



**Gatabaki v Muga Developers Limited (Civil Suit 90 of 2015)
[2025] KEHC 7768 (KLR) (Civ) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 90 OF 2015

SN MUTUKU, J

MAY 8, 2025

BETWEEN

NANCY WANJA GATABAKI PLAINTIFF

AND

MUGA DEVELOPERS LIMITED DEFENDANT

RULING

THE CHAMBER SUMMONS

1. This Ruling relates to aa Chamber Summons Application dated 5th September 2024 (the Reference) brought by Nancy Wanja Gatabaki (the Applicant). She has based that Applicaiton under Article 159 of *the Constitution* of Kenya, sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA), Order 42 Rule 6 of the Civil Procedure Rules (CPR), and Paragraph 11(1) – (4) of the Advocates (Remuneration) Order.
2. She has supported the said Application with the grounds set out on the face of the Application and on the Supporting Affidavit sworn by the Applicant on 5th September 2024. She seeks the following orders:
 1. Spent.
 2. Spent.
 3. THAT this Honourable Court be pleased to set aside the decision of the Taxing Officer contained in the ruling delivered on 7th June 2024.



4. THAT this Honourable Court be pleased to refer the Defendant's party and party Bill of Costs dated 18th October 2023 back for re-taxation by a different Taxing Officer with proper and appropriate directions thereon.
 5. THAT in the alternative to prayer 4 above, the Court exercises its inherent jurisdiction and be pleased to re-tax the items relating to instruction fees and getting up fees in the Defendant's Bill of Costs dated 18th October 2023 in accordance to the law and the principles of taxation.
 6. THAT costs of this Reference be provided for.
3. Central to the grounds in support of the Application is the arguments that in arriving at the taxation ruling, the taxing officer committed an error of principle by basing the value of the subject matter on assumptions and by factoring in interest which had not previously been awarded by the court; that in ascertaining the value of the subject matter, the taxing officer ignored the 6th Schedule, Part A of the Advocates Remuneration Order and therefore assessed the legal fees at a manifestly excessive sum, thereby necessitating interference by this court and that the taxing officer took into account irrelevant factors in making the taxation ruling.
 4. The Applicant has deposed, in the Supporting Affidavit, that at the onset, she filed the present suit by way of a Plaint dated 25th February 2014 which suit was ultimately dismissed with costs, vide the judgment delivered on 21st September 2023; that Muga Developers Limited (the Respondent) filed a Party and Party Bill of Costs dated 18th October 2023 which was taxed at a sum of Kshs. 863,005/-; that the taxation ruling was delivered in her absence and without notice to her, adding that she only managed to obtain a certified copy thereof on 5th September 2024 and that in view of the foregoing, this court ought to exercise its discretion in her favour, by allowing the Reference as prayed.

The Replying Affidavit

5. The Application is opposed by the Respondent through the Replying Affidavit sworn by its co-director, Peter Kiarie Muraya, on 2nd December 2024. The Respondent has stated that the Application is unsubstantiated; that the Applicant has not demonstrated that the award by the taxing officer is so excessive as to warrant interference by this Court and that it has not been demonstrated that the taxing officer committed an error of principle in assessing the Bill of Costs.
6. The Respondent has stated, further, that the grounds set out in the Application are vague and fail to elaborate the purported error on the part of the taxing officer; that in assessing the instruction fees in the present suit, the taxing officer applied the correct principles and considered all relevant factors, on the basis of the Applicant's pleadings and that it would, therefore, serve the interest of justice to dismiss the Application with costs.

Parties' Submissions

7. Pursuant to the directions issued by the court, the Application was disposed of through written submissions. In her submissions, the Applicant has relied *Outa v Odoto & 3 others (Petition 6 of 2014)* [2023] KESC 75 (KLR) where it was held thus:

“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."

8. The Applicant also relied on *Peter Muthoka & Another v Ochieng, Onyango, Kibet & Ohaga Advocates* [2019] eKLR in which the Court of Appeal set out the following as constituting the applicable principles in determining the value of the subject matter when taxing costs:

".....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....."

9. The Applicant has faulted the taxing officer for basing the value of the subject matter of the dispute on an assumption that the suit was before the High Court purely on the basis of pecuniary jurisdiction, notwithstanding the fact that the High Court has unlimited original jurisdiction to entertain civil and criminal matters; that in the present instance, the value of the subject matter which ought to have been applied is the sum of Kshs.10,000,000/- pleaded in the Applicant's plaint and that the amount taxed on instruction fees and getting up fees, is manifestly excessive and ought to be disturbed accordingly.



10. The Applicant has further faulted the taxing master for including an interest of Kshs. 13,200,000/- in assessing the value of the subject matter, yet the court did not award any interest in the judgment thereby committing an error of principle. The Applicant has placed relied Bank of India v Surgilabs Limited & 3 others [2008] KEHC 714 (KLR) where the court reasoned that in an instance where a court dismisses a suit and makes no order regarding payment of interest, then no interest should be applied by a taxing officer when assessing costs on instruction fees. The Applicant has urged this court to allow the Application.
11. In its submissions, the Respondent reiterated the averments made in the Replying Affidavit, that the taxing officer correctly applied the relevant legal principles in assessing the instruction fees, by ascertaining the value of the subject matter from the pleadings since the same did not feature in the judgment, which principle is drawn from the case of Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] KECA 325 (KLR).
12. The Respondent has further contended that the case of Peter Muthoka & Another v Ochieng, Onyango, Kibet & Ohaga Advocates relied on by the Applicant, is distinguishable; since in that particular case, the taxing officer was deemed to have erred by ascertaining the value of the subject matter from the pleadings therein, whereas a deed of settlement indicating the value thereof constituted part of the record.
13. The Respondent submitted that no proper basis has been laid to warrant the exercise of this court's discretion in favour of the Applicant and therefore, the Application is unmerited and ought to be dismissed with costs.

Analysis and Determination

14. I have considered the Application and the grounds in support of the same. I have considered the Replying Affidavit and rival submissions as well as the authorities relied on by the parties.
15. From the record of the court, I have noted that the Applicant commenced the present suit against the Respondent through a Plaint dated 25th February 2015 seeking a sum of Kshs. 10,000,000/- plus interest thereon at the bank lending rates applicable at the time, from 7th May 2012 until payment in full as well as costs of the suit. The dispute arose from an alleged breach on the part of the Respondent, in paying the aforementioned sum to the Applicant, as compensation for loss resulting from demolition of her houses.
16. The record shows that the suit was determined and a judgment delivered on 21st September 2023 dismissing the Applicant's suit with costs. Consequently, the Respondent proceeded to file Party and Party Bill of Costs dated 18th October 2023 to the tune of Kshs. 1,492,088.33. The Bills was taxed at Kshs. 863,005/-. That taxation gave rise to this Application which seeks to set that ruling aside and re-taxation of the Bill of Costs.
17. It is trite that a court will not normally interfere with the exercise of the taxing officer unless the taxing officer, in taxing the bill of costs, erred in principle.



18. The courts have previously considered factors that would necessitate interference by the Court of the discretion of the taxing officer. In the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR the Court of Appeal 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.”

19. The Court went ahead to reason that an error of principle would include an excessive award on costs or an over-emphasis on factors such as the nature and complexity of the matter at hand (see also *Moronge & Company Advocates v Kenya Airports Authority* [2014] eKLR).

20. I have noted that in respect of the instant Application, it is clear that items 1 and 2 of the Party and Party Bill of Costs, which constitutes the instruction fees and getting up fees, respectively, are the ones being challenged.

21. Regarding the instruction fees, the Respondent sought to have the same taxed at a sum of Kshs. 1,000,000/- on the basis that the pleaded sum was for Kshs. 10,000,000/- plus interest thereon, giving a total of Kshs. 23,200,000/-. The Applicant on her part proposed that the same be taxed at a sum of Kshs. 300,000/-. Upon considering the rival positions, the learned taxing officer taxed the above item at a sum of Kshs. 564,000/- basing it under Schedule 6, Paragraph 1(b) of the Advocates Remuneration Order 2014.

22. In arriving at the above figure, the taxing officer relied on the figure of Kshs. 23,200,000/- suggested by the Respondent, further reasoning that the pecuniary jurisdiction of the High Court stands at over Kshs. 20,000,000/-. The Applicant has averred that in making the above assessment, the taxing officer both committed an error of principle and arrived at an inordinately high figure.

23. Upon consideration of the record, it is not in dispute that the present suit was determined by the High Court. Consequently, the applicable provision of the Advocates Remuneration Order is Schedule 6 which was applied by the taxing officer, and which caters for costs in respect of proceedings in the High Court.

24. Paragraph 1 of Schedule 6 provides for instruction fees, and expresses the following:

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).
- 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.

...

- (b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-



pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties

...

25. It is clear, from a reading of the foregoing provision, particularly paragraph (b), that instruction fees are to be assessed upon consideration of the value of the subject matter which can be ascertained either from the pleadings, judgment or settlement entered into between the parties.
26. The legal position is that it is only when the value of the subject matter cannot be ascertained that a taxing officer is permitted to exercise his or her discretion in taxing the instruction fees. This position was laid out by the Court of Appeal in the case of *Peter Muthoka & another v Ochieng & 3 others* [2019] KECA 597 (KLR) cited in the Applicant's submissions, thus:

“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.

What we have said is in direct harmony with what this Court stated in *JORETH LIMITED -vs- KIGANO & ASSOCIATES* [2002] IEA 92,

“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 ascertainable the taxing officer is entitled to use his discretion to assess 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, and direction by the trial judge and all other relevant circumstances.”



27. In this matter, as earlier mentioned, the Applicant by way of the plaint sought a sum of Kshs. 10,000,000/- together with an unspecified amount in interest. Nevertheless, the suit was ultimately dismissed with costs. In the circumstances, this court is of the view that the learned taxing officer would fall back on the pleadings to ascertain the subject matter.
28. From a consideration of the impugned taxation ruling, the court observed that the learned taxing officer adopted the sum of Kshs. 23,200,000/- proposed by the Respondent and in view of the pecuniary jurisdiction of the High Court. However, it is apparent that the said sum not only exceeded what was pleaded, but also incorporated an unspecified interest amount. Furthermore, the court observed that the Respondent did not elaborate on how the amount sought on interest was arrived at, in order for it to be incorporated in assessing the instruction fees here. In the court's view therefore, the Applicant has reasonably demonstrated the manner in which the said assessment on instruction fees is excessive in nature and was based on an error of principle.
29. In view of the foregoing, the court is satisfied that the learned taxing officer erred in assessing the instruction fees.
30. In respect to the getting up fees, the Respondent sought a sum of Kshs. 333,333.33 under this item. The learned taxing officer taxed the same at Kshs. 188,000/- being 1/3 of the instruction fees.
31. The relevant provision on getting up fees is Paragraph 2 of Schedule 6 (supra), which expresses that:
- 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:
- ...
32. Upon consideration thereof coupled with its earlier findings on the subject of instruction fees, the court is satisfied that the assessment of getting up fees here would be impacted, since the same was based on the assessment made on the instruction fees. As such, the assessment on the getting up fees would likewise necessitate interference by this court.
33. For the above reasons therefore, it is imperative that the decision of the taxing officer be interfered with, in respect of items 1 and 2. Consequently, this court finds that the Chamber Summons dated 5.09.2024 is merited and the same is hereby allowed on the following terms:
- a. The ruling delivered by the taxing officer on 7th June 2024, together with the Certificate of Taxation be and is hereby set aside.
 - b. The Defendant's/Respondent's Party and Party Bill of Costs dated 18th October 2023 shall be placed before a different taxing officer other than Hon. Eric Wambo (Deputy Registrar) for re-taxation only in respect of items 1 and 2.
 - c. Each party shall bear own costs of this application.
 - d. For purposes of fast tracking this matter, it shall be mentioned before the DR, Hon. Kurumbu, on 21st May 2025 for fixing taxation date.
34. It is so ordered.

Dated, signed and delivered this 8th May 2025.

S. N. MUTUKU



JUDGE

In the presence of:

Mr. Ken Murgor for the Defendant/Respondent

