



**Muraya v Kenya Commercial Bank Ltd & another (Environment & Land
Case 113 of 2014) [2022] KEELC 3777 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 113 OF 2014**

M SILA, J

JULY 21, 2022

**(ON REFERENCE ON THE TAXATION OF THE
2ND DEFENDANT'S PARTY AND PARTY COSTS)**

BETWEEN

JANE WANGARI MURAYA PLAINTIFF

AND

KENYA COMMERCIAL BANK LTD 1ST DEFENDANT

SHALLOM HOMES LIMITED 2ND DEFENDANT

RULING

1. What is before me is an objection to taxation brought pursuant to rule 11 (1) of the *Advocates (Remuneration) Order*. The plaintiffs object to the award of Kshs 1, 1085,695/= as costs to the 2nd defendant.
2. To put matters into perspective, the plaintiffs/applicants commenced this suit on May 20, 2014 originally only against Kenya Commercial Bank Limited (the bank). The applicants averred to be the owners of the land parcel subdivision No 12101 (original No 7599/9) section I, mainland north. Using the suit property, and another parcel of land (subdivision No 12100) as security, they obtained a loan of Kshs 50,000,000/= from the bank on August 12, 2010 and the suit property was charged. A further charge for Kshs 10,000,000/= was registered on September 2, 2011 with the suit property, and the other, subdivision No 12100, as security. There was default in repayment and the bank moved to exercise its statutory power of sale. To avert a sale, the applicants averred that they negotiated to sell the suit property to a third party but this was being frustrated by the bank. What they wanted in the suit was to stop the bank from auctioning the suit property. The auction nevertheless proceeded on May 21, 2014 with Shalloom homes limited, the respondent herein, being the successful bidder. The purchase price was Kshs 29, 850,000/=. Owing to that sale, the respondent was subsequently joined to



the suit as 2nd defendant. The plaintiffs appear to have had a change of mind in proceeding against the respondent and they filed an application to amend plaint, whose effect was to remove the respondent from the suit, and pursue damages against the bank. The application was allowed and the applicants conceded that the respondent deserves costs now that she was being removed from the case.

3. The respondent filed her party and party bill for taxation in the sum of Kshs 2, 062, 412/=, and as I have mentioned earlier, the same was taxed at Kshs 1, 085, 695/= on March 12, 2021. This reference was then filed. In taxing the bill, the taxing officer used the sum of Kshs 50 million as the basis for assessing instruction fees. The reasoning was that this was the value of the suit property, based on the plaintiff's pleadings and the sale agreement dated May 6, 2014, listed in the applicants' list of documents. She assessed instruction fees at Kshs 712,500/=. She also awarded getting up fees, being 1/3 of the instruction fees thus Kshs 237,500/=. The other items were not upset and do not appear to be in controversy.
4. In this reference, the applicants contend that the taxing officer erred in discerning the value of the subject matter. Ms Murage, learned counsel for the applicants, submitted that the suit was challenging the process of sale, and thus the subject matter of the suit was not monetary, whose value could be discerned from the pleadings. She submitted that in those circumstances, the correct schedule to use should have been schedule 6 (i) of the Advocates Remuneration Order, 2014, which provides for fees for "other matters" and the fee to be assessed "should not be less than Kshs 75,000/= if the suit is defended." She submitted that it was an error to use the sum of Kshs 50,000,000/= as the basis for taxation. She referred me to the cases of *Joreth Limited v Kigano* (2002) eKLR and *Bunson Travel & others v Kenya Airways* (2006) eKLR. She further submitted that the getting up fees also ought to be based on the sum of Kshs 75,000/=.
5. For the respondent, Mrs Omondi, learned counsel, inter alia submitted that the value of the subject matter was ascertainable from the pleadings. She referred to paragraph 13A of the amended plaint dated February 26, 2015, the affidavit of the 1st applicant to the motion dated July 10, 2019, and the sale agreement dated May 6, 2014. She was of opinion that the taxing officer used the correct schedule in taxing the bill. She also relied on the case of *Joreth Limited v Kigano* (2002) eKLR and the case of *Kenyariri & Associates Advocates v Salama Beach Hotel* (2014) eKLR.
6. I have considered the above alongside the authorities referred to me by both counsel. This is a reference arising out of a taxation and I am guided by the principles laid down in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* (2005) eKLR where the Court of Appeal stated as follows:-

On a 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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this court said at page 492 paragraph I:

"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 interfere only in exceptional cases".

7. In taxing the bill, the taxing officer used schedule 6 of the *Advocates Remuneration Order, 2014*, which relates to proceedings before the High Court. That was the correct schedule to use and there is no contention on that. That schedule provides as follows on instruction fees and on getting up fees :-

1. Instruction fees



subject as hereinafter provided, the fees for instructions shall be as follows—

- (a) To sue in an ordinary suit in which no appearance is entered under order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a).
- (b) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).
- (c) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this schedule.

The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it—

- (a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and—

To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and—

That value exceeds Kshs	But does not exceed Kshs	Kshs
—	500,000	45,000
500,000	750,000	65,000
750,000	1,000,000	75,000
1,000,000	20,000,000 fees as for Kshs 1,000,000 plus an additional 1.75%	
Over 20,000,000	fees as for 20,000,000 plus an additional 1.5%.	

(b)	
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To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—



That value exceeds Kshs.	But does not exceed Kshs.	Kshs.
-	500,000	75,000
500,000	750,000	90,000
750,000	1,000,000	120,000
1,000,000	20,000,000 fees as for Kshs 1,000,000 plus an additional 2%.	
Over 20,000,000	fees as for 20,000,000 plus an additional 1.5%.	
That value exceeds Kshs	But does not exceed Kshs	Kshs
-	500,000	75,000
500,000	750,000	90,000
750,000	1,000,000	120,000
1,000,000	20,000,000 fees as for Kshs. 1,000,000 plus an additional 2%.	
Over 20,000,000	fees as for 20,000,000 plus an additional 1.5%.	

- (c) ...
 - (d) ...
 - (e) ...
 - (f) ... (not relevant)
 - (g) ... (not relevant)
 - (h) ... (not relevant) adoption and guardianship
 - (i) ... (not relevant) election petitions
 - (j) ... (not relevant)
- other matters

To sue or defend in any case not provided for above; such sum as may be reasonable but not less than -

- (i) If undefended - Kshs. 45,000
- (ii) If defended – Kshs. 75,000



2. Fees for getting up or preparing for trial

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.

8. The respondent herein was the defendant. The respondent had filed defence but was removed before the case could proceed for trial. In my view, direction (b) applies and it provides as follows :-

(b) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).

9. Item 1 (b) relates to the situation “where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties” and thereafter various scale fees are prescribed depending on the value of the subject matter.

10. I am not persuaded by the contention of Ms Murage that the above scale ought not to be used and that what ought to have been used was the scale fees on “other matters.” The subject matter herein had a value and it was correct to peg fees on the value of the subject matter. Neither am I moved by her reference to the case of *Bunson Travel Services & Others v Kenya Airways* (supra). I have read that case which was decided by a court of equal jurisdiction. The dispute therein appears to have been for commissions to be earned by the applicant against the respondent. The court thought that the amount was not quantified in the pleadings as this is what the court stated :-

“To my mind, any plaintiff who wishes to obtain a monetary judgement is required to set out the sums he is seeking, if the same were quantifiable. Therefore, if one did not seek judgement for a specified sum, the court could not award the same, as special damages. It is only general damages which the plaintiff would not be expected to quantify from the outset.”

11. Clearly, the court did not have the opinion that the suit was a money claim, for the court continued as follows :-

Having gone through the pleadings on record, I too have verified that the suit herein was not for a money claim.



12. The court thus found nothing wrong in the taxing officer rejecting an amount of Kshs 15.5 billion as the value of the subject matter.
13. I am not bound by the above decision as it was made by a court of equal jurisdiction. I may not fully appreciate the facts of that case and I do not wish to dwell too much on this decision.
14. My position is that every case has a subject matter which can be valued, unless the suit is one for loose declaration of rights not pegged to anything that can be valued. Even where the suit is for an injunction, so long as it is seeking an injunction related to a subject matter that has value, and can be valued, then it is that subject matter, and its value, which is going to be considered when taxing the bill. In this instance, the applicants were seeking an injunction to stop the sale of the suit property. That suit property has a value and it is the value of the suit property which should be considered as the value of the subject matter when assessing instruction fees. The taxing officer did exactly that and I see no error in principle on her part in proceeding on that basis.
15. The only issue I have is the value of Kshs 50,000,000/= that the taxing officer used. The taxing officer used this value on the reasoning that it was found in paragraph 4 of the plaint and in a sale agreement dated May 6, 2014. What paragraph 4 of the original plaint pleaded was that a sum of Kshs 50,000,000/= was borrowed using two properties, being the suit property and the plot subdivision No 12100. So the Kshs 50,000,000/= actually covered two properties and not one. The sale agreement of May 6, 2014, was for sale of the plot subdivision No 12100 (not to be confused with the suit property which is subdivision No 12101), where the property was being sold for Kshs 45,000,000/=. Thus, although the taxing officer was correct in using the value of the subject matter to tax the instruction fees, she fell into error by using the wrong property. She ought to have used the value of the suit property and not the value of the plot subdivision No 12100 which is not the subject matter of this case.
16. In my opinion, the correct sum to use is the amount that the respondent used to purchase the property. When defending the suit, the respondent was defending the value of her purchase, which was Kshs 29, 850,000/=. In purchasing the property at that amount, I believe that this is the value that the respondent thought the property should have. Therefore in my view, it is that amount which ought to have been used as the value of the subject matter in calculating instruction fees.
17. I will thus set aside the taxation on instruction fees as it was based on the wrong quantification of the subject matter.
18. I remit back the advocate's bill with direction to the taxing officer to tax the bill based on the amount of Kshs 29,850,000/= as the value of the subject matter.
19. No orders as to the costs of this reference.
20. Orders accordingly.

DATED AND DELIVERED THIS 21 DAY OF JULY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

In presence of:-



Ms Murage instructed by M/s Gikandi & Company Advocates for the applicants
No appearance on part of M/s Omondi Kinyua & Company for the respondent.
Court Assistant – Wilson Rabong’o

