



REPUBLIC OF KENYA



**KENYA LAW**

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**Wambua & 3 others v Kenya Commercial Bank & 2 others (Environment & Land Case 5 of 2020) [2024] KEELC 13762 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13762 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 5 OF 2020**

**JG KEMEI, J**

**DECEMBER 5, 2024**

**BETWEEN**

**JONES JOHN KITILI WAMBUA ..... 1<sup>ST</sup> PLAINTIFF**  
**JOYCE SYOKAU KITILI WAMBUA ..... 2<sup>ND</sup> PLAINTIFF**  
**LUCY WANGARI KAMAU ..... 3<sup>RD</sup> PLAINTIFF**  
**JOSEPH KIARIE KAMAU ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> DEFENDANT**  
**NANCY NJERI NDUNGU ..... 2<sup>ND</sup> DEFENDANT**  
**ROMAN KITHINJI M'TUAMWARI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect of two applications; the Chamber Summons dated 16/4/2024 and the Notice of Motion dated 20/5/2024 both filed by Kenya Commercial Bank (KCB), the 1<sup>st</sup> Defendant/Applicant.
2. They are determined in order of filing.
3. With respect to the Chamber Summons dated 16/4/2024, the Applicant craves for Orders;
  - a. That the Ruling of the Deputy Registrar dated 5<sup>th</sup> April 2024 together with the Certificate of Taxation resultant thereto be and is hereby set aside and the Plaintiffs' Party and Party Bill of Costs dated 26<sup>th</sup> September 2023 be taxed afresh and/or;



- b. That the decision of the Deputy Registrar as evidenced in the Ruling delivered on 5<sup>th</sup> April 2024 with respect to items 1, 2, 21 and 55 of the Plaintiffs Advocate-Client Bill of Costs dated 26<sup>th</sup> September 2023 be set aside and taxed afresh by the Honourable Court.
  - c. That this Honourable Court be pleased to reassess items 1, 2, 21 and 55 of the Plaintiffs' Advocate-Client Bill of Costs dated 26<sup>th</sup> September 2024 make a finding on the same and substitute its decision to that of the Deputy Registrar.
  - d. That in the alternative, and without prejudice to the foregoing, this Honorable Court be pleased to order that the Plaintiffs' Advocate-Client Bill of Costs dated 26<sup>th</sup> September 2023 in respect to items 1, 2, 21 and 55 be taxed afresh by another Deputy Registrar; and
  - e. That costs of this application be provided for.
4. The Application is based on extensive grounds That; -
- a. The Deputy Registrar erred in assessing the instruction fees based on the number of Plaintiffs and the subject value of the property.
  - b. The Deputy Registrar erred in law and in principle as she arrived at a decision which is contrary to the law applicable and by failing to exercise the powers and discretion given to her under the Advocates Remuneration Order and failing to apply the principle of reasonableness.
  - c. The Deputy Registrar erred in law and principle by awarding instruction fees of Kshs. 4,000,000/- and getting up fees of Kshs. 1,333,333/- which were manifestly excessive against the principle as contemplated under the Advocates Remuneration Order.
  - d. The Deputy Registrar further erred in law and principle in arriving at Court attendance fees for Ruling and Judgment in items numbers 21 and 55 that was not judicious considering the items had not been drawn to scale.
  - e. The Deputy Registrar erred in principle in awarding a manifestly excessive amount on the Party and Party Bill of Costs dated 26<sup>th</sup> September 2023 contrary to work done and against clear guidelines of the Advocates Remuneration Order, 2014 in assessing the Bill of Costs.
  - f. The Deputy Registrar erred in law and principle in failing to consider for determination the 1<sup>st</sup> Defendant's written submissions dated 8<sup>th</sup> February 2024 in opposition to the 1<sup>st</sup> Respondent's Party and Party Bill of Costs dated 13<sup>th</sup> February 2023.
  - g. The Deputy Registrar misdirected herself and contrary to the principles and guidelines established by the Honourable Courts and precedents in rendering her determination.
  - h. This application has been made timely.
  - i. It is therefore just that this reference to taxation be heard to conclusion at the earliest opportune moment and the application be allowed as prayed.
5. The Application is further supported by an Affidavit of even date sworn by Lilian Sogo, the Applicant's Head Counsel Litigation. Reiterating the above grounds, she averred that dissatisfied with the impugned Ruling dated 5/4/24, she filed a Notice of Objection on 9/4/24 annexed as LS-1.
6. Opposing the Chamber Summons, the Plaintiffs/Respondents filed their Grounds of Opposition dated 23/5/2024 through the firm of Milimo Muthomi & Co. Advocates. They contented that the application is fatally defective and an abuse of the Court process; the assessment on instruction fees



was made in accordance with the applicable principles of taxation; the Taxing Officer appreciated the complex nature of the matter and bulky evidence tendered in Court in prosecution of the suit in light of the Plaintiffs' investment worth over Kshs. 60 Million is properly supported by instruction fees of Kshs. 4 Million; that the Taxing Officer considered all the necessary legal and factual parameters in her Ruling and as such the application is bereft of merit and ought to be dismissed with costs.

7. On 10/7/2024 directions were taken to canvass the Chamber Summons by way of written submissions.
8. The Applicant filed submissions dated 26/8/2024 and drew two issues for determination to wit; whether the Taxing Master's decision of 4/4/2024 should be set aside and taxed afresh and whether the warrants of attachment and proclamation should be set aside.
9. On the first issue, it was posited that the Taxing Officer erred in principle in assessing the instruction fees and resultant getting up fees. That the Taxing Officer stated that 'the suit property is prime and could well be the value stated by the Plaintiffs – and this has a bearing on the importance of the matter'. That neither a valuation report nor disclosure of the value of the suit property in the pleadings was tendered but the Taxing Officer relied on the value stated in the Plaintiffs submissions. That it is trite that a Taxing Officer in exercising discretion, must do so judiciously and not whimsically as was aptly discussed in Republic Vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others [2006] eKLR. That the Taxing Officer in the instant case took into account the wrong value of the subject matter which led her to arrive at the wrong instruction fees, getting up fees and in the end wrong quantum of total fees.
10. Regarding items 1 and 2, the Applicant relied on the case of Joreth Limited Vs. Kigano & Associates [2002] EA 92 whereby the Court held that where the subject matter was not ascertainable, the Taxing Officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of proceedings and any direction by the trial Judge and all relevant circumstances. That it is evident that the Taxing Officer herein did not consider the aforesaid parameters and therefore fell into error.
11. Concerning Items 21 and 55 in the bill, it was contended that the Court attendance fees for the Ruling and Judgment of Kshs. 5,000/- was not drawn to scale and are contrary to Schedule 6A (7)(d) of the Advocates Remuneration Order (ARO). The Court was urged to allow the reference and Items 1 and 2 be taxed afresh.
12. In rebuttal, the Respondents/Plaintiffs filed submissions dated 9/9/2024. Rehashing the pleadings and Judgment of the trial Court, they argued that the value of the subject matter was expressly stated in para 20 of their Plaint filed on 24/1/2020 as read with para 22(8) of the said Plaint. Further that a Redemption notice was produced in evidence disclosing the market value of the property as Kshs. 60 Million. That accordingly it is not the value of the charge that is applicable but that of the suit property whose ownership was in dispute.
13. On the issue of complexity of the matter, it was submitted that extensive research was carried out to uncover the massive fraud and forgery committed by the Defendants. That the award of Kshs. 4M is reasonable in the circumstances of this case and it ought to be upheld. Defending Item 1 on getting up fees, the Respondents relied on the case Stephen Mwangi & 2 Others Vs. Tusker Mattresses Ltd [2014] eKLR where the Court allowed getting up fees as a third of instructions fees awarded.
14. The main issue for determination is whether the Applicant has established a case for this Court to interfere with the Taxing Officer's decision.



15. It is trite that in a reference case like this one, the governing principle that guides exercise of the Court's jurisdiction was well summarized in the case of Kipkorir, Titoo & Kiara Advocates Vs. Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR where the Court of Appeal distilled the principle as follows;

“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”.

16. The gist of the reference revolves around the awards on instructions and getting up fees of Kshs. 4 Million and Kshs. 1.3 Million respectively which the Applicant contends are manifestly excessive to warrant this Court's re-assessment. The Applicant avers that the Taxing Officer erroneously arrived at the said figures without proper ascertainment of the value of the suit land. In rebuttal the Respondents maintained that the subject value of the suit land was expressly stated in the plaint at paras. 20 and 22(8). A reading of those paras reveals an exercise of statutory power over the suit land and allegation to sell it at a reserve price of Kshs. 45 Million.

17. In my view the aforesaid paragraphs do not constitute the subject value of the suit land. Be that as it may the Taxing Officer was obliged to ascertain the value of the suit land before proceeding with taxation. The determination in the impugned Ruling on Taxation of Bill of Cost inter alia reads;

“The main contention is whether to base the instruction fees on the value of the suit property. Looking at the prayers made in the plaint, the reliefs sought had no bearing on the value of the suit land. However I agree that the suit property is prime and could well be the value cited by the Plaintiffs – and this had a bearing on the importance of the matter.”

18. Indeed the Taxing Officer proceeded to rely on the Court of Appeal Peter Muthoka and Another Vs. Ochieng and 3 Others [2019]eKLR where the Court allowed the Taxing Officer exercise discretion when the subject matter is neither discernible from the pleadings, Judgment or the settlement. Notably the Appellate Court was emphatic that such discretion only steps in after the Taxing Officer has engaged with the proper basis as expressly and mandatorily provided.

19. In the case of Joreth Ltd Vs. Kigano & Associates [2002] 1 E.A. 92, the Court of Appeal addressed the issue 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 the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances.”

20. Further in the case of Peter Muthoka (supra) the Court of Appeal was emphatic that a Taxing Officer 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. That he has no leeway to disregard the statutorily commanded starting point. The Appellate Court further added that the starting point can only be one of the three. That 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.

21. Lastly the Court of Appeal in the case of Otieno, Ragot & Company Advocates Vs. Kenya Airports Authority [2021] eKLR held that once the instruction fee in the party and party costs are ascertained, they become the basis of the computation of the instruction fees in the Advocates and client bill. It follows therefore the ascertainment of the instruction fees is at the heart of the Taxing Officer's Taxation.
22. Guided by the above precedents, in this instance I find that the Taxing Officer proceeded to adopt the subject value on an assumption based on the Plaintiffs stated value contrary to the guidelines set above.
23. The upshot of the forgoing is that the Reference is merited in so far as Item 1 and 2 are concerned.
24. The Bill of Cost be and is hereby remitted for fresh assessment before another Taxing Officer.
25. The Reference is allowed with costs to the Applicant.
26. Having reached the above conclusion, the second Application dated 20/5/2024 sought in the main, stay of execution of warrants of attachment dated 5/4/2024 and Proclamation dated 20/5/2024 pending the hearing and determination of the Reference. The Reference having succeeded it follows therefore that the Motion is moot for consideration. It is thus marked as spent.
27. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Muthomi for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs

Ms. Njari HB Cheruiyot for 1<sup>st</sup> Defendant

2<sup>nd</sup> and 3<sup>rd</sup> Defendants - Absent

Court Assistants – Ann/Melita

