



**Talam v Chepng'eno (Environment and Land Miscellaneous Application
E010 of 2023) [2024] KEELC 5249 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2023
LA OMOLLO, J
JULY 11, 2024**

BETWEEN

JAMES ARAP TALAM APPLICANT

AND

IRENE CHEPNG'ENO RESPONDENT

RULING

Introduction.

1. This ruling is in respect of the Applicant's Chamber Summons application dated 31st October, 2023. The said application is expressed to be brought under Sections 1A, 3B, 3A of the [Civil Procedure Act](#), Rule 11 of the [Advocates Remuneration Order](#) and Order 21 Rule 9A of the [Civil Procedure \(Amendment\) Rules](#), 2020.
2. The application seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That the decision of the Taxing Officer as evidenced in the ruling delivered on 17th October, 2023 with respect to items 1, 4, 5, 6, 7, 11 and 12 in the bill of costs dated 18th July, 2023 be set aside and taxed afresh by this Honourable Court.
 - d. That in the alternative to order 3 above, the Honourable Court be pleased to order that the Respondent's bill of costs with respect to items 1, 4, 5, 6, 7, 11 and 12 be taxed afresh by another taxing master.
 - e. That the costs in the application be provided.



3. The application is based on the grounds on its face and the supporting affidavit of one James Arap Talam sworn on 31st October, 2023.

Factual Background.

4. The application under consideration first came up for hearing on 6th November, 2023 when the Court directed that it be served upon the Respondent herein.
5. On 23rd January, 2024 the Court directed that the application be disposed of by way of written submissions.
6. The application was mentioned severally to confirm filing of submissions by the parties. It was finally reserved for ruling on 15th May, 2024.

Applicant's Contention.

7. It is the Applicant contention that the Respondent herein filed the Party and Party bill of costs dated 18th July, 2023.
8. It is also the Applicant's contention that the said bill of costs was scheduled for taxation on 26th September, 2023 before Hon. F.M Nyakundi.
9. It is further the Applicant's contention that on the said date, his Advocate on record logged into Microsoft Teams using the link provided at 8:40 am as the Court was scheduled to start at 9:00 am.
10. He contends that his Advocate on record remained in the lobby until 12:00 pm without getting admitted and his efforts to get in touch with the registry staff and the Court clerk were futile.
11. He also contends that it was only after getting in contact with an Advocate practicing in Kericho that his Advocate on record was informed that the matter had already been dispensed with and reserved for ruling on 17th October, 2023.
12. He further contends that on 5th October, 2023 he filed his submissions in response to the Respondent's bill of costs together with a letter addressed to the Taxing Officer, who is also the Deputy Registrar ELC informing him of the challenges encountered by his Advocates on record and that despite the said challenges, he had been able to file and serve his submissions.
13. It is the Applicant's contention that on 17th October, 2023, his Advocate on record instructed an Advocate who practices in Kericho to hold brief for him before the Taxing Officer.
14. It is also the Applicant's contention that the Taxing Officer delivered his ruling on 17th October, 2023 wherein he taxed the bill of costs at Kshs. 492,250/=.
15. It is further the Applicant's contention that the Taxing Officer awarded the said amount of money as party and party costs to the Respondent for defending an application that he had filed in Kericho ELC No. E014 of 2023 *James Arap Talam v Irene Chepng'eno & 3 Others*.
16. He contends that upon getting the said ruling, he realized that the Taxing Officer had assessed a party and party bill of costs dated 27th April, 2023 as the Respondent's bill of costs and yet the Respondent's bill of costs was dated and filed in Court on 18th July, 2023.
17. He also contends that after the Taxing Officer delivered his ruling, the Respondent herein served him with the application dated 16th August, 2023 that was filed on 17th October, 2023 seeking for stay of



proceedings in ELC Case No. 1 of 2023 until the costs in Kericho ELC No. E014 of 2023 *James Arap Talam v Irene Chepng'eno & 3 Others* are fully paid.

18. He further contends that the Respondent attached a copy of the ruling to the said application dated 16th August, 2023 but failed to mention it in her application or mark it as an annexure pursuant to the provisions of Rule 9 of the *Oaths and Statutory Declaration Rules*.
19. It is the Applicant's contention that the Taxing Officer committed an error of principle in arriving at the various figures while taxing the items relating to instruction fees, drawing, attendances and service.
20. It is also the Applicant's contention that the Taxing Officer failed to consider his submissions with regard to the items set out in the preceding paragraph and the Provisions of Schedule 6 of the *Advocates Remuneration Order*.
21. It is further the Applicant's contention that on 25th October, 2023 he filed a Notice of Objection pursuant the provisions of Paragraph 11(1) of the *Advocates Remuneration Order*.
22. He also contends that in the said Notice of Objection he requested for the taxing officer's reasons for his decision.
23. It is his contention that he is aggrieved with the ruling and its resultant effect which has unlawfully driven him from the seat of justice leaving him with no means of accessing justice in the pending suit which is Kericho ELC No. 1 of 2023.
24. He further contends that the reference raises a real legal issue as to whether there exists a clear basis of how the Taxing Officer arrived at the figure of Kshs. 400,000/= as instruction fees after relying on paragraph I(j) under "other matters" despite acknowledging that the matter was not complex and had not proceeded for full hearing.
25. It is the Applicant's contention that based on the foregoing, there is justification in law to interfere with the decision of the Learned Taxing Officer as sought in the application herein.
26. It is also the Applicant's contention that this Court has wide powers and discretion to issue the orders sought herein and that unless they are granted, he stands to suffer prejudice.
27. It is further the Applicant's contention that the Taxing Officer's decision amounts to a grave injustice and ought to be set aside in its entirety to safeguard the administration of justice and his constitutional right to a fair trial, due process and equality before the law.
28. He contends that it is in the interest of justice and fairness that the impugned ruling and order be set aside and the bill of costs dated 18th July, 2023 be taxed by this Court or in the alternative the same be taxed before a different taxing officer.
29. He ends his deposition by stating that the setting aside of the said decision will aid the administration of justice and safeguard it from potential embarrassment and ridicule as well uphold the constitutional rights of the Applicant to a fair trial, due process and equality before the law.

Respondent's Response.

30. The Respondent filed a replying affidavit on 12th January, 2024 sworn by her Advocate on record Franklin Obondo Koko.
31. He deposes that the Applicant filed Kericho ELC case No. E014 of 2023 which was dismissed on 12th July, 2023 by Lady Justice MC Oundo.



32. He also deposes that the Environment and Land Court's pecuniary jurisdiction exceeds Kshs. 20,000,000/= while that of the Magistrate's Court does not exceed Kshs. 20,000,000/=.
33. He further deposes that in filing the said suit before this Court, the Applicant assumed the jurisdiction of this Court and not the lower Court taking into consideration the value of the subject matter.
34. It is his deposition that the subject matter of the said suit was land parcel No's Kericho/Kapsuser/5256 and 5257.
35. It is also his deposition that Section 71(a) of the Magistrate's Act provides for the pecuniary jurisdiction of the Magistrate's Court and that since the Applicant filed the said suit before this Court, there was no need to do a valuation of the suit properties and therefore the Respondent assumed the minimum value of the parcels of land.
36. It is further his deposition that the conduct of the Applicant demonstrates the value of the subject matter and contends that the Applicant had the option of filing the suit before the Magistrate's Court pursuant to Section 9 (a) of the Magistrate's Court Act if the value of the subject matter was below Kshs. 20,000,000/=.
37. He deposes that nothing prevented the Applicant from filing his suit in a Court with the requisite pecuniary jurisdiction.
38. He also deposes that Section 26 of the Environment and Land Court Act provides that the Chief Justice may by notice in the gazette appoint certain Magistrates to preside over cases involving Environment and Land.
39. He further deposes that in Kericho law Courts there are several magistrates gazetted to handle such cases and if the Applicant believed that the value of the subject matter was not Kshs. 20,000,000/= nothing prevented him from filing the said suit before the Magistrate's Court.
40. It is his deposition that by the Applicant filing the said suit before this Court, he was in compliance with Section 13 of the Environment and Land Court Act and Article 162(2) of the Constitution of Kenya.
41. It is also his deposition that the Taxing Officer has the discretion to deal with a bill of costs as provided for by Schedule 6 of the Advocates Remuneration Order.
42. It is further his deposition that the Respondent's bill of costs was simple and does not need a 'rocket scientist' to decipher the value of the subject matter as set out in the preceding paragraphs.
43. He reiterates that the taxing master has the judicial discretion to assess any bill of costs as per Section 76 of the Advocates Remuneration Order.
44. He deposes that the Applicant had filed Kericho ELC No. 1 of 2014 which was heard and determined, Kericho ELC No. E014 of 2023 that was dismissed and another suit still pending before this Court over land parcel No's Kericho/Kapkures/5256 and 5257 despite the fact that the subordinate Court has the jurisdiction to hear matters with subject properties whose value is below Kshs. 20,000,000/=.
45. He ends his deposition by stating that the Applicant's application is misconceived and should be struck out with costs.

Applicant's Response to the Respondent's Replying Affidavit

46. The Applicant filed a supplementary affidavit on 8th March, 2024 sworn on 7th March, 2024.



47. He deposes that the only orders that he is seeking in his reference application are for stay of execution and enforcement of any certificate of taxation arising from the ruling delivered by the Deputy Registrar on 17th October, 2023 and that the decision of the Taxing Officer be set aside and taxed afresh.
48. He also deposes that from the orders sought and the grounds in support of the application under consideration, he does not in any way require this Court to hear and determine facts that are pending in a different suit.
49. He further deposes that the Respondent is attempting to introduce other facts involving the subject matter currently being heard and determined in a different suit from the one filed herein with the intention of redirecting this Court's attention from the orders sought to other facts that are not before it.
50. It is the Applicant's deposition that the said issues being raised by the Respondent are pending hearing and determination in a different suit and are meant to circumvent the law and defraud him of the orders sought by introducing matters which do not answer the present application.
51. It is also the Applicant's deposition that the Environment and Land Act, 2011 gave the Environment and Land Court exclusive jurisdiction to determine disputes related to the environment, use and occupation of and title to land. That it was only in the year 2015, when the said act was amended to allow the Chief Justice, by notice in the gazette to appoint certain Magistrates to preside over cases involving environment and land matters.
52. It is further the Applicant's deposition that the Respondent is misleading the Court as Kericho ELC No. 1 of 2014 was initially filed by the Respondent's father-in-law against him which suit was filed in the proper forum before the Environment and Land Act was amended in the year 2015.
53. He deposes that Kericho ELC No. E014 of 2023 abated for failure to serve summons while Kericho ELC No. E001 of 2023 is still pending. That both suits approached the same Court which had issued a judgement in Kericho ELC No. 1 of 2014 for cancellation of illegal subdivisions and restoration of title while also giving other new parties an opportunity to be heard.
54. He also deposes that pursuant to Rule 10 of the Advocates Remuneration Order, the Taxing Officer who taxes bills of costs under the said order shall be the Registrar or Deputy Registrar of the High Court and that this being an application seeking that the decision of the Deputy Registrar be set aside and the bill of costs in question be taxed afresh, this Court has the jurisdiction to grant the orders sought.
55. He further deposes that in as much as the Taxing Officer has the discretion to deal with a bill of costs, the discretion must be exercised judicially and also follow the principles governing taxation as was set out in the judicial decision of *Premchad Raichand Ltd v Quarry Services of East Africa Limited* [No. 3] [1972] EA 162.
56. It is his deposition that the Taxing Officer did not exercise his discretion judicially as he concurred with his submissions that the abated suit was not complex and neither was it novel and that it never went for full hearing and yet proceeded to apply Paragraph j under Schedule 6 of the Advocates Remuneration Order and increased the minimum fee from Kshs. 75,000/= to Kshs. 400,000/= which amount was so high and amounted to an injustice.
57. It is also his deposition that unless the Court grants the orders sought in his application, he will be occasioned a great injustice.



58. He ends his deposition by stating that it is in the interest of justice that the prayers sought in the application under consideration be granted as prayed and the Bill of Costs dated 18th July, 2023 be taxed afresh.

Issues for determination.

59. The Applicant filed his submissions on 8th March, 2024 while the Respondent did not file any submissions.

60. The Applicant reiterates the averments in his supporting affidavit and submits on whether his application is merited.

61. The Applicant relies on paragraph 11 of the Advocates Remuneration Order and submits that he filed a Notice of Objection as required by Paragraph 11(i) of the Advocates Remuneration Order five days after the Taxing Officer delivered his ruling.

62. The Applicant also submits that the Taxing Officer did not provide any reasons and so he filed the reference dated 31st October, 2023.

63. The Applicant further submits that he complied with all the requirements outlined in paragraph 11 of the Advocates Remuneration Order.

64. It is the Applicant's submissions that the costs awarded to the Respondent during the hearing of the application in Kericho

ELC No. E014 of 2023 were costs of the application and not of the suit as the suit was undefended and neither was it heard or determined.

65. The Applicant reiterates that the Taxing Officer taxed a different party and party bill of costs as he states in his ruling that he taxed the bill of costs dated 27th April, 2023 and yet the Respondent's bill of costs was dated and filed on 18th July, 2023.

66. It is also the Applicant's submissions that he objects to the amounts awarded by the Taxing Officer on item No's 1, 4, 5, 6, 7, 11 and 12.

67. With regard to item No. 1, the Applicant submits that the Taxing Officer awarded Kshs. 400,000/= as instruction fees which amount was unreasonable and too high.

68. With regard to item No. 4, the Taxing Officer awarded Kshs. 1,100/= as drawing fees for the bill of costs which only had two folios despite Schedule 6(4)(c) of the Advocates Remuneration Order prescribing Kshs. 180 per folio as fees for drawing a bill of costs.

69. The Applicant submits that the Taxing Officer awarded Kshs. 2,000/= for items 5 to 7 as attendance for a mention and taxation and kshs. 5,000/= for items 11 and 12 as service fee and yet service was effected via email pursuant to Order 5 Rule 22 (b) of the Civil Procedure (Amendment) Rules 2020 hence no costs were incurred.

70. The Applicant relies on the judicial decisions of *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* (No. 3) [1972] EA 162, *Joreth Limited v Kigano & another* [2002] EA 92 as was cited in *Brampton Investment Limited v Attorney General & 2 Others* [2013] eKLR and *Kamunyori & Company Advocates v Development Bank of Kenya Limited* [2015] Civil Appeal 206 of 2006.

71. The Applicant also relies on the judicial decision of *Ochieng, Onyango, Kibet and Ohaga Advocates v Adopt Light Ltd* HC Misc. 729 of 2006 as was cited in *Karen & Associates Advocates v Caroline*



Wangari Njoroge [2019] eKLR and submits that a mere citation of a Taxing Officer's discretion does not suffice but rather the said officer ought to disclose what informed the decision to tax the costs in one way as opposed to another.

72. The Applicant relies on Republic v Minister for Agriculture & 2 Others Ex parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR as was cited in KTK Advocates v Nairobi City County (Miscellaneous Application E005 of 2021) [2023] KEHC 22242 (KLR) (Judicial Review) (15th September 2023) (Ruling) in support of his arguments.
73. The Applicant submits that costs should not rise to a level as to confine access to justice to the wealthy and that the Taxing Officer erred in principle by assessing the bill of costs at Kshs. 492,250/= for defending an application without considering the provisions of Schedule 6 of the Advocates Remuneration Order.
74. The Applicant relies on the South African judicial decision of Visser v Gubb 1981 (3) SA 753 (c) 754 H – 755 C as was cited in Eddy Nicholas O. Orinda T/A One and Associates Advocates v Victoria Commercial Bank Limited [2020] eKLR, Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR and seeks that the Court allows his reference dated 31st October, 2023 and sets aside the decision of the taxing officer.

Analysis and determination.

75. I have considered the application, the response thereto and the rival submissions.
76. The issues that arise for determination are as follows;
 - a. Whether the Court should set aside the Taxing Officer's decision delivered on 17th October, 2023.
 - b. Who should bear costs of the application?

A. Whether the Court should set aside the Taxing Officer's decision delivered on 17th October, 2023.

77. The Applicant is challenging the decision of the Taxing Officer delivered on 17th October, 2023 on the ground that the Taxing Officer did not lay a basis for awarding Kshs. 400,000/= as instruction fees and yet he acknowledged that the matter was not complex.
78. The Applicant also argues that the taxing master in his decision stated that he was taxing the Respondent's bill of costs dated 27th April, 2023 and yet the Respondent's bill of costs was dated 18th July, 2023.
79. The Applicant further argues that he is specifically challenging the Taxing Officer's decision on item No's 1, 4, 5, 6, 7, 11 and 12 of the Bill of Costs.
80. In response, the Respondent submits that she was awarded costs in Kericho ELC No. E014 of 2023 which was filed before this Court.
81. The Respondent also submits that since this Court has the pecuniary jurisdiction of over Kshs. 20,000,000/=, it was presumed that that was the value of the suit properties and therefore the Taxing Officer was justified in the sums of money that he awarded as instruction fees.



82. The procedure for filing a reference is provided for by Paragraph 11 of the Advocates Remuneration Order as follows;

- “ 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 which he objects.
- 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 the parties concerned, setting out the grounds of his objection.
- 3) Any person aggrieved by the decision of the Judge upon any objection referred to such Judge under subparagraph (2) may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal.
- 4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have expired.”

83. Paragraph 11(1) of the *Advocates Remuneration Order* requires a party to give a notice in writing to the Taxing Officer on the items of taxation to which they are objecting to within fourteen days of delivery of the ruling.

84. The Applicant submits that he filed the Notice of Objection dated 24th October, 2023 on 25th October, 2023 requesting for the Taxing Officer’s reasons on item No’s 1, 4, 5, 6, 7, 11 and 12.

85. A perusal of the Court record shows that the Applicant indeed filed a Notice of Objection and he therefore complied with the provisions of Paragraph 11(1) of the *Advocates Remuneration Order*.

86. A further perusal of the Court record shows that the Taxing Officer did not provide reasons. In the judicial decision of *Vincent Kibiwott Rono v Abraham Kiprotich Chebet & another* [2022] eKLR the Court held as follows;

“The taxation ruling was delivered on 17th January 2022. The applicants wrote to the Taxing Officer on 19th January 2022 notifying him of the items that he wished to object to. There are no reasons that have been presented by the Taxing Officer as per the provisions of Rule 11(2) of the Advocates (Remuneration) Order. However, it is a judicial principle that a ruling contains reasons for the decision given. I associate myself with the reasoning of the Court in *Bernard Gichobi Njira v Kanini Njira Kathendu & another* [supra] where the Court was of the opinion that the paragraph only grants an aggrieved party in a case chance to ventilate his grievance(s) only on the itemized bill. I do not find the failure of the Magistrate to give these reasons fatal to the reference as the same would be more or less a duplication of the ruling.” (Emphasis mine)

87. As was held in the above cited judicial authority, failure by the Taxing Officer to give reasons is not fatal to a reference and therefore this reference is competent before this Court.



88. As afore stated in the previous paragraphs, the Applicant submits that the Taxing Officer stated in his ruling that he was taxing the Respondent's bill of costs dated 27th April, 2023 and yet the bill of costs filed by the Respondent was dated 18th July, 2023.
89. Upon perusal of the Court record in Kericho ELC E014 of 2023, I have confirmed that indeed the Respondent filed a bill of costs dated 18th July, 2023 on the same date.
90. The Taxing Officer in his decision delivered on 17th October, 2023 states as follows;
- “The Party to party (sic) bill of cost dated 27th February, 2023 is hereby taxed at Kshs. 492,250/=”
91. It is also important to note that the decision of the Taxing Officer is titled as follows;
- “Ruling on the Defendant bill of costs dated 18th July, 2023”
92. Upon further perusal of the pleadings filed in Kericho ELC No. E014 of 2023, I have confirmed that the only bill of costs that was filed is one dated 18th July, 2023.
93. The Taxing Officer acknowledged at the beginning of his decision that he was taxing the bill of costs dated 18th July, 2023. The Taxing Officer made an error at the conclusion of his ruling when he stated that he had taxed the bill of costs dated 27th April, 2023.
94. It is my view that the said oversight is not fatal as there is no other bill of costs filed in Kericho ELC E014 of 2023 except for the one dated 18th July, 2023.
95. This Court is guided by Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Article 159 of the [Constitution](#) of Kenya which obligates this Court to administer justice without undue regard to technicalities.
96. Section 1A of the [Civil Procedure Act](#) provides as follows;
- “1A. Objective of Act
- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”
97. Section 1B of the [Civil Procedure Act](#) provides as follows;
- “1B. Duty of Court



- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”

98. Section 3A of the [Civil Procedure Act](#) provides as follows;

“3A. Saving of inherent powers of Court.

Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

99. I shall therefore proceed to interrogate the bill of costs dated 18th July, 2023. As afore stated, the Applicant is challenging the Taxing Officer’s decision on the taxation of item No’s 1, 4, 5, 6, 7, 11 and 12.

100. The Taxing Officer in his ruling delivered on 17th October, 2023 taxed Item No. 1 which was on instruction fees at Kshs. 400,000 and the other items as follows;

“Item 2 to 4 is assessed at Kshs. 1,100 each

Items 5, to item 7 are all assessed at 2000 each.

Item 8 to item 14 are all assessed as drawn.”

101. There are numerous judicial decisions which offer guidance on the circumstances under which a Judge determining a reference may interfere with the discretion of a Taxing Officer.

102. In [Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board](#) NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR the Court of Appeal stated thus;

“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.”

103. In [Premchand Raichand Ltd v Quarry Services of East Africa Ltd](#) (1972) EA 162 the Court outlined the principles of taxation as follows:

- “(a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy.



- (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession.
- (d) so far as practicable there should be consistency in the award made and
- (e) The Court will only interfere when the award of the Taxing Officer is so high or so low as to amount to an injustice to one party.”

104. The Court of Appeal in *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR in determining the issue of instructions fees stated 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.”

105. In the present matter, Taxing Officer in taxing the instruction fees held as follows;

“I have noted that the application was for instructions fee in this matter. Paragraph 1(b) is applicable provides that for the amount chargeable ‘to sue or defend in a suit which a defence or other denial of liability is filed. (sic) It also talks of fees to be charged where the suit is determined in a summary manner or in any manner whatever without going to full trial.

Applying paragraph (j) “other matters” a minimum of Kshs. 75,000 is provided to sue or defend in a case not provided for [in the proceeding paragraphs] and where it is defended. It is north worthy (sic) to note that only minimum is prescribed (sic), thus the taxing master has discretion to award a higher sum, however such discretion must be exercised judicially as per the above cited case.

I note that this was not a complex case or a novel case as the matter never went into full trial as the same was dismissed for want of prosecution. It is therefore my considered opinion that I do assess 400,000 as instruction fees.”

106. The Applicant submits that the Taxing Officer did not lay a basis for awarding the Respondent Kshs. 400,000/= as instruction fees and yet he acknowledged that the matter was not complex and had not proceeded for hearing.

107. In response, the Respondent contends that the Applicant filed Kericho ELC E014 of 2023 before this Court which has the jurisdiction of kshs. 20,000,000/= and therefore the value of the subject properties could only be presumed to be Kshs. 20,000,000/= which informed the basis of the award of instruction fee.

108. Upon perusal of the pleadings filed in Kericho ELC E014 of 2023, it is evident that the value of the suit properties cannot be ascertained. My view, therefore, is that the Respondent’s submission that the value of the suit properties is presumed to be over 20,000,000/= because the matter was filed before this Court is misguided and cannot hold.



109. In *Elijah Ireri t/a Ireri & Company Advocates v County Government of Embu* [2021] eKLR the Court held as follows;

“24. Where the value of the subject matter is discernible and determinable from the pleadings, the taxing master is not permitted to use his discretion to assess instruction’s fees. 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 instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provisions above. (See *Peter Muthoka & another - v- Ochieng & 3 others* [2019] eKLR.”

110. In the judicial decision of *Wamanda & 2 others v Egoli Estates Limited & another* (Environment and Land Case Civil Suit 103 of 2020) [2024] KEELC 1416 (KLR) (14 March 2024) (Ruling) the Court held as follows;

“33. In the present case, the matter having been filed in 2020, the relevant remuneration order is the Advocates Remuneration Order (2014). The value of the subject matter having not been ascertained, the instruction fees herein is as per Schedule VI Paragraph 1 titled ‘Other Matters’ which sets the sum at Kshs 75,000/=.

34. Upon awarding Kshs. 75,000 as dictated by law, Schedule VI Paragraph 1(b) provides as follows: “To sue or defend in a suit in which the suit is determined in a summary manner or in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).”

35. It follows that where a suit is withdrawn, or is dealt with in a summary manner without going to full trial like in this case, the fees of Kshs. 75,000 should be reduced by 25%, bringing the instruction fees to Kshs. 56,250/=. In as far as the Taxing Officer awarded the sum of 900,000/= being a figure substantially more than the minimum fee, and did not give any reasons justifying such as an increase, the Court finds that her decision was based on an error of principle.”

111. Similarly, in the present case, since the value of the subject matter cannot be ascertained, the instruction fees is to be assessed under Schedule 6 of the Advocates Remuneration Order 2014 that is titled ‘other matters. It sets the fee at Kshs. 75,000/=. It is also important to note that since the suit abated, Schedule 6 paragraph 1(b) of the Advocates Remuneration Order is applicable. It provides as follows;

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

112. That being the case, the fee of Kshs. 75,000/= should be reduced by 25% which amounts to Kshs. 56,250/=. It is my view that the Kshs. 400,000/= awarded by the Taxing Officer was way more than the minimum fee.

113. The Taxing Officer acknowledged that the suit was neither complex nor novel and yet he awarded Kshs. 400,000/= as instruction fee. It is my view that the said amount was manifestly excessive and therefore the Taxing Officer’s decision was based on an error of principle.



114. The Applicant is also challenging the taxation of item No. 4. He submits that the same was taxed at Kshs. 1,100 and yet Schedule 6 paragraph 4 of the Advocate's Remuneration Order prescribes Kshs. 180 per folio for drawing a bill of costs.
115. Item No. 4 on the Respondent's bill of costs was for drawing of the bill of costs. The Respondent sought to be awarded Kshs. 1,100/= which the Taxing Officer taxed as prayed.
116. Schedule 6 Paragraph 4(d) of the *Advocates Remuneration Order* 2014 provides as follows;
- “All other documents (including proofs of witnesses and evidence) so far as necessary per folio Kshs180
- (d) Bill of costs per folio Kshs 180”
117. Paragraph 17 of the *Advocates Remuneration Order* provides as follows on the length of a folio;
- “A folio shall for all purposes of this Order be deemed to consist of 100 words and any part of a folio shall be charged as one folio. A sum or quantity of one denomination stated in figures is to be counted as one word: e.g. "£25,564 16s 8d." is to be counted as three words, and "254 feet 11 inches" is to be counted as four words.”
118. A perusal of the Respondent's Bill of Costs dated 18th July, 2023 shows that the bill of costs consists of two folios and therefore the Taxing Officer ought to have taxed item No. 4 at Kshs. 360/=.
119. The Applicant also challenges the Taxing Officer's decision in respect of item No. 5, 6 and 7 of the Respondent's bill of costs.
120. The said items were on attendances in Court on various dates. The Taxing Officer had taxed the said items at Kshs. 2,000/=. My view is that the Applicant has not laid a basis for interference by this Court.
121. The Applicant is further challenging the taxation of item No's 11 and 12 which were on the service of various documents upon the Defendants in Kericho ELC Case No. E014 of 2023. The said items were taxed as drawn at Kshs. 5,000/=. The Applicant submits that service was done via email and therefore the amounts awarded are excessive.
122. In the judicial decision of *Aoro v Were* (Miscellaneous Reference Application E019 of 2022) [2022] KEHC 14628 (KLR) (31 October 2022) (Judgment) the Court held as follows;
- “The starting point herein is to point out that whereas Order 5 of the Civil Procedure Rules relates to service of summons, it applies mutatis mutandis to service of other Court processes, which include applications and related documents. This provision, it should be noted, was necessitated by the advent of Covid-19 pandemic which made it impossible for personal and even postal service of documents or Court processes.
54. For the above reasons, I hold that service via e-mail is still service and draws an award of Kshs. 1,400 in line with Paragraph 10 of schedule 7 of the Advocates Remuneration Order.” [Emphasis Mine]
123. In the present case, the provision of Schedule 6 paragraph 9 is applicable and it provides for a sum of Kshs. 1,400/= for service. My view is that the Taxing Officer erred in awarding Kshs. 5,000/= on items 11 and 12 of the Respondent's bill of costs and yet the Remuneration Order provides for a fee of Kshs. 1,400/=.



Disposition.

124. In view of the foregoing, this reference succeeds. Consequently,

a. The Taxing Officer's decision rendered on 17th October, 2023 pertaining to taxation of item No. 1, 4, 11 and 12 of the Bill of costs dated 18th July, 2023 is hereby set aside and the items taxed as follows:

i. Item No. 1 Kshs. 56,250/=

ii. Item No. 4 Kshs. 360/=

iii. Item No. 11 Kshs. 1400/=

iv. Item No. 12 Kshs. 1400/=

b. The Applicant shall have costs of the reference.

125. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 11TH DAY OF JULY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Wngu for Gitonga for the Applicant.

Mr. Koko for the Respondent.

Court Assistant; Mr. Joseph Makori.

