Dari Limited & another v East African Development Bank & 3 others (Commercial Case E191 of 2021) [2025] KEHC 8721 (KLR) (Commercial and Tax) (9 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8721 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E191 OF 2021

JWW MONG'ARE, J

JUNE 9, 2025

BETWEEN

DARI LIMITED ..... 1ST PLAINTIFF

RAPHAEL TUJU ..... 2ND PLAINTIFF

AND

EAST AFRICAN DEVELOPMENT BANK ..... 1ST DEFENDANT

VIVIENNE YEDA APOPO ..... 2ND DEFENDANT

DAVID OCHIENG ODONGO ..... 3RD DEFENDANT

JOTHAM MUTOKA ..... 4TH DEFENDANT

RULING

1. On 29th September 2023, the court's Deputy Registrar delivering rulings ("the Rulings") in respect of the 1st Defendant's Party and Party Bill of Costs dated 21st February 2023 and the 2nd – 4th Defendants' Party and Party Bill of Costs dated 29th March 2023 ("the Bills of Costs") where she certified that both Bill of Costs were taxed at Kshs.50,423,174.35. The Plaintiffs are dissatisfied with the Rulings and they have filed References dated 12th October 2023 seeking to set aside the same and that the Bills of Costs be re-assessed, more so on the item on instruction fees.

2. The References are supported by the grounds on their faces and the supporting affidavits of Paul Nyamodi, the advocate in conduct of this matter on behalf of the Plaintiffs, sworn on 12th October 2023. The 1st Defendant opposes the Reference through the replying affidavit of its Ag. Head of Country Business, David Odongo, the 3rd Respondent herein, sworn on 24th November 2023. He has also responded to the Reference on behalf of the 2nd – 4th Defendants through the replying affidavit

23rd November 2023. The References were canvassed by way of written and oral submissions by the parties' respective counsel which together with the pleadings, I have carefully considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

3. Going through the References and the submissions, the main issues for determination are whether the Deputy Registrar erred in awarding the Instruction Fees as she did under item 1 of the Party and Party Bill of Costs and whether she erred in her award of the items listed as numbers 3, 6, 7, 9, 10, 11, 14, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 27, 29, 30, 31, 32, 33, 34, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 and 57 of the Bills of Costs.

4. As submitted by the parties, I do not think there is any dispute about the approach this court should take in dealing with a Reference. In Kipkorir,Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] KECA 325 (KLR), 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".

5. I am in further agreement with the parties' submissions that the principle to be applied when assessing instruction fees in a suit are well settled. In Joreth Limited v Kigano & Associates [2002] KECA 153 (KLR), the Court of Appeal outlined the principle as follows:

> We would at this stage point out that the value of the subject matter of a suit for the purpose 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 such instruction fee 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 the proceedings, any direction by the trial judge and all other relevant circumstances .

6. Further, as submitted by counsel for the 2nd – 4th Defendants, the Court of Appeal in Peter Muthoka & another v Ochieng & 3 others [2019] KECA 597 (KLR) expounded on the principles in Joreth Ltd v Kigano & Associates(supra) and set down the proper basis of taxing the instruction fees as follows:-

> 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.

7. As cited by counsel for the Plaintiffs, in Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [2006] KEHC 3504 (KLR) J.B Ojwang J.,(as he was then) in

submitting a Bill of Costs for fresh taxation outlined the following principles as a guide to the taxing officer:

(i) .....

(ii) the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;

(iii) the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;

(iv) so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;

(v) objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;

(vi) where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be identified and stated; and secondly, complexity is to be judged on the basis of the express or implied recognition and mode of treatment by the trial Judge;

(vii) where responsibility borne by advocates is taken into account, its nature is to be specified;

(viii) where novelty is taken into account, its nature is to be clarified;

(ix) where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.

8. The Respondents in their objection and responses filed to the reference have taken issue with the failure by the applicant to give Notice of their intention to object to the taxed bill in accordance with the provisions of Paragraph 11(1) of the Advocates Remuneration Order. The Respondents argue that the said omission is fatal to the reference and urges the court to strike the same out. I note that in their response the Plaintiffs argue that such a failure to issue the notice of its intention to object to a taxed bill is not fatal and is curable by dint of Article 159(2)(d) of *the Constitution* which urges courts to dispense substantive justice when faced with a matter where technicalities are involved. The said Article 159(2)(d) provides as follows: " in exercising judicial Authority, the Courts and Tribunals shall be guided by the following principles; -

a. Justice shall be done to all, irrespective of status;

b. Justice shall not be delayed;

c. Alternative forms of dispute resolution including reconciliation, mediation and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

d. Justice shall be administered without undue regard to procedural technicalities."

9. The Supreme Court interpreted Article 159(2)(d) in the Raila Odinga and Others Vs. *Independent and Electoral Boundaries Commission and 3 others in Nairobi Petition No. 5 of 2023*(2013)eKLR where in a motion brought to strike out a further affidavit, the court pronounced itself as follows; " the essence of that provision is that a Court of Law should allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however in our opinion, bears no meaning cast -in -stone, an which suits all situation of dispute resolution. On the Contrary, the court as an agency of the processes of justice, is called upon to appreciate all

the relevant circumstances and requirements of a particular case and conscientiously determine the best course.". This principle was further affirmed by the Court in the case of Zakaria Okoth Obado v Edward Akong'o Oyugi & 2 others (2014) eKLR where the court held that the essence of article 159(2) (d) is that a court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice. I find therefore failure by the Plaintiff to give its objection notice to the taxed bill before moving to file the reference objection cannot be used as a reason by the court to strike out the pleadings before it. I am satisfied that the absence of the said notice did not in any way prejudice the Respondents as they were able to defend and respond appropriately to the same and to file their respective documents in opposition to the reference. The challenge to the references on this point therefore fails.

10. Turning to the second and substantive issue as to whether the Taxing officer committed an error of principle in her proceeding to tax the Party and Party bills of costs as she did, I note that both parties agree that taxation is more than a mathematical exercise as was stated by the Court of Appeal in Premchand Raichand Ltd A& Another v Quarry Services of East Africa Ltd & Another (1972 E.A.162 where the court held as follows; " the taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. a court will therefore not interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because he thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other."

    The court, in addition, added that certain principles should be taken into consideration so that the court will not itself be a bar to access to justice and should consider the following:-

    a. Costs should not be allowed to rise to such a level as to limit access to the courts to the wealthy;

    b. A successful litigant ought to be fairly reimbursed for the costs he has to incur;

    c. The general level of remuneration of advocates must be such as to attract recruits to the profession;

    d. So far as practical there should be constituency in the award made;"

11. In determining a Bill of Costs before her, the taxing master is expected, in addition to the set principles as set out under Paragraph 11 Of The Advocates Remuneration Order, to exercise their discretion as set out in the case of Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W' Njuguna (supra) Justice Ojwang further stated as follows ' ....discretion, as an aspect of judicial decision making is to be guided by principles, the elements which are clearly stated and which are logical and consistently conceived, it is not enough to set out by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs".

12. The principles of taxation, as both parties herein agree are as set out in the Court of Appeal in Joreth Limited v Kigano & Associates [2002] KECA 153 (KLR) where the taxing master is urged to first look at the judgment or settlement to base the value of the subject matter and in the absence of a judgment or a settlement to discern the same from the pleadings.

13. I note that the taxing master in the present references picked the sum of USD 30,980,241 and multiplied this with a rate of 107 to the dollar which she argued was the prevailing rate of the US Dollar to the Kenya Shilling as at the time of filing suit and determined that was the subject value of the suit

as discernible from the pleadings. I have looked at the Pleadings as filed. I note that as set out in the Plaint, the Plaintiff had sought the following reliefs:

a. An order for rescission of the contract entered between the 1st Plaintiff and the 1st Defendant for the provision of a loan facility in the amount of Kshs. 1.119 Billion;

b. Special Damages in the sum of USD 30,980,241 whose particulars are captured at Paragraph 68 of the Plaintiff;

c. General Damages for breach of Contract

d. Interest on (b) and (c) above at court rate

e. Costs of this suit.

14. A casual glance at the pleadings reveals that there are two distinct and separate sums pleaded in the plaint, one being Kshs. 1.119 billion at prayer (a) being the figure of the loan facility which the Plaint sought to terminate and the second being the sum of USD30,980,241 which the taxing master upon application of the rate of 107 calculated it to be in excess of Kshs.3,336,571,955.70 being the item at prayer (b) sought as special damages and which the taxing master proceeded to take the same as the figure discernible from the pleadings and therefore determined it to represent the value of the subject matter value of the suit for purposes of taxation, in line with the dictates of the Court of Appeal in Joreth(supra). There is no explanation from the taxing master why the figure of Kshs. 1.119 billion that is pleaded at prayer (a) in the plaint was not applied as the value of the subject matter for purposes of taxation.

15. It is not in dispute that the suit was struck out at the outset on a preliminary application for the being res judicata. It is trite that where a party seeks to be awarded special damages in a suit, the same must be particularised in the pleadings and specifically proved before a court can allow the same. In the present suit, the Plaintiff had in their suit at paragraph 68 of the plaint sought to be awarded special damages and particularised the same in compliance with the requirements of the law. It is my understanding that these damages could not be automatically granted as pleaded and were subject to proof by receipts invoices and other documentary evidence as is the legal requirement. I find therefore in choosing to rely on the figure of US dollars USD30,980,241 as the value of the subject matter, the taxing master committed an error of principle as she took this to mean that the said claim was a liquidated claim and that the Plaintiff would automatically be awarded the same by the court upon proving their case on the standard of proof set out by law, that is on a balance of probabilities. The award of instructions fee under item 1 at Kshs.50,423,174.35 arising from a subject matter value of US dollars USD30,980,241 or Kshs.3,336,571,955.70 was, in my view, was a misdirection and an error on the part of the Taxing master. It is clear from the pleadings that the said sum was not pleaded as liquidated damages and could therefore not be used as the basis for taxation.

16. The correct procedure was to have the Deputy Registrar apply her discretion and return a reasonable amount as instruction fees especially considering the fact the matter did not proceed to trial but was struck out at a preliminary stage by the court an on application by the Respondents.

17. The general principle in determining a reference before it is as set out in Kipkorir & Kiara advocates v Deposit Protection Fund Board (2005)1KLR 528 where the court held as follows; “and if a judge on a reference from a taxing officer finds that the taxing officer has committed an error of principle, the general practice is to remit the question of quantum for the decision of a taxing officer. The judge has however a discretion to deal with the matter himself or herself if the justice of the case requires.” Similar sentiments were captured by Justice Ringera (RTD- as he then was) in First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR observed “I have asked myself whether I should

remit the bill back to the taxing officer with directions that she should determine the instruction fees and then consider not increasing it as there are no factors to warrant an increase. I am convinced in my mind that that would be a waste of Judicial time in the circumstances of this case. It would also saddle the parties with further unnecessary costs." In the present case before me, I find that it is in the interest of justice to deal with impugned bill and determine what in my view, the fee under item 1 should be calculated as. Having looked at the pleadings and being satisfied that this matter, justice will be better served if the court conclusively deals with the issues before it, and noting the court has found that in the present suit the value of the subject matter is not discernible from the pleadings, the court hereby retaxes the Party and Party Bill at item 1 on instructions fees and reduces it from Kshs.50,423,174.35, to a sum of Kshs.750,000. The court, being satisfied that the value of the subject matter of the suit is not discernible from the pleadings finds that the said sum of Kshs.750,000 under item 1 on instructions fees is reasonable and adequate compensation as instructions fees under item 1 on instructions fees, taking into consideration that this suit did not proceed for trial but was dismissed at a preliminary stage as being res judicata.

18. Turning to the Plaintiffs' reference on the other items on the Bills of Costs, I note that the Plaintiffs have given computations as to how the said Items should have been taxed but they have not set out the basis for the same. Going through Schedule VI (A) of the Advocates Remuneration Order under the headings of 'Copies', 'Drawings', 'Perusals' and 'Attendances' and juxtaposing the same with the Bills of Costs, I find that items therein were drawn to scale and I have no reason to fault the Deputy Registrar's conclusions under those Items.

19. Let me also add by reiterating that taxation of costs is not a mathematical exercise but entirely a matter of opinion based on experience. A court is circumspect in interfering with a Deputy Registrar's discretion in taxation matters and judges must extend some latitude to taxing officers and avoid unnecessary interference with questions of quantum in which taxing officers have greater experience, unless, of course there is some misdirection (see Ouma v Warega [1982] KECA 27 (KLR) and Republic v Minister for Agriculture(supra)].

Conclusion and Disposition

20. In the foregoing, it is my finding is that the Plaintiffs' References dated 12th October 2023 are merited. I allow the same and retax the item under no. 1 on instructions fees at Kshs.750,000. As stated elsewhere in this ruling, I find no reason to interfere with the taxation of the rest of the items raised in the reference. On costs for the references, both the Respondents and the Plaintiffs are partly successful, I direct that each party bears their own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF JUNE 2025

J.W.W. MONGARE

JUDGE

In the presence of:-

Mr. Nyamodi for the Plaintiffs /Applicants.

Mr. Wakhisi holding brief for Prof. Githu Muigai SC and Mr. Eammanuel Wetangula for the 1st Respondent.

Mr. Kahora holding brief for Dr. Fred Ojiambo for the 2nd, 3rd, and 4th Respondents.

Amos - Court Assistant