. The Respondent asserts that the suit, the subject matter of the taxation was filed way back in the year 2014 in Nairobi. It was transferred to Machakos and eventually to Kajiado in the year 2017. He further asserts that the land in contention is 50 acres in size and is valued at Kshs. 30,000,000/-. Considering the amount of work involved in the case and the years it took in court, the award of Kshs. 500,000/- as instruction fees is not excessive. It was a land issue which was not only emotive but also important to the parties.
6. The Respondent deposes that the Applicant has not advanced valid reasons to warrant a review or setting aside of the Taxing Officer's decision.

Court's directions

7. The court's directions were that the application be canvassed by way of written submissions which both parties had already filed. They are part of the record of this court.

Issues for determination.

8. Having considered the application herein and the response thereto as well as the submissions by the parties, the sole issue for determination is whether the Applicant has made a case for setting aside of the impugned ruling of the Taxing Officer.



Analysis and determination

9. I will begin by stating that a reference against the taxation of a party and party bill of costs ought to be filed in the matter in which the taxation was done. There is no need to open a new miscellaneous application as the Applicant in this case did. That notwithstanding, I will proceed to consider the application before me.
10. The impugned ruling was delivered on 9th March 2022 by Hon. Edwin Mulochi, Deputy Registrar on 9th March 2022. The Hon. Taxing Officer applied schedule VI of the Advocates Remuneration Order, (2014).
11. With regard to instructions fees, the Taxing Officer relied on the Court of Appeal decision in the case of Joreth Limited –vs- Kigano & Associates and decided that since the value of the subject matter was not clear from the pleadings or the judgment, he had the discretion to award instruction fees. He considered the size of the subject matter, the work undertaken by the counsel for the Defendant, and arrived at the figure of Kshs. 500,000/- as the reasonable figure in the circumstances thereby taxing off Kshs. 335,000/- from the item of instruction fees in the Respondents’ party and party bill of costs.
12. The Taxing Officer further proceeded to award getting up fees, being a third of the instruction fees. For the items No. 3- 39, the Taxing Officer awarded the same as presented having found that they were drawn to scale.
13. The principles applicable in a reference against a taxation under Rule 11 of the Advocates Remuneration Order are well settled. Ringera J (as he then was), in the case of First American Bank of Kenya –vs- Shah & others (2002) eKLR, pronounced the principles in the following words,

“...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. It would be an error of principle to take into account irrelevant factors...or to fail to take into account relevant factors...some of the relevant factors 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 court ...not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider any such factors as may exist in the actual case before him...”
14. Again in Republic –vs- Ministry of Agriculture and 2 others; ex parte Muchiri W Njuguna & others (2006) eKLR, the court (Ojwang J, as he then was) stated that:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a Taxing Officer, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the Taxing Officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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.”

15. The proper exercise of discretion by the Taxing Officers was restated in *Kamunyori & Company Advocates -vs-Development Bank of Kenya Limited* (2015) Civil Appeal 206 of 2006, where it was held that;

“...Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside.”

16. Needless to say that the Applicant has the burden of persuading the court that the decision of the Taxing Officer was either based on an error of principle, or the fee awarded was so manifestly excessive to justify an inference that it was based on an error of principle. A mere statement that it was is not adequate. The court, as stated above, will not interfere with the decision of a Taxing Officer on the mere basis that the award was somewhat too high or too low.

17. The Supreme Court of Kenya in *Petition No. E011 of 2023 Kenya Airport Authority –vs- Otieno Ragot & Company Advocates*, spelt out the principles applicable in taxation of instructions fees. The Supreme Court of Kenya affirmed the decision of the Court of Appeal in *Joreth Limited (Supra)* with regard to the value of the subject matter which is to be determined from the pleadings, judgment or settlement (as the case may be). It was the same position espoused in the case of *Peter Muthoka & another –vs- Ochieng & 3 others* (2019) eKLR, where the Court of Appeal (differently constituted) stated as follows;

“It seems to us quite plain that the basis for matter value for purposes of instruction fees is wholly dependence 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 the subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to 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. Where however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with pleadings where there is a settlement.”

18. The Supreme Court of Kenya was categorical that in the event that the value of the subject matter cannot be ascertained and the nature of the suit is not provided for in paragraph 1 of schedule VIA, proviso (i) thereunder empowers a taxing officer to exercise his/her discretion in assessing instruction fees for such a suit taking into consideration other fees and allowances due to advocate (if any) in respect to which any such allowances applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, any direction by the trial court and all other relevant circumstances.



19. For emphasis, the Supreme Court of Kenya quoted the decision of the Court of Appeal in Peter Muthoka case (Supra) as to when discretion comes into play as follows;

“It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the Taxing Officer is permitted to use his discretion to assess instruction fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does not have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as provided; either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.”

20. In this case, judgment has already been delivered. The Taxing Officer rightly found that the value of the subject matter was not discernible from the judgment. Both parties are in agreement that the value of the subject matter was not discernible from the judgment.
21. Accordingly going by the decision of the Supreme Court of Kenya in the Otieno Ragot case (supra) and that of the Court of Appeal in the Peter Muthoka case (supra), the Taxing Officer was permitted to exercise his discretion to assess instruction fees in accordance with what he considered just bearing in mind the various elements including the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any directions by the trial judge.
22. The Taxing Officer applied the correct schedule, schedule 6 of the Advocates Remunerations Order in taxing the party and party bill of costs. The Applicant however submits that the case was not complex as the main question was on ownership of the suit property. According to him, the instruction fee claim was far-fetched, excessively high and was not justifiable. He submitted that it ought to have been taxed at Kshs. 120,000/-
23. The case that is the subject of the taxation was filed way back in 2014 in Nairobi. It was eventually transferred to Machakos and subsequently to this court. It was a matter before the superior court, and being a land matter and taking into consideration the duration of the litigation, I am not persuaded that the award of Kshs. 500,000/- as instruction fees was manifestly excessive as to justify the inference that it was based on an error of principle. It was indeed, considering the circumstances of the case, a reasonable amount.
24. In as much as the courts must guard to ensure that costs are not allowed to rise to a level as to confine access to justice to the wealthy; the courts too have a responsibility as expressed in the case of Premchand Raichand Ltd vs Quarry Services of E.A Ltd (1962) EA, to ensure that the successful litigant is fairly reimbursed for the cost he has had to incur and further that the general level of remuneration of advocates must be such as to attract recruits to the profession.
25. On the award of getting up fees, the Advocates Remuneration Order is clear on that. It is awardable in any case, in which there is a denial of liability or in which issues for trial are joined by the pleadings. That was the case in the suit between the parties herein. The Taxing Officer was justified in awarding getting up fees of not less than one third of the instruction fees.



26. In his replying affidavit at paragraph 3, and as earlier on pointed out, the Respondent deposed in his replying affidavit to his party and party bill of costs the Applicant had indicated that he was not opposed to the items (3-39) listed therein. This is a point that was not contradicted by the Applicant by way of a further affidavit. That being the case, I find that the Taxing Officer was justified in awarding the items as drawn.
27. That said, I find no reason for interfering with the decision of the Taxing Officer.
28. The Applicant's chamber summons application dated March 24, 2022 fails in its entirety. It is hereby dismissed with costs to the 1st Respondent.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 23RD DAY OF APRIL 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Wanjiku for 1st Respondent

Mr. Kiptoo Laisamoi for the Applicant h/b for Mr. Kiplangat

N/A for the 2nd Respondent

Court Assistant: Mpoye

