



**Wakf Commissioners of Kenya v Kabundu Holdings Limited (Environment & Land Miscellaneous Case E114 of 2022) [2025] KEELC 1153 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1153 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E114 OF 2022**

**YM ANGIMA, J  
MARCH 6, 2025**

**BETWEEN**

**WAKF COMMISSIONERS OF KENYA ..... APPELLANT**

**AND**

**KABUNDU HOLDINGS LIMITED ..... RESPONDENT**

**RULING**

**A. Applicant's reference**

1. This ruling is in respect of a reference dated 03.01.2024 by the applicant challenging the decision of the taxing officer (Hon J. Nyariki) dated 06.12.2023. By the said decision, the taxing officer taxed and allowed the respondent's bill of costs dated 30.05.2023 in the sum of Kshs. 2,685,481.67 only. The reference was filed pursuant to paragraph 11 of the Advocates Remuneration Order even though the applicant described itself as an appellant in the proceedings
2. In the said reference, the applicant sought the following key prayers;
  - a. That the court be pleased to review, vary, set aside or dismiss the decision of the taxing officer dated 6.12.2023.
  - b. That in the alternative the respondent bill of costs dated 30.05.2023 be remitted back for taxation before a different taxing officer.
  - c. That the costs of the application be provided for.
3. The reference was based upon the grounds set out on the face of the chamber summons. It was pleaded, inter alia, that the taxing officer grossly erred in taxing the respondent's bill of costs since the suit had already been withdrawn vide a notice of withdrawal dated 16.03.2023 whereas the respondent's advocate was appointed on 12.05.2023. It was pleaded that the taxing officer erred in finding that the



value of the subject matter was ascertainable from the pleadings whereas the suit was never heard on merit.

4. The applicant also faulted the taxing officer for awarding a getting up fee of 1/3 of the instructions fee whereas there was no hearing of the suit as it was withdrawn soon after filing. The applicant also faulted the taxing officer for overruling its objection on the legality of the appointment of the respondent's advocates.

## **B. Directions on Submissions**

5. It would appear that the parties agreed to canvass the reference through written submissions. The record shows that the respondent filed its submissions dated 20.01.2025 and further submissions dated 20.02.2025. On its part, the applicant filed written submissions dated 06.02.2025.
6. The respondent opposed the reference on two main grounds. First, that there was no valid reference before the court since the applicant had not properly complied with the requirements of paragraph 11 of the Advocate Remuneration Order as to giving notice of objection and seeking and obtaining reasons for the taxation. Second, that the taxing officer was right in awarding instructions fee and getting up fee based on the value of the subject matter which was declared by the applicant as kshs. 120,000,000/= (one hundred and twenty million only). The respondent supported the rest of the items in its bill of costs as having been drawn and taxed per scale.

## **C. Issues for Determination**

7. The court has perused the reference dated 03.01.2024 and the material and submissions on record. The court is of the view that the following are the key issues for determination herein:
  - a. Whether there is a valid and competent reference before the court.
  - b. Whether the respondent's advocates were properly on record before withdrawal of the applicant's suit.
  - c. Whether the taxing officer erred in principle in taxing and allowing the respondent's bill of costs at Kshs.2,685,481.67.
  - d. Who shall bear costs of the reference.

## **D. Analysis and Determination**

### **a. Whether there is a valid and competent reference before the court**

8. The court has considered the material and submissions on record on this issue. The court has noted that the respondent raised the same objection during the hearing of the applicant's application for stay of execution which was heard before Hon. Justice N. A. Matheka. It is evident from the ruling of the court dated 12.06.2024 that the court did not uphold the respondent's objection based on alleged non-compliance with the provisions of paragraph 11 of the Advocates Remuneration Order. For that reason, this court cannot validly revisit the issue with a view to reviewing the decision by Justice Matheka.

### **b. Whether respondent's advocates were properly on record before withdrawal of the applicant's suit**

9. The applicant submitted that its notice of withdrawal of suit dated 16.03.2023 was adopted by the court on 20.03.2023 and that by the time the respondent appointed an advocate on 12.05.2023 the



suit had already been withdrawn. It was thus its submission that the respondent was not entitled to file a bill of costs in the circumstances.

10. The respondent, on its part, submitted that the suit was actually withdrawn by consent on 25.05.2023 before Justice N.A. Matheka and it was awarded costs upon withdrawal. It was contended that the said consent had never been reviewed or set aside and that it was recorded in the presence of the advocates for both parties. The respondent thus contended that it was entitled to file a bill of costs because it was represented by an advocate by the time of withdrawal of suit.
11. The court has perused the record of the proceedings which took place before Justice Matheka. The record shows that even though the applicant filed a notice of withdrawal of suit dated 16.3.2023 under Order 25 Rule 1 of the Civil Procedure Rules, the notice was not endorsed or adopted by the court until 25.5.2025. The record shows that when the applicant informed the court on 20.03.2023 that it wished to withdraw the suit, the respondent, then acting in person, object to the intended withdrawal. As a result, the matter was stood over to 25.05.2023 for directions.
12. The record shows that on 24.05.2023 the respondent's advocates filed a notice of appointment of advocate on the e-filing portal. When the matter was mentioned on 25.05.2023 both sides were duly represented by advocates. The record shows that Mr. Bosire appeared for the applicant whereas Mr. Mbithi represented the respondent. When the applicant's advocate sought to withdraw the suit, the respondent's advocate objected. Nevertheless, the court allowed withdrawal but awarded costs to the respondent.
13. In view of what the record of proceedings shows, there was no consent order recorded on 25.05.2023. The record is also clear that the respondent's advocates filed a notice of appointment one day before withdrawal of the suit and that they were present on the date of withdrawal. The court is thus satisfied that the respondent's advocates were properly on record at the material time and that they were entitled to file the bill of costs dated 30.0.5.2023.

**c. Whether the taxing officer erred in principle in taxing and allowing the respondent's bill of costs at kshs. 2,685,481.67**

14. The court has considered the material and submissions on record. The applicant faulted the taxing officer for taking the sum of Kshs.120,000,000/= as the value of the subject matter. It was the contention of the applicant the said amount merely reflected the mesne profits sought in the application and does not necessarily reflect the value of the subject matter within the meaning of the Advocates Remuneration Order. Curiously, the applicant did not suggest the appropriate value of the subject matter which the taxing officer should have applied.
15. The respondent submitted that the value of the subject matter was readily disclosed by the applicant's pleadings which claimed, inter alia, mesne profits pf Kshs.120,000,000/=. Hence there was no need to look elsewhere. It was submitted that the taxing officer was right in adopting that figure for the purposes of taxation since it was the applicant's pleaded figure.
16. The principles to be considered by a Judge seized of a reference against a taxing officer's decision were superbly summarized by Hon. G.V.O. Odunga J (as he then was) in the case of Republic -vs- Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarkets Ltd & 2 Others [2018] eKLR as follows:

“ 18. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are,



- (1) that 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;
- (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the 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;
- (3) if the Court considers that the decision of the Taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
- (4) it is within the discretion of the Taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
- (5) the Taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;
- (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
- (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of *First American Bank of Kenya vs. Shah and Others* [2002] 1 EA 64."

17. The court is satisfied that the taxing officer did not err in principle on applying schedule 6 of the ARO 2014 in taxation of the bill of costs dated 30.05.2023. The court also finds no fault in taking the sum of Kshs.120,000,000/= as the value of the subject matter. However, there is no indication that the taxing officer took into account the fact that the applicant's suit never proceeded to full trial hence the instructions fee ought to have been pegged at 75% of the scale fee. The court finds the omission to reduce the instructions fee by 25% to constitute an error in principle since paragraph 1(b) it is clear that where proceedings are terminated in a summary manner without a hearing the applicable fee shall be 75% of the fee chargeable under item 1(a).



18. The material on record shows that no defence was ever filed by the respondent to the action. In fact, the respondent's contention was that there was no substantive suit to defend hence the miscellaneous application filed by the applicant was merely hanging in the air. That was why the respondent filed a notice of preliminary objection dated 12.01.2023. It did not even file a replying affidavit to deny the allegations in the miscellaneous application.
19. The court is further of the view that the taxing officer erred in principle in awarding a getting up fee of 1/3 of the instructions fee whereas there was no trial or preparation for trial. The applicant's suit was withdrawn at its infancy hence there was no justification for awarding a getting up fee. The whole amount awarded for getting up should thus be excluded. It would thus follow that the court is satisfied that the taxation dated 06.12.2023 ought to be set aside to pave way for fresh taxation.

#### **d. Who shall bear the costs of the application**

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court is of the view that each side has partly succeeded and partly failed each party should bear its own costs of the reference.

#### **E. Conclusion and Disposal Order**

21. The upshot of the foregoing is that the applicant's reference succeeds in part. The decision of the taxing officer dated 06.12.2023 is hereby set aside. As a result, the court makes the following orders for disposal of the reference dated 03.01.2024:
  - a. The decision of the taxing officer dated 06.12.2023 is hereby set aside.
  - b. The respondent's bill of costs dated 30.05.2023 is hereby remitted to another taxing officer for taxation in accordance with the findings of the court, that is,
    - i. That the respondent is entitled to only 75% of the instruction fee.
    - ii. That the respondent is not entitled to any getting up fee.
    - iii. The rest of the items in the bill of costs shall be taxed afresh per scale.
  - c. Each party to bear its own costs.Orders accordingly.

**RULING DATED AND SIGNED AT MOMBASA THIS 6<sup>TH</sup> DAY OF MARCH, 2025 AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Ms. Temingo Kibet for the respondent

No appearance for the applicant

C/A - Kalekye

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**Y. M. ANGIMA**

**JUDGE**

