



**Amondi & Co Advocates v Oyieko (Miscellaneous Civil Application
E020 of 2023) [2024] KEELC 6529 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6529 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E020 OF 2023**

SO OKONG'O, J

OCTOBER 2, 2024

**IN THE MATTER OF A REFERENCE FROM THE DECISION OF
THE TAXING OFFICER HON. M. SHIMENGA DELIVERED ON 9TH
NOVEMBER 2023 IN THE ADVOCATE/CLIENT BILL OF COSTS**

BETWEEN

AMONDI & CO ADVOCATES APPLICANT

AND

JOHN OYARE OYIEKO RESPONDENT

***(Arising from the services rendered by the Applicant to the Respondent in Kisumu ELC No.
E014 of 2022 JOHN OYARE OYIEKO.....PLAINTIFF -
VERSUS- COUNTY GOVERNMENT OF KISUMU.....1ST DEFENDANT
KISUMU CITY MANAGEMENT BOARD.....2ND DEFENDANT)***

RULING

Background

1. The Applicant filed a suit on behalf of the Respondent against the County Government of Kisumu and the Kisumu City Management Board (hereinafter referred to as “Defendants in the primary suit”) on 11th April 2022 in Kisumu ELC No. E014 of 2022 seeking a permanent injunction restraining the Defendants in the primary suit from threatening or/otherwise interfering with the Respondent’s quiet possession of the parcels of land known as L.R No. 5/553, L.R No. 180/111 and L.R No. 416/166 (hereinafter referred to as “the suit properties”), and in the alternative, an order that the Defendants in the primary suit pays compensation to the Applicant for the suit properties if compulsorily acquired by the Government. The Respondent averred that he was the registered proprietor of the suit properties and that the Defendants in the primary suit had entered the suit properties and purported to develop the same without the consent of the Respondent and proceeded to exercise proprietary rights over the



- properties. The Respondent averred that the Defendants in the primary suit also purported to have compulsorily acquired the suit properties without any evidence of such acquisition.
2. The Defendants in the primary suit filed a statement of defence on 13th January 2023 denying the Respondent's claim in its entirety. The primary suit is pending a hearing before this court. In the meantime, the Respondent changed advocates in the primary suit on 17th July 2023 and appointed the firm of Odhiambo Ouma & Co. Advocates to act for him in place of the Applicant. Following that development, the Applicant filed its advocate/client bill of costs dated 24th July 2023 for taxation in Kisumu ELC Misc. No. E002 of 2023. The bill of costs was drawn in the sum of Kshs. 243,252,210/- of which the instruction fees (Item 1) was charged in the sum of Kshs. 104,820,000/-. The Applicant also claimed getting-up fees under the same item 1 in the sum of Kshs. 34,940,000/-. In justifying the instruction fees of Kshs. 104,820,000/-, the Applicant stated that the suit properties measured approximately 20 acres and were valued at Kshs. 350,000,000/- per acre bringing their total value to Kshs. 7,000,000,000/-. The getting-up fees was charged at 1/3 of the instruction fees.
 3. In her ruling delivered on 9th November 2023 which is the subject of this reference, the taxing officer taxed the Applicant's bill of costs at Kshs. 342,720.60. The taxing officer taxed the instruction fees at Kshs. 128,080/-. Getting-up fees being 1/3 of the instruction fees was taxed at Kshs. 42,693.33. While taxing the instruction fees at Kshs. 128,080/-, the taxing officer stated that although the Respondent had stated in his witness statement that the suit properties were valued at Kshs. 7,000,000,000/- on which the Applicant had based its claim for instruction fees, the Respondent had produced in the primary suit copies of Grants for the suit properties which indicated that the Respondent had acquired each property at a consideration of Kshs. 468,000/- each making a total of Kshs. 1,404,000/- for the tree properties. The taxing officer stated that she would base the instruction fees on this sum of Kshs. 1,404,000/- rather than the sum of Kshs. 7,000,000,000/- that the Applicant had relied on. It was on account of that that the taxing officer arrived at the instruction fees of Kshs. 128,080/-.

The reference

4. The Applicant was aggrieved with the said taxation and preferred this reference. In its Chamber Summons application dated 10th November 2023, the Applicant challenged only the taxation of the instruction fees and the getting up fees. The Applicant urged the court to set aside the same and have them taxed a fresh. The Applicant contended that the
5. taxing officer erred in basing the instruction fees on the said sum of Kshs. 1,404,000/- as the value of the subject matter of the suit rather than the sum of Kshs. 7,000,000,000/- which the Applicant claimed was the value of the subject matter of the suit at the time the primary suit was filed. The Applicant contended that the value of Kshs. 1,404,000/- that was relied on by the taxing officer was the standing premium that the Respondent had paid to the Department of Lands. The Applicant averred that the taxing officer committed an error of principle and that the award made by the taxing officer was manifestly low. The Applicant contended further that the taxing officer took into account irrelevant matters in determining the value of the subject matter of the primary suit thereby arriving at a wrong and manifestly low award.
6. The Applicant's application was not opposed by the Respondent. On 29th April 2024, the court directed that the application be argued by way of written submissions. The Applicant filed submissions dated 9th May 2024. In its submissions, the Applicant reiterated that the value of the subject matter of the primary suit was Kshs. 7,000,000,000/-. The Applicant submitted that this value was provided by the Respondent and it was what should have formed the basis for assessing instruction fees. In support of this submission, the Applicant cited *Joreth Limited v. Kigano & Associates* [2002]eKLR. The Applicant submitted that in basing her assessment of instruction fees on the sum of Kshs. 1,404,000/-



which was the stand premium paid by the Respondent to the Department of Lands for the suit properties which was not the pleaded value of the suit properties, the taxing officer committed an error of principle. The Applicant urged the court to find that the instruction fees of Kshs. 104,020,000/- and the getting-up fees of Kshs. 34,940,000/- that it had claimed in its bill of costs was in accordance with the scale.

Analysis and determination

7. In *Kipkorir, Tito & Kiara Advocates v. Deposit Protection Fund Board* [2005] eKLR the court stated as follows:

“ On 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.”

8. In *Kamunyori & Company Advocates v. Development Bank of Kenya Limited Civil Appeal No. 206 of 2006*[2015]eKLR, the court stated as follows:

“ .. 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 instruction fee is arrived at on the wrong principles, it will be set aside”

9. In *Joreth Limited v Kigano & Associates* (supra) the court stated that:

“C.K. Njai Esq. had declined to take into account the valuation letters proffered by Mr. Kigano to enable him to assess the capital value of the suit premises for the purposes of assessing the instruction fee. He said:

“Under item No. 1, the applicant charges Shs.13,500,000/=. In arriving at this amount he has estimated the value of the suit land at Shs. 1 billion. Two "opinions of value" have been tendered giving the average value of suit land as 1.2 Billion. These valuations or opinions as they are referred to are not (in the) pleadings. They cannot be relied on here. For a money value the subject matter of a suit to be the basis of assessing instruction fees, that value has to be ascertainable from the pleadings, judgment, or settlement. (See Schedule VIA1)."...

...In our view C.K. Njai quite correctly rejected the "opinions of value" as proffered by Mr. Kigano from the bar. These opinions are not evidence. In any event these relate to properties known as L.R. Nos. 4920/1 and 4921/1 as well as L.R. Nos. 4920 and 4921. The letter of 21st July, 1998 addressed to Mr. Kigano by Mr. R.K. Lang'at is really not a valuation..."

...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 judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such 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, any direction by the trial judge and all other relevant circumstances...

...What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.”

10. I have considered the Applicant’s application together with its submissions. The Applicant had a duty to satisfy this court that the taxing officer made an error of principle warranting interference by this court. From the facts giving rise to the dispute before the court that I have set out above, it is my finding that the taxing officer erred in her taxation of the Applicant’s bill of costs but for reasons somewhat different from those put forward by the Applicant. I agree with the Applicant that the taxing officer erred in her determination of the value of the subject matter of the primary suit but not because she failed to take into account the value of Kshs. 7,000,000,000/- which the Respondent had given in his witness statement as the value of the suit properties. As was held in *Joreth Limited v Kigano & Associates* (supra), the value of the subject matter of a suit for the purposes of taxation of a bill of costs should be determined from the pleadings, judgment or settlement if any and if the said value cannot be ascertained in that manner, the taxing officer would use his discretion to assess such instruction fee as he considers just.
11. I have perused the pleadings in the primary suit. The value of the subject matter of the suit was not ascertainable from the pleadings. The suit is still pending and as such there was no judgment or settlement on which the instruction fees could be based. The sum of Kshs. 7,000,000,000/- on which the Applicant based its instruction fees claimed in the bill of costs dated 24th July 2023 was not in any of the parties’ pleadings. A witness statement is not a pleading. The sum of Kshs. 1,404,000/- on which the taxing officer based her assessment of instruction fees at Kshs. 128,080/- was also not pleaded. The taxing officer obtained the said sum of Kshs. 1,404,000/- from copies of the Grants that the Respondent had attached to his affidavit in support of his interlocutory application in the primary suit. Neither the said affidavit nor Grants were pleadings.
12. Since the value of the subject matter of the primary suit could not be ascertained from the pleadings, judgment or settlement, the taxing officer should have used her discretion to assess such instruction fee as she would consider just taking into account, the nature and importance of the matter, the interest of the parties, the general conduct of the proceedings, and any direction given by the court.
13. Due to the foregoing, I am unable to fault the taxing officer for refusing to base her assessment of the instruction fees on the sum of Kshs. 7,000,000,000/- that was proposed by the Applicant. The taxing officer however erred in basing her assessment on the sum of Kshs. 1,404,000/- that was neither pleaded nor contained in a judgment or settlement in the primary suit. In the final analysis and for the foregoing reasons, it is my finding that the taxing officer committed an error of principle in taxing the instruction fees claimed in the Applicant’s bill of costs based on a value of the subject matter that was not pleaded instead of exercising her discretion to assess reasonable instruction fees.
14. In *Kipkorir Titoo & Kiara Advocates v. Deposit Protection Fund Board*(supra), the court stated as follows:

“ 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 v Ferrao* [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires.”



15. In *First American Bank of Kenya Ltd v. Gulab P Shah & Others* (2002)1 E.A. 61 the court stated that:

“I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”

16. As I have mentioned earlier, the Applicant challenged the taxation of two items only in the bill of costs dated 24th July 2023 namely; the instruction fees and getting-up fees. I am of the view that it will save the parties time and unnecessary costs if I deal with the matter with finality. The suit properties are situated within Kisumu City. The properties were acquired by the Respondent between June 2014 and January 2015 at a total consideration of Kshs. 1,404,000/-. The dispute between the Respondent and the Defendants in the primary suit arose in 2022, 7 years after the Respondent had acquired the suit properties. The suit properties must have appreciated in value at the time the primary suit was filed on 11th April 2022. Their value could not have remained Kshs. 1,404,000/- on which the taxing officer based her assessment of instruction fees. The suit properties had been unlawfully taken over by the Defendants in the primary suit. The Applicant was instructed to obtain a permanent injunction against the Defendants in the primary suit to restrain them from continued interference with the suit properties. Taking into account the nature and importance of the matter, the interest of the parties, the conduct of the primary suit, I agree with the Applicant that the award of Kshs. 128,080/- as instruction fees was manifestly low and warrants interference by this court. I would award the Applicant a sum of Kshs. 600,000/- as instruction fees. The getting up fees which is 1/3 of the instruction fees will come to Kshs. 200,000/-.

Conclusion

17. In conclusion, the ruling and orders made by the taxing officer, Hon. M. Shimenga on 9th November 2023 in respect of item 1 in the bill of costs dated 24th July 2023 are set aside. The instruction fees is taxed at Kshs. 600,000/- and getting-up fees at Kshs. 200,000/-. Item 1 of the bill is taxed at a total sum of Kshs. 800,000/-. The taxation of the other items in the said bill of costs shall remain the same save that VAT charged on fees shall be adjusted. The taxing officer shall compute the total costs payable to the Applicant afresh taking into account the re-taxation of item 1 of the bill and shall issue a fresh certificate of taxation to the Applicant.

DATED AND DELIVERED AT KISUMU ON THIS 2ND DAY OF OCTOBER 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nyambeki for the Applicant

N/A for the Respondent

Ms. J. Omondi-Court Assistant

