Shamji Kaylan Pindoria Limited v National Land Commission; Kenya Railways Corporation & 2 others (Interested Parties) (Environment and Land Miscellaneous Application E103 of 2023) [2024] KEELC 13525 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13525 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E103 OF 2023

JO MBOYA, J

NOVEMBER 7, 2024

BETWEEN

SHAMJI KAYLAN PINDORIA LIMITED ..... APPLICANT

AND

NATIONAL LAND COMMISSION ..... RESPONDENT

AND

KENYA RAILWAYS CORPORATION ..... INTERESTED PARTY

CHINA ROAD AND BRIDGE CORPORATION ..... INTERESTED PARTY

THE HON. ATTORNEY GENERAL ..... INTERESTED PARTY

RULING

Introduction and Background

1. The subject matter was commenced and/or filed by the Applicant in terms of the Notice of Motion Application dated 18th April 2023; and wherein the Applicant had sought for an order for the adoption of the compensation award, which was given to the Applicant and arising from the compulsory acquisition of L.R No's 209/12272 and 209/12273, respectively.

2. Following the filing of the Notice of Motion Application [details in terms of the preceding paragraph], the court heard the application culminating into the adoption of the award[s] that had been awarded by National Land Commission.

3. Nevertheless, it appears that a dispute arose between the Applicant and her advocates culminating into the advocate filing [sic] an advocate client bill of costs. Suffice it to point out that the impugned advocate client bill of costs was filed in respect of the instant matter and not in accordance with the provisions of the *Advocates Act*, Chapter 16 Laws of Kenya.

4. For good measure, there is no gainsaying that an advocate who is desirous to tax an advocate-client bill of costs is enjoined by the provisions of Sections 48 of the *Advocates Act* and Rule 13 of the Advocates Remuneration Order, to file a separate Miscellaneous Application between the Advocate and the Client. Instructively, the Advocate Client Bill of Cost cannot be filed in the substantive suit or matter.

5. Be that as it may, the advocate -client bill of costs in respect of the instant matter was filed in the main proceedings and thereafter the learned taxing officer proceeded to and entertained the bill of costs. Notably, the advocate- client bill of costs was disposed of vide ruling rendered on 11th June 2024; and which is the ruling that underpins the reference beforehand.

6. Vide Chamber Summons Application [Reference] dated 5th July 2024, the Applicant/Client has sought for the following reliefs;

    i. That the decision by the Learned Deputy Registrar dated 11th June 2024 be set aside and the Advocate-Client Bill of Costs dated 7th February 2024 be taxed afresh or the court be pleased to make such other orders as it may deem fit;

    ii. That the Honourable Court be and is hereby pleased to extend time within which to file this Reference in the event that it was not filed timeously;

    iii. That costs of this Application be provided for.

7. The Chamber Summons application [reference] is anchored on the various grounds which have been enumerated in the body thereof. Furthermore, the reference has been supported by the affidavit Jayesh Vijay Patel sworn on 5th July 2024. Suffice it to point out that the deponent has annexed thereto a total of four [4] documents including a copy of the impugned ruling and the notice of objection to taxation.

8. Upon being served with the reference, the advocate, namely, M/s Brian Khaemba Kamau Kamau & Co Advocates responded thereto vide a replying affidavit sworn by Brian Khaemba, advocate. Instructively, the deponent of the replying affidavit has contended that the reference has been filed out of time and in any event, the taxing officer applied the correct scale in taxing the advocate- client bill of costs.

9. First forward, the reference beforehand came up for directions on 9th October 2024 whereupon the advocates for the parties covenanted to canvass the reference by way of written submissions. In this respect, the court thereafter proceeded to and adopted the agreement by the parties. Additionally, the Court also circumscribed the timelines for the filing and exchange of the written submissions.

10. Pursuant to the foregoing directions, the Applicant/Client filed written submissions dated 19th October 2024 whereas the Advocate filed written submissions dated 24th October 2024.

11. Other than the Applicant and the Advocate, the Honourable Attorney General, who was joined in the original proceedings as an interested party also filed written submissions. For coherence, the submissions on behalf of the honourable attorney general are dated on 28th October 2024.

Parties' Submissions:

a. Applicant's Submissions:

12. The Applicant/Client filed written submissions dated 19th October 2024 and wherein same [Applicant] has adopted the grounds contained at the foot of the reference as well as the averments contained in the body of the supporting affidavit. Thereafter, the Applicant has highlighted and canvassed two [2] salient issues for consideration and determination by the court.

13. Firstly, the Applicant has submitted that the ruling in respect of the bill of costs was delivered on 11th June 2024. However, the Applicant herein was never availed a copy of the ruling immediately upon the delivery. Additionally, learned counsel for the Applicant has submitted that following the delivery of the ruling, the Applicant generated a letter dated 12th June 2024, seeking to be availed a copy of the ruling.

14. Furthermore, learned counsel for the Applicant has submitted that a copy of the ruling was ultimately availed to the Applicant on 23rd June 2024. Upon procuring a copy of the ruling, learned counsel for the Applicant has contended that the Applicant felt aggrieved and thereafter instructed same [counsel] to lodge a notice of objection to taxation.

15. Arising from the instructions, learned counsel has posited that same thereafter proceeded to and lodged a notice of objection to taxation. For coherence, it was contended that the notice of objection to taxation was lodged on 24th June 2024. In this regard, it has been contended that the notice of objection to taxation was lodged within 14 days in accordance with the provisions of Rule 11[1] of the Advocates Remuneration Order.

16. Other than the foregoing, learned counsel for the Applicant has submitted that same proceeded to and filed the reference on 5th July 2024. In this regard, it has thus been contended that the reference was therefore filed within the prescribed timelines. To this end, the Applicant has cited and referenced Rule 11[2] of the Advocates Remuneration Order.

17. In a nutshell, learned counsel for the Applicant has submitted that the Reference beforehand was filed timeously and within the prescribed duration. Consequently and in this regard, the court has been invited to find and hold that the reference was not filed out of time.

18. Secondly, learned counsel for the Applicant has submitted that the learned taxing officer committed several errors of commission and omission. Furthermore, it has been contended that the ruling of the learned taxing officer and the consequential certificate of taxation, are wrought with serious errors of principles.

19. Additionally, learned counsel for the Applicant has submitted that the learned taxing officer proceeded to tax the instruction fees as if what had hitherto been filed was a substantive suit yet, what was filed before the court was a miscellaneous application. In this regard, it has been contended that the taxing officer adopted and applied wrong provisions of the Advocate Remuneration Order in reckoning and computing the instruction fees.

20. Learned counsel for the Applicant has further submitted that the learned taxing officer also erred in law in proceeding to award and assess fees for getting up. Nevertheless, it has been contended that the original proceedings were prosecuted on the basis of affidavit evidence and there was no confirmed hearing in the conventional manner.

21. On the other hand, learned counsel for the Applicant has also submitted that other than adopting and applying the wrong provisions of the Advocates Remuneration Order, 2014, the learned taxing officer also went on a frolic of his own in subjecting each and every singular item to increment by half. In this regard, it has been contended that the learned taxing officer even increased disbursement by half.

22. It was the further submissions by learned counsel for the Applicant that the learned taxing officer also abused his discretion whilst assessing instruction fees payable on garnishee proceedings. In this regard, it was contended that whereas the basic instruction fees for garnishee proceedings is kes.14, 000/= only, the learned taxing officer proceeded to and awarded an astronomical figure of kes.2, 573, 828.42/

= only. For coherence, it has been submitted that the upgrading of the basic instruction's fees from Kes.14, 000/= to Kes.2, 573, 828.42/= only, represent improper and injudicious exercise of discretion.

23. On the other hand, learned counsel for the Applicant thereafter proceeded to canvass and argue each and every singular item impugned at the foot of the Notice of Objection to Taxation. Interestingly, learned counsel for the Applicant has proceeded as if this court is performing the functions of a taxing officer and thus shall engage with the nitty-gritties of taxation

24. Arising from the foregoing submissions, learned counsel for the Applicant has therefore invited the court to find and hold that the ruling by the learned taxing officer and the resultant certificate of taxation, are vitiated and thus warrants being reviewed and set aside.

b. Respondent's Submissions:

25. The Respondent filed written submissions dated 24th October 2024 and wherein same [Respondent] has adopted and reiterated the contents of the replying affidavit and thereafter highlighted two[2] salient issues for consideration by the court.

26. First and foremost, learned counsel for the Respondent has submitted that the reference beforehand has been filed outside the prescribed timeline and hence same [reference] ought to be struck out. In this regard, learned counsel for the Respondent has invited the court to take cognizance of the provisions of Rule 11[1] and Rule 11[2] of the Advocates Remuneration Order.

27. Secondly, learned counsel for the Respondent has submitted that the learned taxing officer was properly guided by the Advocate Remuneration Order 2014 and the various decided case law and same exercised his judicial discretion in accordance with the law. In this regard, it has been contended that the taxation and ultimate award of costs in favour of the Respondent was undertaken in accordance with the settled principles.

28. Furthermore, learned counsel for the Respondent has also submitted that it was incumbent upon the Applicant to establish and demonstrate the error of principle, if any, that affects the ruling and the certificate of taxation. However, it has been contended that the Applicant herein has failed to establish any error of principle to warrant the intervention of the court.

29. Other than the contention that the learned taxing officer adopted and deployed the correct approach in taxing the bill of costs, learned counsel for the Respondent has thereafter ventured forward to address each and every item that has been challenged. Just like the Applicant, the Respondent herein has also canvassed his written submissions as if this court is undertaking re-taxation of the bill of costs. However, it is instructive to point out that the mandate of the judge whilst handling a reference is well circumscribed under the law.

30. Be that as it may, learned counsel for the Respondent has contended that the application [reference] by the Applicant is not only misconceived but same is legally untenable. In this regard, the court has been invited to strike out the reference with costs.

c. Interested Party's Submissions:

31. The interested party filed written submissions dated 28th October 2024 and wherein same has raised and canvassed two [2] issues for consideration.

32. Firstly, the interested party herein has submitted that the Applicant duly filed and served a notice of objection to taxation dated 24th June 2024. In addition, it has been contended that having filed the

notice of objection to taxation on 24th June 2024, the Applicant herein was at liberty to await for the reasons for taxation.

33. Nevertheless, insofar as the reasons for taxation were contained and evident at the foot of the ruling, it was contended that the Applicant was within the law to proceed and file the reference within 14 days from the date of lodgement of the notice of objection to taxation.

34. According to learned counsel for the interested party, the reference beforehand has been filed timeously and in accordance with the provisions of Rule 11[2] of the Advocates Remuneration Order. Simply put, learned counsel for the interested party has submitted that the reference is lawful and ought to be determined on merit.

35. Secondly, learned counsel for the interested party has submitted that the ruling and the resultant certificate of taxation, contain several errors of law and hence same is illegal. In particular, learned counsel for the interested party has isolated the inappropriate application of the Advocate Remuneration Order, award of fees for getting up, multiplication of disbursements and the improper assessment of instructions fees for garnishee proceedings.

36. Flowing from the foregoing, learned counsel for the interested party has submitted that the learned taxing officer improperly exercised his discretion and thereafter arrived at an erroneous conclusion. To this end, the court has been invited to vary and set aside the certificate of taxation.

Issues For Determination:

37. Having reviewed the Chamber Summons application [reference] and the responses thereto and upon the consideration of the written submissions filed on behalf of the parties, the following issues do emerge and are thus worthy of determination;

    i. Whether the Application [Reference] was filed within the prescribed timelines and in accordance with Rule 11[2] of the Advocates Remuneration Order or otherwise.

    ii. Whether the Applicant has established and demonstrated the existence of errors of principle that vitiates the certificate of taxation or otherwise.

Analysis And Determination

Issue Number 1 Whether the Application [Reference] was filed within the prescribed timelines and in accordance with Rule 11[2] of the Advocates Remuneration Order or otherwise.

38. There is no dispute that the impugned ruling was rendered on 11th June 2024. To this end, it is therefore instructive to outline that any person, the Applicant not excepted, is obliged to file/lodge a notice of objection to taxation within 14 days from the date of delivery of the ruling on taxation.

39. Suffice it to point out that the Applicant herein has averred that upon the delivery of the ruling, same [Applicant] requested for a copy of the Ruling vide letter dated 12th June 2024. Furthermore, the applicant has contended that same was ultimately availed a copy of the ruling on 24th June 2024.

40. Additionally, learned counsel for the Applicant has submitted that upon receipt of the ruling by the learned taxing officer, same [learned counsel] proceeded to and lodged a notice of objection to taxation. For coherence, the notice of objection to taxation was lodged on 25th June 2024.

41. Other than the foregoing, learned counsel for the Applicant has posited that same proceeded to and lodged the reference on 5th July 2024. In this regard, the question that does arise and which the court

must dispose of beforehand, is whether the reference was filed timeously and in accordance with the provisions of Rule 11[2] of the Advocates Remuneration Order.

42. To start with, there is no gainsaying that any person, the Applicant not excepted, who is desirous to challenge the ruling on taxation and the consequential certificate of taxation, is obliged to issue and serve a notice objection to taxation within 14 days from the date of delivery of the impugned ruling. Instructively, the notice of objection herein was lodged on 25th June 2024.

43. First forward, the Applicant thereafter proceeded to and filed the reference on 5th July 2024. To my mind, the reference beforehand was filed within 14 days from the date of the lodgement of the notice of objection to taxation.

44. On the other hand, it is also worth pointing out that even if the time for computing the duration of filing the reference is computed from the date of delivery of the ruling, namely, 24th June 2024, the reference would still fall with the prescribed 14-day period.

45. Nevertheless, taking into account the muddle attendant to the instant matter, namely, the ruling being supplied before the notice of objection to taxation, I would have been prepared to excuse any lapse and/or delay in the filing of the reference. However, it is crystal clear that the reference was filed within the prescribed timeline and in accordance with Rule 11[2] of the Advocates Remuneration Order.

46. To buttress the foregoing exposition of the law, it suffices to adopt and reiterate the holding in the case of Muturi Mwangi & Associates v Mwangi [Environment & Land Misc. Application E163 of 2021] [2024 KEELC 1604] [KLR] [14th march 2024] [Ruling] where the judge stated as hereunder;

> 21. The timelines stipulated in the Advocates Remuneration Order are that a party seeking to object to a decision should, within fourteen days of such decision, give notice in writing to the Taxing Officer of the items of taxation to which he objects. The Taxing Officer should thereafter forward the reasons for her decision with respect to those items. Within fourteen days of receiving the reasons, the objector should file a Chamber Summons setting out the grounds of his objection.

47. Likewise, the legal position, highlighting the timelines for filing of a reference was also espoused and elaborated upon in the case of Vincent Narisia Krop, Cox Patricia Nasira, Chemutuken Paleeloukoyum & Jane Nasira Chepotum v Martin Semero Limakou, Kapchonge Sharti, Samuel Alukuren & Riongosia Samakituk & 9 others (Environment & Land Case 118 of 2013) [2021] KEELC 348 (KLR) (14 December 2021) (Ruling), where the court held thus;

> 17. At that point two things are likely to occur: the parties will agree to the taxation or one party may be aggrieved by the decision. In case the parties agree, then execution shall ensue or payment shall be due. In my view, that can only be ascertained after the end of 14 days of the delivery of the decision or up to the time an aggrieved party writes to the taxing master intimating that he wishes to be given reasons for the taxation of certain or all items, whichever is earlier. The reason is that under paragraph 11 (1) of the Order any party aggrieved by the findings of the taxing master has up to 14 days to consider the decision and notify the taxing master.
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> If after the end of 14 days there is no notice of objection to the taxation, the execution may proceed. That is when the execution shall have crystallized, and the road is clear. It would be advisable for taxing masters to always give a stay of execution for at least 14 days of the delivery of their decisions so that this sub-rule is given effect.

18. The second occurrence is where a party is aggrieved by the taxation. There is no doubt that such a party will have to lodge an objection in writing to the taxing master. He needs to do so within 14 days of the decision of the taxing master. He should list the specific items he has an issue with and ask the taxing master to give reasons for his decision. Upon receipt of the notice the taxing master is under duty to give him or her the reasons for the taxation. Thus, it would be advisable that taxing masters ought to have their reasons on the ready just in case they are asked to account for how and why they taxed each item as they did. This would avoid delays and going through the bill twice, so to say.

19. In terms of paragraph 11(2) of the Order, once the aggrieved part receives the reasons, he may take two of the options herein: he may see the light and agree with the taxing master or he may disagree with the taxing master. In case the earlier option is taken he will comply or wait for execution. In case he takes the second option, he is obligated to file a reference to a judge, setting out the grounds of the objection. He has to do so within fourteen (14) days upon receipt of the reasons from the taxing officer. Once a reference is filed, the costs cannot be said to be ascertained in terms of the taxation unless and until the reference is determined on merits, struck out or dismissed for whatever reasons.

48. Arising from the foregoing, my answer to issue number one [1] is to the effect that the reference beforehand was timeously and duly filed within the stipulated timeline. For good measure, the computation of timeline for purposes of filing a reference is guided by the provisions of Rule 11[2] of the Advocates Remuneration Order.

Issue Number 2 Whether the Applicant has established and demonstrated the existence of errors of principle that vitiates the certificate of taxation or otherwise.

49. The matter before the court is a reference by the Applicant and wherein the Applicant contends that the ruling by the learned taxing officer and the consequential certificate of taxation are vitiated and thus warrant variation and/or setting aside.

50. Suffice it to point out that even though a judge is seized and possessed of the requisite jurisdiction to vary and/or set aside the ruling by the learned taxing officer and the consequential certificate of taxation, it must be noted that the jurisdiction of the judge is not unfettered. In this regard, the judge is called upon to exercise necessary caution and circumspection before endeavouring to vary and or set aside the said certificate of taxation.

51. Put differently, whereas a judge has the jurisdiction to vary and set aside the certificate of taxation, the judge is called upon to exercise deference to the taxing officer and to interfere, only where it is established that the taxing officer committed an error of principle, or where the award of costs is manifestly high; or inordinately, low.

52. To appreciate the circumscribed jurisdiction of the judge whilst entertaining a reference, it suffices to take cognizance of the ratio in the case of *First American Bank of Kenya Ltd v Gulab P. Shah, Panachand Jivraj Shah & Dipack Panachand Shah (Civil Suit 2255 of 2000*) [2002] KEHC 1277 (KLR) (Civ) (25 April 2002) (Ruling), where the court stated as hereunder;

> First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. (See Steel & Petroleum (e.a) Ltd Vs. Uganda Sugar Factory (Supra). Of course. It would be an error of principle to take into account irrelevant factors or

to omit to consider relevant factors. And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment. (see Nanyuki Esso Service V Touring Cars Ltd; Steel & Petroleum (e.a.) Ltd V Uganda Sugar Factory; Thomas James Arthur V Nyeri Electricity Undertakers And Joreth V Kigano & Associates).

53. The circumscribed jurisdiction of the judge while entertaining and handling a reference was also highlighted and elaborated upon in the case of Kipkorir,Titoo & Kiara Advocates v Deposit Protection Fund Board (Civil Appeal 220 of 2004) [2005] KECA 325 (KLR) (29 April 2005) (Judgment), 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:
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> "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".
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> 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

54. Likewise, the parameters to be observed whilst entertaining and/or dealing with a reference were also elaborated 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], where 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:
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> (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)
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> (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.

55. Flowing from the ratio decidendi canvassed in the decision [supra], it is crystal clear that a judge can only interfere with the discretion of the taxing officer where it is demonstrated that the taxing officer took into account erroneous factors; failed to take into account relevant factors or better still, committed an error of principle.

56. Guided by the foregoing exposition of the law, I am now minded to revert back and to discern/decipher whether the learned taxing officer acted in accordance with the established principles that govern and regulate taxation of costs, or otherwise.

57. First and foremost, the proceedings which culminated into the filing of the Advocate Client Bill of costs were commenced vide a miscellaneous application. In this regard, it suffices to point out that the taxation of the instruction fees ought to have taken into account that what was filed was an application and not a substantive suit.

58. Owing to the foregoing, it behooved the learned taxing officer to appreciate the requisite provisions of the Advocate Remuneration Order which ought to have been invoked and applied in determining the instructions fees.

59. To my mind, the charging of instruction fees in respect of the matter that birthed the Advocate Client Bill of Costs, ought to have been guided by Schedule 6 of the Advocate Remuneration Order and in particular, the segment relating to other matters.

60. For ease of appreciation, the relevant provisions are reproduced as hereunder;

Other Matters

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

i. If undefended 45,000

ii. If defended 75,000

61. In my humble view, the learned taxing officer was not at liberty to invoke, deploy and apply the provisions of Schedule 6 paragraph [a] of the Advocate Remuneration Order insofar as the said provisions relates to the charging of instruction fees in respect of ordinary suits. Suffice it to point out that ordinary suits would relates to such suits filed vide Plaint or counterclaim and not otherwise.

62. For ease of appreciation, it suffices to reproduce the preamble of Schedule 6 paragraph [a] of the Advocate Remuneration Order.

63. Same stipulates as hereunder:

1. Instruction fees

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

(a) To sue in an ordinary suit in which no appearances is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a). [emphasis supplied].

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

(c) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule.

64. Secondly, even assuming that the miscellaneous application which constituted the original proceedings were an ordinary suit [which is not the case], the learned taxing officer was still under obligation to discern whether the value of the suit properties was discernible from the pleadings, settlement or judgment. For good measure, the learned taxing officer does not appear to have properly guided himself when he proceeded to tax and award instruction fees in the sum of kes.1, 715, 885.615/= [which figure appears erroneous and beyond comprehension].

65. Be that as it may, I must confess that I do not understand whether what was awarded on account of instruction is Kes.1, 715, 885, 615 only, as indicated or otherwise. Nevertheless, it suffices to posit that there is a serious issue of principle revolving around the manner in which the instruction fees have been calculated and arrived at.

66. In my humble view, the award of instruction fees which evidently runs into over a Billion Kenya Shilling, constitutes an error of principle which requires the intervention of this court.

67. Before departing from the issue of the instruction fees, it is apposite to cite and reference the decision of the Supreme Court of Kenya in the case of Kenya Airports Authority v Otieno Ragot and Company Advocates (Petition E011 of 2023) [2024] KESC 44 (KLR) (2 August 2024) (Judgment), where the court stated and held thus;

> 55. It is common ground that the subject matter of the suit in issue should be identified first, and then the value thereof determined. How is the value of the subject matter to be determined? Paragraph 1 of Schedule VIA is clear on this issue, and in point of fact stipulates that, "... where the value of the subject matter can be determined from the pleading, judgment or settlement of the parties". This means that the value of the subject matter can be determined from the pleadings or judgment or settlement of the parties. In that regard, the Court of Appeal in the case of Joreth Ltd. vs. Kigano & Associates [2002] 1 E.A. 92 expressed that-"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) ..."
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> 56. Equally, the Court of Appeal in considering the issue of how the value of a subject matter can be determined in *Peter Muthoka & Another vs. Ochieng & 3 Others, Civil Appeal No. 328 of 2017*; [2019] eKLR, stated as follows:
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> "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."

We concur and approve of the foregoing findings by the Court of Appeal on the factors to take into consideration when determining the value of the subject matter.

68. Other than the error of principle that gravitates around the taxation and award of instruction fees, there is another aspect touching on and concerning getting up fees. To start with, the learned taxing officer has awarded getting up fees. However, getting up fees is such fees that can only be awarded where the matter has been confirmed for hearing. For good measure, a matter can only be confirmed for hearing when witnesses had to be prepared and a plenary hearing is thereafter undertaken.

69. On the contrary, one cannot be heard to speak of a hearing to deserve getting up fees, when the matter in question is prosecuted on the basis of affidavit evidence and written submissions. Quite clearly, there is a clear dichotomy between a hearing and hearing of an application. For coherence, a hearing [which denotes a plenary hearing/trial], involves the preparation and ultimate calling of witnesses.

70. To my mind, fees for getting up can only be awarded where the matter was confirmed for hearing and goes for trial. Where no hearing is confirmed or where the matter proceeds on the basis of affidavit evidence, no getting up fees is due or chargeable.

71. Suffice it to point out, that the provisions of the Advocates Remuneration Order that underpin the charging of "Getting up fees" is explicit. For ease of reference, it suffices to reproduce the said provisions.

72. Same is reproduced as hereunder;

> 2. Fees for getting up or preparing for trial
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> 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—
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> 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.

73. In my humble view, the schedule that underpins the charging of fees for getting up is explicit and devoid of ambiguity. Nevertheless, the learned taxing officer appears to have thrown caution to the wind and was keen to play ball with the Respondent, by awarding fees for getting up merely because same had been charged.

74. For the umpteenth time, I beg to underscore that getting up fees for trial is only chargeable where a matter is confirmed for trial or in such other case, where the judge has issued the requisite certificate or made clear directions to that effect.

75. To underscore the fact that fees for getting up is only chargeable where the matter has been readied for trial and does go for trial, it suffices to cite and reference the decision in *MITS ELECTRICAL COMPANY LIMITED versus NATIONAL INDUSTRIAL CREDIT BANK*

LIMITED (Miscellaneous Application 429 of 2004) [2005] KEHC 251 (KLR) (Civ) (6 July 2005) (Ruling), where the court held thus;

> I wholly accept the arguments of Mr. Wanjama on item No. 2, getting up fee. The item clearly contemplates where counsel is involved in preparation of witnesses and witness statements etc. this was not the case here. The application was supported by affidavit and no viva vorse evidence was adduced.

76. Additionally, there is the aspect where the learned taxing officer has proceeded to award instruction fees for garnishee proceedings in the sum of Kes.1, 715, 885.615/= only. Yet again, I am at a loss as to what is the exact figure that is being awarded. Nevertheless, it looks quite out of reality.

77. Notwithstanding the foregoing, the scale fees for garnishee proceedings is well provided for under the Advocates Remuneration Order. For good measure, Schedule 6 paragraph *14* stipulate[s] that instructions fees to institute or to defend garnishee proceedings when opposed, shall be such sum as the taxing officer considers reasonable but not less than Kes. 14,000/=. Suffices it to point out that Kes. 14,000/= is the minimum fees prescribed.

78. It is also instructive to note that the taxing officer is bestowed with discretion to increase the scale fees. However, in exercising the discretion to increase the scale fees, the taxing officer must act within the parameters of reasonableness and justifiability. Furthermore, it is not lost on this court that the discretion granted under the law is not to be deployed and used whimsically, arbitrarily and/or capriciously. Simply put, the discretion is judicial discretion and must therefore reflect objectivity, sensitivity, equity and social justice.

79. Unfortunately, the learned taxing officer went on a frolic and chose to do whatever came to his mind. It is difficult to fathom and comprehend how an application for garnishee can culminate into the amounts that were decreed by the taxing officer.

80. In my humble view, the learned taxing officer herein should find time to acquaint and appraise himself of the ratio decidendi in the case of Peter Muthoka v Ochieng & 3 Others [2019] eKLR, wherein the Court of Appeal elaborated the manner in which the taxing officer is called upon to exercise discretion and the parameters to be taken into account.

81. For coherence, the court stated thus:

> 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. [emphasis added].

82. Other than the foregoing decision, where the parameters to be taken into account and applied whilst exercising discretion were highlighted, it is also instructive to take cognizance of the decision of the Supreme Court of Kenya in the case of Non- Governmental Organizations Coordination Board v EG

& 5 others (Petition (Application) 16 of 2019) [2023] KESC 102 (KLR) (Civ) (8 December 2023) (Ruling), where the court stated and held as hereunder;

> 22. The gravamen of the applicant's reference is the taxed award of Kshs 5,000,000 for instruction fees. This court recently in Outa v Odoyo *& 3 others, SC Petition No 6 of 2014*; [2023] KESC 75 (KLR) highlighted the following principles to be considered in an application for setting aside a certificate of taxation: "(11)A certificate of taxation will be set aside, and a single Judge can only interfere with the taxing officer's decision on taxation if;
>
> a. there is an error of principle committed by the taxing officer;
>
> b. the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy;(and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).
>
> c. the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and
>
> d. the award proposed is so far as practicable, consistent with previous awards in similar cases. To these general principles, I may add that;
>
> i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,
>
> ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,
>
> iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes."

83. It is also worth stating that having plucked an astronomical [mystical] figure from God knows where and granted same as instruction fees for filing the garnishee proceedings, the learned taxing officer has again proceeded to and awarded fees for getting up.

84. How and on what basis getting fees has been awarded on an application has not been accounted for. Quite clearly, the learned taxing officer was not being guided by the Advocate Remuneration Order. [See Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR].

85. Be that as it may, I wish to reiterate that getting up fees is neither chargeable nor awardable in applications or any other matter which has not been confirmed for trial. Quite clearly, the provisions of the Advocates Remuneration Order that underpin fees for getting up are succinct and apt.

86. Finally, I beg to say something about the attendances that were awarded; some of which are indicated to be the attendance for the whole day. It is not lost on this court that the proceedings beforehand were canvassed on the basis of affidavit evidence and oral submissions. However, it is inconceivable that such a matter can attract attendance for a whole day.

87. Other than the foregoing, there is yet another puzzling aspect to the manner in which the learned taxing officer went about the taxation exercise. Instructively, upon taxing each and every singular item, the

learned taxing officer ventured forward to subject the item[s] to increment by half. In this regard, all the taxed items were individually multiplied by two.

88. However, there is no gainsaying that the law provides for the taxing officer to undertake the taxation and thereafter arrive at the aggregate total. To my mind, the aggregate total would relate to the taxation of all the items enumerated in the body of the Bill of Costs. Thereafter, the learned taxing officer is called upon to subject the final outcome [aggregate total] to increment by half. Simply put, it is the aggregate total arrived at which is subjected to increment by half.

89. To this end, it is instructive to take cognizance of Schedule 6 B of the Advocates Remuneration Order which underpins the aspect for increment by half.

90. Same stipulates as hereunder;

> B Advocate And Client Costs
>
> As between advocate and client the minimum fee shall be—
>
> (a) the fees prescribed in A above, increased by 50%; or
>
> (b) the fees ordered by the court, increased by 50%; or
>
> (c) the fees agreed by the parties under paragraph *57* of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.

91. From the foregoing analysis, there is no gainsaying that the learned taxing officer proceeded to and undertook the impugned taxation without due regard to the Advocate Remuneration Order 2014. For coherence, the manner in which the taxation was done and the contents of the impugned ruling, raises a number of questions both on matters of principle and ethics.

92. Be that as it may, it is my finding and holding that there are a plethora of errors that vitiate the ruling and the resultant certificate of taxation. In any event, I beg to point out that it is one thing to allude to a decision, but a completely different thing to internalize and apply the ratio decidendi espoused in the highlighted decision.

93. I say this deliberately because I have seen the various case law that have been referenced in the body of the ruling but sadly, the ratio decidendi espoused thereunder has not been applied in the process of the taxation. Quite clearly, what becomes evident is that the case law may have been thrown in for aesthetic/ cosmetic purposes.

Final Disposition:

94. Flowing from the analysis [details enumerated in the body of the ruling] it must have become crystal clear that the Client/Applicant herein has established and demonstrated various errors of principle committed by the taxing officer in the course of the impugned taxation. In this regard, the Chamber Summons [Reference] is meritorious.

95. Consequently, and in the premises, the final orders that commend themselves to me are as hereunder;

> i. The Chamber Summons [Reference] dated 5th July 2024 be and is hereby allowed.
>
> ii. The Ruling of the Learned Taxing officer dated 11th June 2024 and the resultant Certificate of Taxation arising thereto be and are hereby quashed.

iii. The Advocate Client Bill of Costs dated 7th February 2024 [but filed erroneously in the main proceedings] shall be placed before a different taxing officer other than Hon. Vincent Kiplagat for purposes of taxation in accordance with the Advocates Remuneration Order 2014

iv. Costs of the Reference be and are hereby awarded to the Applicant/Client.

v. Furthermore, the costs in terms of clause [iv] are hereby assessed and certified in the sum of Kes. 25,000/= only

96. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2024

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. John Ochwo for the Client/Applicant.

Mr. Byan Khaemba for the Advocate/Respondent.

Mr. Allan Kamau [Principal Litigation Counsel] for the Interested Party.