Kiattu & another v Muhika & 2 others (Environment & Land Case 410 of 2019) [2024] KEELC 6616 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6616 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 410 OF 2019

JO MBOYA, J

OCTOBER 9, 2024

BETWEEN

ROBERT MWANIA KIATTU ..... 1ST PLAINTIFF

LENAH MUTONGOI KIATTU ..... 2ND PLAINTIFF

AND

PETER NJENGA MUHIKA ..... 1ST DEFENDANT

AGNES MUGURE KIGATHI ..... 2ND DEFENDANT

THE LAND REGISTRAR ..... 3RD DEFENDANT

RULING

Introduction And Background

1. The Defendants/Applicants being aggrieved and dissatisfied with the ruling of the learned taxing officer delivered on the 24th March 2024 and the resultant certificate of taxation arising therefrom, have filed the reference beforehand and wherein the Applicants have sought for the following reliefs;

    i. That the Ruling of the Taxing Master [Hon. T. E Marienga] delivered on the 27th March 2024 in respect to the items No. 1[a], 1[b] and 2 of the 1st and 2nd Defendant's Party and Party Bill of Costs dated the 23rd October 2023 be reviewed and/or set aside.

    ii. That this honourable court be pleased to give such further directions and/or orders as it may deem fit in respect to the said Party and Party Bill of Costs.

    iii. That the costs of this application be awarded to the Applicant.

2. The Reference [which has been commenced by way of Notice of Motion and not Chamber Summons] is premised on various grounds which have been enumerated at the foot thereof. Furthermore, the

Reference is supported by the affidavit of one Peter Njenga Muhika, who is the 1st Defendant/ Applicant herein. For good measure, the supporting affidavit is sworn on the 8th April 2024.

3. Upon being served with the reference, the Plaintiffs/Respondents filed a replying affidavit sworn on the 11th June 2024 and wherein the deponent has contended that the reference before the court is not only misconceived but same does not raise any lawful/reasonable basis to warrant interreference with the certificate of taxation rendered by the taxing officer.

4. The Reference beforehand came up for hearing on the 22nd July 2024 whereupon the advocates for the respective parties covenanted to canvass and ventilate the reference by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

5. Suffice it to point out that the Applicants thereafter proceeded to and filed written submissions dated the 5th August 2024 whereas the Plaintiff/Respondents filed written submissions dated the 26th September 2024. The two [2] sets of written submissions form part of the record of the court.

Parties' Submissions:

Applicants'submissions:

6. The Applicants filed written submissions dated the 5th August 2024 and wherein same [Applicants] adopted the grounds contained at the foot of the Reference and also reiterated the contents of the supporting affidavit. In addition, the Applicants thereafter highlighted three [3] salient issues for consideration by the court.

7. Firstly, learned counsel for the Applicants has submitted that the learned taxing officer committed an error of principle and improperly exercised her discretion whilst taxing and awarding instruction fees due to the Applicants.

8. In particular, learned counsel for the Applicants has submitted that the learned taxing officer failed to appreciate that the value of the subject matter which was in dispute before the court was evident and discernible from the body of the pleadings that were filed. In this regard, learned counsel referenced the contents of the plaint dated the 20th December 2019 and wherein the Plaintiffs adverted to the value of Kes.35, 000, 000/=.

9. On the other hand, learned counsel for the Applicants also cited and referenced the counterclaim that had been filed by and on behalf of the Applicants. To this end, learned counsel cited and referenced the counterclaim dated the 21st February 2020 and which similarly alluded to the value of the suit property as well as the claim mounted on behalf of the Applicants.

10. Having referenced the pleadings [plaint and counterclaim] respectively, which were filed by the parties, learned counsel for the Applicants has contended that the learned taxing officer failed to appreciate the value of the subject matter and thus erred in adopting [sic] the sum of Kes.5, 000, 000/= as the basis for assessing and awarding instruction fees.

11. Based on the foregoing, learned counsel for the Applicants has submitted that the award of Kes.200, 000/= only as instruction fees, constitutes a serious error of principle and same is therefore erroneous.

12. Secondly, learned counsel for the Applicants has also submitted that the learned taxing officer also misapprehended the scope and extent of her jurisdiction in taxing costs when same [taxing officer] purported to hold that instruction fees can only be awarded once, despite the fact that the Applicants herein had been awarded costs in respect of both the plaint [suit] and the counterclaim [cross-suit].

13. In particular, learned counsel for the Applicants has submitted that in failing to appreciate that the Applicants were entitled to instructions fees on account of the plaint as well as instruction fees on account of the counterclaim, the learned taxing officer misapprehended the import and tenor of the judgment of the court.

14. Thirdly, learned counsel for the Applicants has also submitted that having erred in assessing and awarding instruction fees payable to the Applicants, the learned taxing officer arrived at an erroneous award on account of getting up fees which constitutes a percentage [fraction] of the instruction fees.

15. All in all, learned counsel for the Applicants has submitted that the learned taxing officer therefore took into account erroneous factors; failed to take into account relevant material and thus proceeded to exercise her discretion in a manner contrary to the Advocate Remuneration Order.

16. Arising from the foregoing, learned counsel for the Applicants has therefore contended that the learned taxing officer improperly exercised her discretion and in so doing returned an award of instruction fees and fees for getting, which are manifestly low and thus same constitutes an error of principle.

17. In support of the contention that the learned taxing officer improperly exercised her discretion and therefore committed an error of principle, learned counsel for the Applicants has cited and referenced the decision in First American Bank of Kenya v Shah & Others [2002] 1 EA 64. In addition, learned counsel has also cited judicial hints on Civil Procedure, second Edition by Justice [retired] Richard Kuloba.

18. Flowing from the foregoing submissions, learned counsel for the Applicants has therefore implored the court to find and hold that the Applicants have established and demonstrated sufficient basis to warrant the impeachment of the certificate of taxation issued by the taxing officer.

Respondent's Submissions:

19. The Respondents filed written submissions dated the 26th September 2024; and wherein the Respondents have reiterated the contents of the replying affidavit sworn on the 11th June 2024. Furthermore, the Respondents have thereafter highlighted and canvassed two [2] salient issues for consideration by the court.

20. First and foremost, learned counsel for the Plaintiffs/Respondents has submitted that the learned taxing officer correctly exercised her judicial discretion in taxing the instructions fees that was due and payable to the Applicants herein. In particular, it was contended that the learned taxing officer applied the value of Kes.5,000,000 only, for purposes of taxation on instruction fees because the Applicants had posited that the suit property was purchased/acquired at the sum of Kes.5,000,000 only.

21. To this end, learned counsel for the Respondent has contended that in adopting and applying the sum of Kes.5,000,000 only, as the value of the suit property for purposes of assessing instruction fees, the learned taxing officer did not commit any error of principle.

22. Secondly, learned counsel for the Respondents has submitted that having correctly assessed and awarded instruction fees, the learned taxing officer was duty bound to apply 1/3 [One third] fraction in calculating and computing the amount payable on account of getting up fees.

23. Thirdly, learned counsel for the Plaintiffs/Respondents have contended that the learned taxing officer was right in finding and holding that the Applicants herein could not claim and charge double instruction fees. In this respect, learned counsel for the Respondents contended that it is trite law that instruction fees are only charged once upon receiving instructions from the client.

24. According to learned counsel for the Respondents the Applicants herein can therefore not be allowed to claim and charge instruction fees for Defending the Plaintiff's suit and at the same time for prosecuting the counterclaim.

25. To support the submissions, that instruction fees are only chargeable once upon receipt of instructions from the client, learned counsel for the Respondent has cited and referenced the holding in the case of Joreth Ltd v Kigano & Associate [2002]eKLR.

26. In a nutshell, learned counsel for the Respondent has contended that the Applicants herein have neither established and demonstrated any error of principle that was committed by the learned taxing officer to warrant interference with the exercise of discretion by the said taxing officer.

27. At any rate, learned counsel for the Respondents has posited that the court can only interfere with the certificate of taxation in circumscribed circumstances and not otherwise. In this regard, counsel for the Respondents has cited and referenced inter-alia Joreth Ltd v Kigano & Associate [2002]eKLR, Kipkorir Tito & Kiara Advocates v Deposit Protection Fund Board [2005]eKLR and First American Bank Ltd v Shah [2002] EA 64.

28. Based on the foregoing, learned counsel for the Respondents has invited the court to find and hold that the Applicants herein have not met the requisite threshold to warrant the review and/or setting aside the certificate of taxation.

Issues For Determination:

29. Having reviewed the reference beforehand and the response thereto and upon taking into account the written submissions filed by the Advocates for the respective parties, the following issues do crystalize [emerge] and are thus worthy of determination;

    i. Whether the learned taxing officer correctly appreciated and apprehended the nature of the pleadings underpinning the suit and whether same [taxing officer] applied the correct principles in assessing instructions fees.

    ii. Whether the learned taxing officer committed an error of principle and if so, whether the certificate of taxation ought to be set aside.

Analysis And Determination

Issue Number 1 Whether the learned taxing officer correctly appreciated and apprehended the nature of the pleadings underpinning the suit and whether same [taxing officer] applied the correct principles in assessing instructions fees.

30. The instant suit was filed and/or lodged by the Plaintiff's/Respondents herein vide plaint dated the 20th December 2019 and wherein the Plaintiffs sought for a plethora of reliefs touching and concerning L.R No. Nairobi Block 112/180, Runda Mimosa – Nairobi.

31. Vide the plaint under reference, the Plaintiffs sought for the following reliefs;

    i. A Declaration that the Plaintiffs' are the Bona-fide registered Proprietors of L.R Block 112/180 Runda Mimosa, Nairobi.

    ii. A Declaration that the Certificate of Lease issued on 17th of October 1991 is the valid and genuine title to the suit property.

iii. A Declaration that any Certificate of Lease issued to the 1st and 2nd Defendants is null and void and for order the cancellation of the 1st and 2nd Defendants' Title Deed.

iv. An Order of Eviction be issued against the 1st and 2nd Defendants.

v. A Permanent Injunction restraining the 1st and 2nd Defendants whether by themselves, servants, agents, representatives and or employees or anyone claiming under them howsoever from charging, selling, re-entering, taking possession, remaining thereon, erecting or continuing to erect any building or structures upon Nairobi/Block 112/180, or in any way interfering with the Plaintiffs quiet possession and enjoyment of the suit property.

vi. Mesne profits.

vii. In alternative Kshs.35,000,000/- being the current value of the suit property .[Underlining supplied for emphasis].

viii. Costs of the suit.

ix. Any other Relief the court deems fit.

32. Upon being served with the plaint and summons to enter appearance, the 1st and 2nd Defendants herein duly entered appearance and thereafter filed a statement of defence and counterclaim dated the 21st February 2020 and in respect of which the Defendants sought for the following reliefs;

a. A Declaration that the 1st and 2nd Defendants are the bona-fide purchasers for valuable consideration and the lawful registered Proprietors of all that Property known as Land Reference No. Nairobi/Block 112/180 Runda Mimosa, Nairobi.

b. A Declaration that the Certificate of Lease issued on 7th October 1991 in favor of the Plaintiffs in respect of all that Property known as Land Reference No. Nairobi/Block 112/180 Runda Mimosa, Nairobi is invalid, unlawful, null and void and the 3rd Defendant be directed to cancel the said Title forthwith and unconditionally.

c. A Permanent Injunction restraining the Plaintiffs and each of them whether by themselves, their servants or authorized agents or any person claiming under them from entering, taking possession, claiming and/or from interfering with the 1st and 2nd Defendants quiet possession and enjoyment of all that Property known as Land Reference No. Nairobi/Block 112/180 Runda Mimosa, Nairobi.

d. In the alternative to Prayer (a) and (b) above, the 3rd and 4th Defendants be ordered to compensate the 1st and 2nd Defendants and consequently, Judgment be entered against the 3rd and 4th Defendants jointly and severally for the total sum of Kshs. 45,820,015/= Only, in terms of Paragraph 35 above

e. In further alternative, General Damages against the 3rd and 4th Defendants jointly and severally for Misrepresentation, Loss and Inconvenience suffered by the 1st and 2nd Defendants towards the acquirement of the suit property and the Quantum of such damages be assessed by this Honourable Court.

f. Costs of this suit and the Counter- claim be borne by the Plaintiffs and/or the Defendants in the Counter-claim.

g. Any other or further relief such as this Honourable Court may deem fit and just to grant.

33. The plaint and the counterclaim [which have been referenced in the preceding paragraphs] constitute the pleadings that were filed by and on behalf of the respective parties. In this regard, it was incumbent upon the taxing officer to take cognizance of the said pleadings in her endeavour to discern whether or not the value of the suit property was discernible from the pleadings.

34. To my mind, the value of the suit property was well adverted to and disclosed by the Plaintiffs themselves. For good measure, the Plaintiffs herein had sought to be declared as the lawful proprietors of the suit property or in the alternative, to be paid the sum of Kes.35, 000, 000/= only being the current value of the suit property.

35. There is no gainsaying that the Plaintiffs themselves confirm and acknowledge that the suit property which was being disputed had a market value. Further and in any event, the Plaintiffs themselves ventured forward and disclosed the current market value of the property.

36. Other than the foregoing, it is not lost on this court that the 1st and 2nd Defendants also appreciated that the suit property had a market value and in their [Defendant's] counterclaim, the Defendants also adverted to a monetary claim pertaining to and concerning the suit property.

37. From the pleadings filed, there is no gainsaying that the value of the subject matter is well delineated and disclosed. In this regard, it was the obligation of the learned taxing officer to peruse the said pleadings and thereafter to deploy the disclosed value of the suit property in determining the correct instruction fees, payable to the Applicants.

38. Notwithstanding the fact that the value of the suit property was discernible [evident] from the face of the pleadings, the learned taxing officer went on an a frolic of her own in deploying and relying part of the documents [Exhibits] which was tendered as evidence on behalf of the Applicants herein.

39. To this end, it is apposite, to reproduce the pertinent aspect of the ruling by the learned taxing officer which culminated into the usage of Kes.5, 000, 000/= as the value of the suit property.

40. Same stated as hereunder;

> " 9. 9. In the Joreth case, the Court held that the value of the subject matter can be determined from the pleadings, judgment or settlement between parties. from the pleadings in the court file there are two distinct valuations for the subject property provided for by the Plaintiff and the 1" and 2nd Defendants. From the submissions by the Plaintiff, the Plaintiff urges the court to use the Plaintiff's valuation report which provides for Kshs 35,000,000/- which is the subject value of the award sought in the plaint. The Plaintiff also submitted that in the alternative the Court may use the valuation report of the 1" and 2nd Defendants. There is no consensus on the valuation reports and therefore I am unable to use them to determine the instruction fees. However, I find that among the l" and 2nd Defendants documents is an agreement for sale dated 24t January 2007 which provides for the purchase of the suit property at Kshs 5,000,000/-. This will be the subject value for the instruction fees". [emphasis supplied].

41. I do not understand how the learned taxing officer chose to rely on and or predicate her assessment of instruction fees on an exhibit, namely, the sale agreement dated the 24th January 2007 whereas it is common ground that an exhibit is not a pleading. Quite clearly, the determination as to whether or not

the subject property had a value could only be arrived at by taking into account either the pleadings filed, the judgment, if any or the settlement, where apposite.

42. Furthermore, it is my humble view that there is a clear dichotomy between what constitutes a pleading and what constitutes evidence [documents]. To my mind, a document [read an exhibit] cannot be conflated with a pleading.

43. In this regard, I can do no better than to cite and reference the decision of the Court of Appeal in the case of *Superior Homes (Kenya) PLC v Water Resources Authority & 9 others (Civil Appeal E330 of 2020*) [2024] KECA 1102 (KLR) (19 August 2024) (Judgment), where the court stated and held thus;

> Section 2 of the *Civil Procedure Act* defines "pleading" as follows:"pleading" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."From the above, an affidavit is not a pleading, and alleged special damages set out in an affidavit cannot be considered as pleaded special damages. Indeed, in Stephen Boro Githua v. Family Finance Building Society & 3 Others [2015] eKLR this Court held that:"As is trite law the contents of an affidavit constitute evidence on oath. An affidavit does not constitute a pleading. A pleading includes a summons, petition, a statement of claim or demand or a defence, a reply to a defence or counterclaim, all of which are subject to amendment, unlike an affidavit, which is evidence."

44. Without belabouring the point, the obligation of the learned taxing officer was to discern or decipher whether the value of the suit property was evident from the face of the pleadings and if so, to proceed and deploy same as the benchmark for the taxation of the instruction fees.

45. Certainly and to my mind, the learned taxing officer was not at liberty to resort to her own device and engage in the business of looking at the consideration that was paid at the foot of the sale agreement. In any event, the sale agreement alluded to was entered into many years prior to the filing of the suit.

46. To underscore the position, that the learned taxing officer was obligated to look at the pleadings and not exhibits in ascertaining the value of the suit property, it suffices to cite and reference the holding in Joreth Ltd v Kigano & Associates Advocates [2002]eKLR, where the court stated and held thus;

> 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.

47. Likewise, the significance of pleadings in determining the value of the suit property, where apposite and thereafter deploying same as a basis [benchmark] for taxing instruction fees was re-visited in the case of Peter Muthoka v Ochieng & 3 Others [2019]eKLR.

48. For coherence, the court of appeal stated as hereunder;

> It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent 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 subject value. Once judgment has been entered, and for what seems to us to be an obvious reason,

> recourse will not be had to the 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 the pleadings where there is a settlement.
>
> 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 provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily 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 the taxing officer 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.

49. Flowing from the foregoing analysis, my answer to issue number one [1] is twofold. Firstly, the learned taxing officer conflated an exhibit, namely a sale agreement which was entered into on the 24th January 2007 with a pleading. Simply put, the learned taxing officer misapprehended the dichotomy between a pleading and an ordinary document.

50. Secondly, the learned taxing officer failed to appreciate the nature of the pleadings that were filed in respect of the instant matter and the obvious fact that the value of the suit property was disclosed and evident on the face of the pleadings.

Issue Number 2 Whether the learned taxing officer committed an error of principle and if so whether the certificate of taxation ought to be set aside.

51. It is common ground that issues pertaining taxation fall within the technical competence and discretion of the learned taxing officer. In this regard, the courts are called upon to exercise restraint and defer to the taxing officers on matters pertaining to taxation. However, it is imperative to state and observe that courts are still bestowed with jurisdiction to interfere with the certificate of taxation and by extension the discretion of the taxing officer, where it is demonstrated that the taxing officer committed an error of principle.

52. The scope of the jurisdiction of the court and the circumstance where the court can interfere with the exercise of the discretion of the taxing officer and by extension the certificate of taxation, have been elaborated in a plethora of decisions. In this regard, it suffices to cite and reference the decision in Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR, where the court of appeal stated and held 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. 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".

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see Arthur v Nyeri Electricity Undertaking (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji v Kanji Naran Patel (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle.

53. Further, in the case of Attorney General of Kenya v Peter Anyang Nyong'o & 9 Others Taxation Reference No. 5 of 2010 [East African Court of Justice], the court stated thus;

Firstly, that I am not travelling in a virgin land in this legal field, as there is a plethora of persuasive authorities from national courts which say the following:

(a) As a general rule the allowance for instruction fee is a matter peculiarly in the taxing officer's discretion and courts are reluctant to interfere into that discretion unless it has been exercised injudiciously. As stated in the Premachand's Case (supra) and by this Court in January 15, 2010 Modern Holdings (EA) Limited V Kenya Ports Authority – Taxation References No. 4 of 2010 (Kenya Ports Authority V Modern Holdings Ltd)

(b) A judge will not alter a fee allowed by a taxing officer merely because in his opinion he should have allowed a higher or lower amount (See: Kenya Ports Authority's Case (supra) which had followed the decision in Bank Of Uganda V. Banco Arabi Espaniol, Application No. 29 of 1999 of the Supreme Court of Uganda.

(c) Even if it is shown that the taxing officer erred on principle, the judge should interfere only o being satisfied that the error substantially affected the decision of quantum and that upholding the amount allowed would cause injustice to one of the parties (See BAnk Of Uganda's Case (supra) And Kenya Ports Authority (supra) to mention just a few decisions on this point.

54. Likewise, the circumscribed jurisdiction of the court whilst dealing with a reference arising from a taxation was also underscored by the court of appeal in the case of Peter Muthoka v Ochieng & 3 Others [2019]eKLR, where the court held as hereunder;

It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in Mbogo -vs- Shah (Supra), then the decision though discretionary, may properly be interfered with.

55. Duly guided by the ratio decidendi elucidated in the various decisions [supra], it is now appropriate to revert to the subject matter and to discern whether the learned taxing officer committed an error of principle in the course of taxing the Applicants' bill of costs or otherwise.

56. To start with, I have pointed out whilst dealing with issue number one that the learned taxing officer misapprehended the nature of the pleadings that were filed in respect of the instant matter and as a result of the misapprehension, the learned taxing officer failed to deploy the disclosed monetary value of the suit property as the benchmark for ascertaining instruction fees.

57. Arising from the foregoing misapprehension, the learned taxing officer resorted to and deployed the sum of Kes.5, 000, 000/= as the benchmark for determining instructions fees, which constitutes a serious error of principle. For the umpteenth time, it suffices to underscore that it was not open for the learned taxing officer to scavage through the documents filed and to rely on the sale agreement as [sic] evidencing the value of the suit property.

58. At any rate, it is worth pointing out that the sale agreement which the learned taxing officer resorted to and deployed as the benchmark for ascertaining the value of the suit property was entered into and executed on the 24th January 2007, whereas the suit beforehand was filed in the year 2019. In this regard, the reliance on the sale agreement, which was erroneous, did not reflect the correct market value of the suit property as at the time of the filing of the suit.

59. Secondly, the learned taxing officer proceeded to and assessed instruction fees in respect of the defence of the suit that was filed by the Plaintiffs. However, the learned taxing officer failed and/or neglected to assess instruction fees as pertains to the counterclaim which was filed by the Defendants.

60. According to the learned taxing officer, instructions fees are only chargeable once and therefore having charged/claimed instructions fees on account of defending the suit [filed vide plaint] the Applicants herein could not be heard to lay a further claim on account of instruction fees pertaining to the counterclaim.

61. To my mind, the learned taxing officer failed to appreciate that there were two separate suits beforehand, namely, the suit commenced vide plaint and on the other hand, the cross suit commenced vide the counterclaim. Instructively, the Defendant's counsel took instructions on two accounts and thus same was at liberty to charge instructions fees twice.

62. Put differently, the Advocate for the Applicants herein was entitled to charge instructions fees for defending the suit filed by the Plaintiffs/Respondents. For good measure, the instructions fees for defending the suit, is separate from the instruction fees for mounting the cross suit [counterclaim].

63. Similarly, the advocates for the Defendant/Applicants was entitled to charge instructions fees for the counterclaim [cross suit], separate from the instruction fees that was charged for defending the suit. In this respect, it cannot be said that the Applicants were guilty for duplicating instruction fees or charging double instruction fees, in the manner posited by learned counsel for the Plaintiffs/Respondents.

64. To underscore the position that a counterclaim is a cross suit, which is separate and distinct from the suit, it suffices to cite and reference the decision in the case of Ocean Engineering Works Ltd & another v *SBM Bank of Kenya Ltd (Civil Appeal 112 of 2021)* [2024] KEELC 4724 (KLR) (5 June 2024) (Ruling), where the court held as hereunder;

> 36. The Court of Appeal case of the "County Government of Kilifi – Versus - Mombasa Cement Limited [2017] eKLR", the Court held that the provision of Order 7 Rule 3 of the Civil Procedure Rules, 2010 that allows a Defendant

> to file a Counter - Claim or set - off, is silent on the effect such a Counterclaim must be related to the original subject matter of the suit. Further, on the proposition that a Counter - Claim stands independent of a suit, the Court relies on the "Indian Supreme Court case of Sh. Jag Mohan Chawla & another – Versus - Dera Radha Swami Satsang & Ors", the Court held that a counterclaim can be treated as a cross suit. If it is a cross suit, as long as it was instituted within time, its existence should not necessarily depend on that of the suit. It breathes its own life and can bring forth the life of a judgment or decision of a court independent of the suit. Thus, I find the case of:- "Beatrice Mumbi Wamahiu – Versus - Mobil Oil Kenya Limited [2011] eKLR" to fully summarise and makes the final conclusion on this issue. It was held that:-".....the withdrawal of the main suit did not affect the Counter - Claim. A Counter - Claim is treated as a separate suit under Section 35 of the *Limitation of Actions Act* hence its survival cannot be pegged on the pendency of the primary suit."

65. Other than the foregoing, it is also apparent that insofar as the learned taxing officer misapprehended the basic rule pertaining to assessment of instruction fees and coupled with the finding that instruction fees could not be chargeable twice [meaning, that the Applicants could not charge instruction fees for defending the suit and mounting the counterclaim] the learned taxing officer committed yet another error as pertains to the question of getting up fees.

66. I beg to underscore that getting up fees is provided for and same is chargeable at 1/3 [One third] of the instruction's fees. In this regard, the Defendants/Applicants, who are the successful party would be obliged to charge getting up fees as pertains the hearing of the suit as well as getting up fees for the hearing of the counterclaim.

67. Without belabouring the point as pertain to the circumstances under which getting up fees is chargeable; it suffices to reproduce the provisions of Schedule 6 of the Advocates Remuneration Order which underpins the charging of getting up fees.

68. Same provides as hereunder;

> 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;
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> 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;
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> 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.

69. In view of the foregoing, my answer to issue number two [2] is threefold. Firstly, the learned taxing officer took into account extraneous material and factors, namely the consideration adverted to at the foot of the sale agreement dated the 24th January 2007 in assessing and awarding instruction fees.

70. Secondly, the learned taxing officer ignored and disregarded the contents of the pleadings which were filed by the parties and wherein the value of the subject dispute was evident and discernible. In this regard, the learned taxing officer disregarded relevant material which ought to have been taken into account.

71. Thirdly, the learned taxing officer, committed an error of principle in proceeding to ignore and disregard the terms and tenor of the judgment of the court which essentially decreed that the Applicants were entitled to costs of the suit as well as the costs of the counterclaim.

72. Quite clearly, the ruling rendered by the taxing officer technically varied the terms of the judgment of the court, which is legally unacceptable. [See the doctrine of stare decisis. See also the decision in Dodhia v National & Grindlays Bank [1970] EA 195.

Final Disposition:

73. Flowing from the discussion [details highlighted in the body of the ruling] it is evident and apparent that Applicants herein have been able to demonstrate that the learned taxing officer took into account irrelevant factors; failed to take into account relevant material and thus improperly exercised her discretion.

74. In the premises, I find and hold that the reference beforehand is meritorious. Consequently, I proceed to and make the following orders;

    i. The Reference [Notice of Motion Application] dated the April 8, 2024 be and is hereby allowed.

    ii. The Ruling of the Taxing officer rendered on the March 27, 2024 and the consequential certificate of taxation be and are hereby set aside.

    iii. The Applicants Bill of Costs dated the October 23, 2023 be and is hereby remitted for taxation before the taxing officer of the court other than Hon. Tessy Marienga [DR] whose decision has been impugned.

    iv. The taxing officer shall proceed to tax or retax the specific items relating to instruction fees on the suit, counterclaim and the attendant fees for getting up in line with the directions contained in the body of the ruling.

    v. Costs of the Reference be and are hereby awarded to the Applicants. In any event, same are hereby assessed and certified in the sum of Kes.25, 000/= only.

75. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. Kang'ethe for the 1st and 2nd Defendants/Applicants

Mr. Gekonge for the Plaintiffs/Respondent

N/A for the 3rd Defendant/Respondent