



Tom Ojienda & Associates v Mumias Sugar Company Limited (Miscellaneous Application 31, 32 & 33 of 2017 (Consolidated)) [2025] KEHC 10920 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION 31, 32 & 33 OF 2017 (CONSOLIDATED)**

JM OMIDO, J

JULY 24, 2025

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES APPLICANT

AND

MUMIAS SUGAR COMPANY LIMITED RESPONDENT

RULING

A. Introduction and Background.

1. A brief history of this matter is that the Applicant, a law firm, acted for the Respondent in Sugar Arbitration Tribunal Cause No. 1475 of 2012 between *Kenya Sugar Cane Growers Association & 2 others v Mumias Sugar Company Limited*. Subsequent thereto, the Applicant filed against the Respondent its advocate/client bill of costs dated 14th March, 2017 which, vide the ruling that was delivered on 11th October, 2017 was taxed at Ksh.27,365,802.48/- by Hon. P.W. Mbulikah.
2. Being dissatisfied with the taxation, the Respondent filed a reference against Hon. Mbulikah's ruling before this court. Vide the ruling rendered on 6th February, 2019, this court (Ochieng' J, as he then was) set aside Hon. Mbulikah's decision and directed that the bill be taxed by another Taxing Master.
3. On 3rd April, 2019, the Applicant filed the amended bill of costs dated 1st April, 2019. I note from the said bill that the only item 2 (instruction fee) was amended, whereby the Applicant sought for Ksh.40,143,163.98/- based on the value of the subject matter (as per the bill), which the Applicant placed at Ksh.899,462,085/-. The said amended bill was subsequently taxed by Hon. L. Akoth at Ksh.429,780/- vide a ruling delivered on 30th November, 2020.
4. The Applicant has now filed the reference in respect of which this ruling is made, seeking to challenge and set aside Hon. Akoth's decision on taxation.



B. The Chamber Summons Dated 10th December, 2020.

5. The Applicant's chamber summons application dated 10th December, 2020, expressed to be brought under Paragraph 11 of the *Advocates Remuneration Order*, Section 3A of the *Civil Procedure Act* and all other enabling provisions of the law, seeking the following orders:
 - a. [Spent].
 - b. That the Taxation Ruling of Hon. Lina Akoth dated 30th November, 2020 with regard to the Applicant's amended bill of costs awarding a sum of Ksh.429,780/- be varied and/or set aside.
 - c. That the Applicant's amended bill of costs dated 1st April, 2019 be taxed afresh before another Taxing Master based on the value of the subject matter of Ksh.899,426,085/-.
 - d. That costs and further incidentals to this application be provided for.
6. The grounds upon which the application is premised are on its face and are in precis as follows:
 - a. That the Taxing Master erred in law by failing to take into account the value of the subject matter that the Applicant states was ascertainable from the pleadings, being Ksh.899,462,085/-.
 - b. That the Taxing Master erred in law by failing to determine the instruction fee based on the value of the subject matter of Ksh.899,462,085/- and instead applied extraneous factors thereby reaching the instruction fee of Ksh.200,000/-, which was extremely low.
 - c. That the Taxing Master erred in law by misapplying and misinterpreting the provisions of the Advocates Remuneration Order and taxing off items 1; 3-6; 8-10; 12-14; 16-18; 20-21; 26; 28-30; 33-34; 37-40; 42-43; 46-48; 50-55; 57-58; 62-63 without any basis whatsoever.
 - d. That the Taxing Master erred in law by taxing off all the disbursements and proceeding from the front that the Applicant did not incur any expense in the prosecution of the case that the Applicant refers to as complex and voluminous.
7. The application is supported by the affidavit of Prof. Tom Ojienda, SC sworn on 10th December, 2020 in which the foregoing grounds are expounded.
8. The application is resisted by the Respondent, and to that end a replying affidavit that was sworn on 21st May, 2021 by Patrick Mutuli was filed.
9. The grounds upon which the application is opposed are as follows:
 - a. That the issues raised in the application on instruction fees and disbursements are res judicata, the same having been determined by Ochieng' J in the ruling of 6th February, 2019.
 - b. That the Taxing Officer applied the proper principles in taxing and determining the amended bill of costs dated 1st April, 2019.
10. This court directed that the reference proceeds by way of written submissions and both parties filed their respective submissions, which I have had the occasion to peruse. Parties also orally highlighted their submissions.



A. The Applicant's Submissions.

11. The Applicant states in its written submissions that there is a glaring error in the taxation done by Hon. Akoth for the amount of Ksh.429,780/-, considering that Hon. Mbulikah had earlier taxed the bill at Ksh.27,365,802.48/-.
12. The Applicant states that the learned Taxing Master failed to determine the instruction fee based on the value of the subject matter of Ksh.899.462,085/-, which the Applicant states is ascertainable from the pleadings before the Tribunal.
13. The Applicant further submits that the learned Taxing Master fell into error by taxing off all the disbursements and proceeding from the front that the Applicant did not incur any expenses in the prosecution of the matter in which the Applicant acted for the Respondent.
14. The Applicant has sought to rely on the authority of *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR in which the court observed that this court has jurisdiction to interfere with the discretion and finding of a Taxing Master if the decision was arrived at following fundamental errors of law or principle. The court held as follows:

“It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with ‘unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given. (Per *SMIT AJP in Preller v S Jordaan and Another* 1957 (3) 3A 201 (O) at 203C - E.)”

15. On the same point, the Applicant relies on the authority of *Republic v Ministry of Agriculture & 2 others ex parte Muchiri W'Njuguna & 6 others* in which the court stated thus:

“Counsel noted that yet another reason given for the large award of costs was that a lot of research had been done, and a large number of papers perused by counsel. It was submitted that the need to do research is not a reason to increase instruction fees. On this point counsel relied on *First American Bank of Kenya v Shah & Others* [2002] 1 E.A. 64. In that case Ringera, J (as he then was) made the following remarks:

[p.69]

“...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.... Of course, it would be an error of principle to take into account relevant 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 reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment.”

16. Further relying on the authority of *Mbuki Kasavi v Maingi Mutisya Nzioka* [2016] eKLR, the Applicant states that the principles that the court ought to consider when taxing a bill of costs include the following (as laid down in *Mbuki Kasavi* (*supra*)), while citing with approval the authority of *Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3)* [1972] EA 162:

- a. That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
- b. that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,
- c. that the general level of remuneration of Advocates must be such as to attract recruits to the profession and
- d. so far as practicable there should be consistency in the award made and
- e. The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”

17. The Applicant further urges that in determining factors to consider during taxation, the court is obligated to consider factors as may exist in the actual case in which the work was done. The Applicant relies on the case of *First American Bank Limited v Shah & another* [2002] 1 EA 64, as quoted with approval in the case of *Karen & Associates Advocates v Caroline Wangari Njoroge* [2019] eKLR, in which the court stated as follows:

“Taxing of costs is not based on a mathematical formula but on the discretion of the Taxing Officer taking into account relevant factors. This court will not therefore readily interfere with the Taxing Officer’s exercise of discretion except where it is shown that in awarding costs, the Taxing Officer failed to take into account factors that he/she should have taken into account or took into account irrelevant factors which led to an injustice.

In that regard, the court stated in *First American Bank Ltd v Shah & Another* [2002] 1 EA 64 thus;

“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... it would be an error of principle to take into account relevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...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...” (emphasis).”

18. With regard to instruction fees, the Applicant faults the Taxing Master for reaching the finding that the value of the subject matter could not be ascertained from the pleadings. The Applicant takes



the position that the value of the subject matter was indicated on the face of the pleadings and the Applicant's submissions filed before the Taxing Master, dated 28th September, 2020 pointed out the same.

19. On the same point, the Applicant further states that the value of the subject matter was stated in the pleadings as Ksh.899,462,085/-. The pleadings that the Applicant refers to in its submissions are the statement of claim dated 19th November, 2012 filed in the Tribunal Cause No. 1475 of 2012 by Kenya Sugar Cane Growers Association & 2 others against the Respondent herein and the statement of defence and counterclaim to the said claim, drawn and filed by the Applicant herein on behalf of the Respondent herein.
20. The Applicant relies on the case of *Joreth Limited v Kigano & Associates* [2002] 1 EA 92 in which the Court of Appeal stated 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) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

21. The Applicant further urges that the learned Taxing Master fell into error in the taxing the bill of costs by failing to consider the complexity “and convoluted nature” of the proceedings in which the Appellant acted for the Respondent, the novelty nature of the matter, the amount of work put in by the Applicant and the importance that the parties attached to the matter.
22. On disbursements, the Applicant submits that the learned Taxing Master erred by reaching the finding that the same are not provided for under the Schedule VII of the *Advocates Remuneration Order*. In the Applicant's view, what the learned Taxing Master ought to have done was to take cognizance of the overriding objectives of the law and apply Schedule VI in relation to disbursements.
23. The Applicant relies on the authority of *KANU National Elections Board case* (supra) in which the court, while cited the case of *Reese v Alberta* [1993] 5 A.L.R. (3rd) 40 where it was held that:

“While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice.,the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of feesplus reasonable disbursements....”

24. The Applicant, on the same issue, also relies on the authority of *Odera Obar & Co Advocates v Gaoyu International Company Limited* [2014] eKLR in which the court held that:

“I must also add that the taxing master did err in finding that the Applicant's work was unascertainable, and by not taking into account the work done by the Applicant which he enumerated in his submissions during taxation, and which have also been reiterated in his pleadings and submissions herein. The work rendered included preparation and sending of the letter of offer to the Vendor's Advocates, conducting searches, and reviewing and making final amendments to the draft sale agreements, and the Applicant provided evidence thereof.”



25. In conclusion thus, the Applicant submits that the items touching on perusals, making copies, attendances, service of documents and other disbursements ought to have been awarded by the learned Taxing Master in judicious exercise of her discretion.

B. The Respondent's Submissions.

26. The first ground upon which the reference is resisted by the Respondent is that of jurisdiction. The Respondent submits that this court does not have jurisdiction to determine the issues raised in the reference by virtue of the doctrine of res judicata. The Respondent proffers the position that the value of the subject matter as an issue and the disbursements as claimed are payable as an issue were determined with finality by Ochieng' J in his ruling that was delivered on 6th February, 2019.

27. On the value of the subject matter, the Respondent invites the court to consider the court said in that ruling, as follows:

“The learned taxing officer noted that no monetary value of the subject matter was discernable from the pleadings.

As the advocate submitted before, the taxing officer;

“... assessed the instruction fees based on the nature, the interest and the importance of this cause to the parties and the general conduct of the proceedings.....”

If the taxing officer had been guided by those matters specified by the advocate, she would have been deemed to have applied her discretion in a judicious manner.

But I note that the taxing officer actually stated the sum of Ksh.1,012,070,451/- as the value of the subject matter.

I delved into the submissions which had been made before the taxing officer, and have found that the advocate had arrived at that figure as follows:

“It is our submission that this was a matter involving the dealing which (Sic!) the relationship between Mumias Sugar Company and farmers and the core business of the Company which involved supply of sugar cane, the raw material whose subject matter runs into Ksh.1,012,070,451/- inclusive of interest.”

In effect, the advocate suggested that there was a monetary value of the subject matter, and the taxing officer appears to have accepted the figure suggested by the advocate.

I find that when the taxing officer had reached the conclusion that the value of the subject matter was not discernable from the pleadings, it was an error of principle to then assign a monetary value to the same subject matter.”

28. In the Respondent's interpretation of the words of Ochieng' J, which is disputed by the Applicant, the court reached a determination that the value of the subject matter could not be ascertained from the pleadings and that therefore, it is not open for this court, pursuant to the doctrine of res judicata, to revisit the issue as to whether or not the value of the subject matter can be determined and/or ascertained from the pleadings.



29. With respect to disbursements, the Respondent relies on the following passage, which it claims was extracted from the ruling of 6th February, 2019:

“When a taxing officer awards disbursements when taxing a bill, he or she needs to ascertain that the sums claimed had actually been disbursed. The reason for that is that the person whose bill was being taxed, would be looking for a reimbursement of the sums that he or she disbursed. Therefore, unless he/she can satisfy the taxing officer that he/she had disbursed the monies claimed, there would be no sound basis for reimbursing such money. I hold the considered view that the learned taxing officer erred in principle when she taxed the bill and awarded disbursements which the advocate had not proved having disbursed.”

30. I have combed through the ruling that Ochieng’ J rendered in the present cause (Miscellaneous Application No. 31 of 2017) and cannot, with respect, find therein the above paragraph. It is instructive from the kenyalaw.org website that the above paragraph was extracted from another (related) ruling, being Miscellaneous Application No. 33 of 2017 [*Mumias Sugar Company Limited v Tom Ojienda & Associates*](#) [2019] eKLR.

31. For avoidance of doubt, the signed ruling that I have perused and considered, that is in the court record, is the same one, in terms of contents, that the Applicant annexed to the affidavit in support of the refence.

32. Be that as it may, in urging that the court has no jurisdiction to entertain the matters already determined in the earlier ruling the Respondent relies on Section 7 of the [*Civil Procedure Act*](#), Cap 21 Laws of Kenya which provides that:

“7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

33. On res judicata, the Respondent invites the court to consider the words of the court in the case of [*John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others*](#) [2015] eKLR where the court reiterated and reemphasized on the following words as held in the case of [*Kamunye & others v Pioneer General Assurance Society Limited*](#) [1971] EA 263:

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.



34. In conclusion, the Respondent proffers that the matters presented by the Applicant, having in its view already been determined in the previous ruling, cannot be matters for this court to entertain. The court can only interfere with the Taxing Master's award where the Applicant demonstrates that there is an error of principle in the decision of the Taxing Master or that the award was manifestly excessive or low. The Respondent relies on the case of *Muchiri W'Njuguna* (supra), in which the court observed as follows:

“A Court will not, therefore, interfere with the award of a Taxing Officer, particularly where he is an officer of great experience, merely because it 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 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 manifestly excessive as to justify an interference that it was based on an error of principle.”

C. The Applicant's Rejoinder.

35. On the issue of jurisdiction, the Applicant urges that the question whether or not the value of the subject matter is ascertainable from the pleadings was not determined by the court in the previous ruling and is therefore not *res judicata* and that this court can therefore proceed to address and determine the same, and that the same is indeed ascertainable from the pleadings.

36. The position that the Applicant takes is that what Ochieng' J made a determination on was that the learned Taxing Master (Hon. Mbulikah) in her ruling had awarded the Applicant the Applicant Ksh.27,365,802/- when she had not addressed her mind to what the value of the subject matter was. The Applicant submits that in his ruling, the Judge declined to address his mind on what the value of the subject matter was, leaving the parties to address the learned Taxing Master on the issue.

37. Relying on the authority of *Mohamed Dado Hatu v Dadho Gaddae Godhana & 2 others* [2017] eKLR, the Applicant submits that for a matter or issue to be deemed to be *res judicata*, the court has to have made a final decision on the issue in question, and I will add, between the same parties or between parties under whom they or any of them claim, litigating under the same title.

38. In that case, the court, while citing with approval the authority of *John Florence* (supra), held as follows:

“The doctrine of *res judicata* has two main dimensions: cause of action *res judicata* and issue *res judicata*. *Res judicata* based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue *res judicata* may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

39. The Applicant further submits that when the High Court in determining a reference sets aside the entire taxation by a Taxing Master and refers a matter back to another Taxing Master for a fresh taxation, the doctrine of *res judicata* does not apply as no reference can be made to the previous taxation



ruling/award that is set aside. The Applicant relies on the case of *National Lands Commission v Tom Ojienda & Associates* [2018] eKLR where the court reached the following holding:

“Before concluding this ruling however, I need to respond to the advocates submissions that NLC was barred from filing the present reference because it had previously filed a reference against the taxation of E. Tanui. The advocate’s submission in my view is incorrect. It is incorrect because paragraph 11 of the Advocates (Remuneration) Order provide for reference of taxation. The taxation by S.A. Opande was a separate and distinct taxation from the one carried out by E. Tanui. NLC was therefore quite right to have filed this reference before court.”

40. The view of the Applicant is therefore that the taxation by Hon. Akoth was different and distinct from the previous one by Hon. Mbulikah and that the doctrine of res judicata does not therefore apply as the latter was set aside in its entirety, without the High Court reaching any determination as to whether the value of the subject matter is ascertainable from the pleadings.

41. The Applicant asks this court to relook at the pleadings, particularly the statement of claim and the statement of defence that are both annexed to the affidavit in support of the reference, and states that therein the value of the subject matter is ascertainable and stated to be Ksh.899,462,085/-. On this issue, the Applicant invites the court to be guided by the authority of Joreth (supra) and that of *Governors Balloon Safaris Limited v Skyslip Company Limited & another* [2015] eKLR.

42. In Joreth (supra), the court held as follows:

“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, judgement or settlement.....”

43. The court in the case of *Governors Balloon Safaris* (supra) expressed itself as follows:

“The above formulation of law in the case of Joreth Ltd v Kigano & Associates has not changed. The value of the subject matter of the suit should be deduced from the entire pleadings of the party and should not be restricted to the part where the prayers are contained. This follows after the fact that issues for determination will arise from the pleadings of the parties and no averment in the pleading should be seen as otiose unless it is superfluous or mere embellishment of the pleading or it has been relinquished in accordance with the law. This is the applicable law on this subject and I will accordingly be guided by it. The Applicant has placed much emphasis on Order 2 Rule 3(1) and Order 3 Rule 4 of the Civil Procedure Rules to show that the taxing officer committed an error in principle when she used Kshs. 1.5 billion as the value of the subject of the suit. Order 2 rule 3(1) prescribes what every pleading should contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits. This only supports the view the court has taken that every pleading should contain every material fact and when such material fact is so pleaded, it is part of the cause of action and cannot be seen as otiose unless it is unnecessary or an adornment or has been relinquished in accordance with order 3 rule 4 of the Civil Procedure Rules or has been rendered inapplicable by operation of law or some other intervening circumstances.”

44. The Applicant further submits that the value of the subject matter must not necessarily be stated in the reliefs that parties seek in their pleadings, but can also be ascertained upon a general consideration of



the pleadings. To that end, the Applicant relies on the decisions of *Eddy Nicholas O. Orinda p/a One & Associates Advocates v Victoria Commercial Bank Limited* [2020] eKLR in which the court, cited the case of *Kagwimi Kang'ethe & Co. Advocates v Penelope Combos & another* Nairobi HCCC Misc. App. No. 394 of 2008, where the court stated that:

“..Let it be known that it is not necessary that the value of the subject matter be in the prayers, it is to be ascertained from the pleadings generally. My view therefore is that, since the value of the subject matter in this matter seems to have been ascertainable, there was no error of principle on the part of the taxing officer.”

45. Finally, on disbursements, the Applicant fronts the view that the learned Taxing Master erred in principle by taxing off all disbursements, perusals and copies because they are not provided for under Schedule VII of the *Advocates Remuneration Order*. The Applicant opines that the learned Taxing Master ought to have exercised her discretion and proceeded to consider and award those items under Schedule V as the Applicant had elected to present its bill under the said Schedule.

46. To bolster its argument, the Applicant relies on the authority of *Mutisya & Co. Advocates v Lazaro Omita Nyagol* [2004] eKLR where the court stated that:

“The court considering both views above concluded that for any items that costs fell to be paid but were not provided for under Schedule VII, they were properly put forth under Schedule V and the taxing officer was obliged to consider them and tax according to her discretion as such and not strike them out altogether. Paragraph 22 applies when an advocate knowing that there exists a Schedule under which his remuneration ought to be charged opts out of it altogether and elects/decides instead to get remunerated wholly under Schedule V. In such a case he will notify his client in advance or at the same time as he files his bill of costs.”

47. The Applicant complains that the learned Taxing Master should not reasonably have expected that it provides receipts for disbursements, perusals and copies and that it was therefore an error in principle for those items to be taxed off.

D. Issues for Determination.

48. I have considered the Applicant's reference, the affidavit in support thereof, the replying affidavit, the rulings of Hon. Mbulikah and Hon. Akoth, the pleadings in the original record in which the Applicant acted for the Respondent and the submissions by the two sides. The following issues emerge for this court to determine:

- a. Whether the court (Ochieng' J) in its ruling delivered on 6th February, 2019 determined with finality that the value of the subject matter could not be ascertained from the pleadings and whether that issue, as consequence of that determination, if any, is now res judicata.
- b. Whether the court (Ochieng' J) in its ruling delivered on 6th February, 2019 determined with finality that the disbursements are not payable for lack of proof and whether that issue, as consequence of that determination, if any, is now res judicata.
- c. Subject to (a) and (b) above, whether this court has jurisdiction to determine the two issues, and if so, what are the court's findings on the same.
- d. A determination as to the costs of the application.



E. Analysis and Findings.

49. I will determine the above issues in the order that I have set them out.
50. The first point for me to address is whether the court (Ochieng' J) in its ruling delivered on 6th February, 2019 determined with finality that the value of the subject matter cannot be ascertained from the pleadings and whether that issue is now res judicata.
51. On that issue, the Respondent relies on the following paragraph of the ruling that set aside the taxation by Hon. Mbulikah:

“The learned taxing officer noted that no monetary value of the subject matter was discernable from the pleadings.

As the advocate submitted before, the taxing officer;

“... assessed the instruction fees based on the nature, the interest and the importance of this cause to the parties and the general conduct of the proceedings.....”

If the taxing officer had been guided by those matters specified by the advocate, she would have been deemed to have applied her discretion in a judicious manner.

But I note that the taxing officer actually stated the sum of Ksh.1,012,070,451/- as the value of the subject matter.

I delved into the submissions which had been made before the taxing officer, and have found that the advocate had arrived at that figure as follows:

“It is our submission that this was a matter involving the dealing which (Sic!) the relationship between Mumias Sugar Company and farmers and the core business of the Company which involved supply of sugar cane, the raw material whose subject matter runs into Ksh.1,012,070,451/- inclusive of interest.”

In effect, the advocate suggested that there was a monetary value of the subject matter, and the taxing officer appears to have accepted the figure suggested by the advocate.

I find that when the taxing officer had reached the conclusion that the value of the subject matter was not discernable from the pleadings, it was an error of principle to then assign a monetary value to the same subject matter.”

(Underlined emphasis).

52. The view that the Respondent takes is that the Judge determined with finality that the value of the subject matter could not be ascertained and that as such, it is erroneous for the Applicant to give the value as Ksh.899,462,085/-, as the determination by the court renders that issue res judicata.
53. On its part, the Applicant opines that the above words of the learned Judge did not amount to a determination that the value of the subject matter cannot be ascertained from the pleadings, but rather, the court merely addressed itself to the position that the learned Taxing Master made an award without addressing her mind to what the value of the subject matter was.
54. My understanding of what the learned Judge was saying is that when a Taxing Master reaches the finding that the monetary value of the subject matter cannot be ascertained from the pleadings, it is paradoxical, and therefore an error in principle for the Taxing Master to proceed to assign a monetary



value to the same subject matter (see the words that I have emphasized). There is nowhere in his ruling that the learned Judge reached the definite decision or finding that the value could not be determined from the pleadings.

55. In my most respectful view, if indeed the learned Judge was to reach the position that the value of the subject matter of the dispute before the Tribunal was not ascertainable from the pleadings, nothing would have been easier than to specifically state as much. The issue is therefore not res judicata.
56. The second issue for determination is whether the court (Ochieng' J) in its ruling delivered on 6th February, 2019 determined with finality that the disbursements are not payable for lack of proof and whether that issue, as consequence of that determination, if any, is now res judicata.
57. I have under paragraph 29 above reproduced a paragraph that the Respondent relied on, purportedly extracted from the ruling of 6th February, 2019. The words quoted seem to suggest that the court held that the learned taxing officer erred in principle when she taxed the bill and awarded disbursements which the advocate had not proved having disbursed. I have however stated that the holding or finding, and indeed the quoted paragraph is not in the ruling that the learned Judge rendered. The issue then whether disbursements are payable or not, cannot be said to be res judicata.
58. With regard to the two issues that I have addressed above, I will add that I am further persuaded that the same could in any event not be considered to be res judicata for the reason that the entire taxation award by Hon. Mbulikah was set aside. In my understanding thus, the subsequent taxation by Hon. Akoth was a fresh taxation whereby she had the jurisdiction to consider the bill anew and address all the issues arising therefrom.
59. In my further view, the only situation in which such an issue may be considered to be res judicata is when the High Court in a reference determines the issue and directs the subsequent Taxing Master to take the same into consideration when taxing the bill. An example is a case where, in a reference, the High Court determines the value of the subject matter, in which case the Taxing Officer cannot depart from that value.
60. The foregoing then paves way for me to reach the finding on the third issue, (which is whether this court has jurisdiction to determine the value of the subject matter and whether the disbursements are payable) that this court has jurisdiction to determine the two issues.
61. The principles upon which the High Court may interfere with the Taxing Master's discretion were discussed in the South African case of *Visser vs Gubb (3)* SA 753 (C) 754H – 755C where the court observed that:

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”



62. The court in the case of *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18F C G held that:

“ . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.”

63. The above principles have been echoed in the cases of *KANU National Elections Board* (supra) and *Muchiri W’Njuguna* (supra). The question that then abounds is whether the Applicant, through the reference, has made out a case that would impel this court to interfere with the learned Taxing Master’s exercise of discretion.

64. As we have seen from the authorities of *Joreth* (supra), *Governors Balloon* (supra) and *Eddy Nicholas O. Orinda* (supra) the Taxing Master is required to deduce the value of the subject matter of the suit from the entire pleadings of the parties and not necessarily restrict the same to the prayers or the reliefs that are sought therein.

65. The bill of costs, as directed by the ruling of 6th February, 2019 fell under Schedule VI of the *Advocates Remuneration Order*. Part A, of the Schedule provides how to determine the instruction fees, as follows:

“ 1. Instruction fees

The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it-

....

(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 and.....”

(Underlined emphasis).

66. I have perused the statement of claim and the statement of defence, both pleadings that were filed before the Tribunal.

67. The claimant in the matter before the Tribunal pleaded as follows in paragraphs 6 and 7 of the statement of claim”

“ 6. For the period July, 2009 to September, 2010, the Respondent has unlawfully and deliberately refused to pay sugarcane farmers according to the said formula, thereby causing a loss to the farmers of Ksh.899,462,085/-.

7. The Claimants therefore on behalf of the farmers, who sold their sugarcane between the months of July, 2009 and September, 2010 claim the Ksh.899,462,085/- from the Respondent. They further want the Respondent



compelled by the Tribunal to comply with the prices set by the Sugarcane Pricing Committee as per the Sugar Act, 2001.”

68. The reliefs sought in the statement of claim dated 19th November, 2012 are as follows:

“Reasons wherefore the Claimant prays for judgement/ award as follows:

- (a). Ksh.899,462,085/-.
- (b). Interest on (a) above at Tribunal rates since July, 2009 to date of payment.
- (c). Costs of these proceedings.
- (d). Any other relief that this Honourable Tribunal may see fit to give.”

69. The Respondent pleaded as follows in paragraph 6 of its statement of defence:

“The Respondent refers to paragraph 6 of the statement of claim and puts the claimant to strict proof of allegations set out therein. Specifically, the Respondent states that:

- (a)
- (b) It has applied any formula for the payment of farmers that has had the effect of causing a loss to farmers of Ksh.899,462,085/- or at all.
- (c)

70. Having said as much, it is my persuasion that the value of the subject matter is ascertainable and/or discernible from the pleadings and the same is Ksh.899,462,085/- as was stated by the Applicant before the Taxing Master.

71. In her ruling, the learned Taxing Master, Hon. Akoth, stated as follows:

“Having perused the pleadings and the submissions before me, the suit value has not been pointed out. This was also pointed out by the Hon. Justice Cherere (sic) via the ruling delivered on the 29th of February, 2019. In view of the above, I do consider the complexity in the matter and the time taken in concluded (sic) the matter. In the circumstances and in the exercise of my jurisdiction (sic) I proceed to tax item 1 (instruction fees) at Ksh.200,000/-.”

72. The learned Taxing Master, without a doubt, fell into error in principal in the stand that she took, that the value of the subject matter could not be ascertained, yet the same was clearly pleaded in the pleadings before the Tribunal. Where the value of the subject matter is discernible from the pleadings, the Taxing Master is obligated to use it in the calculation of instruction fees.

73. With regard to disbursements, although the passage quoted in paragraph 29 above related to a different (albeit related) matter, I am of the same persuasion that a party who claims disbursements must prove that he disbursed and/or expended the monies claimed. In mind is the case of *Maina Murage & Company Advocates v Mae Properties Limited* [2018] eKLR in which the court declined a claim for disbursements for lack of receipts. There is also the case of *Hezron Odhiambo Abok v Prajapat Pravinbha Jivabbai t/a Mitra Enterprises (K) Limited* [2019] eKLR where the court stated;

“It is my finding that it was incumbent upon the applicant to prove the disbursements he claimed. There was no evidence by way of receipts as to how he came to the same... That



being the case, there was an error in principle committed by the tax master which mistake goes to the substance of the impugned ruling on assessment of taxes.”

74. The Applicant did not prove the disbursements claimed by way of receipts or other admissible documents. I therefore reach the finding that albeit for different reasons, that the Taxing Master reached the correct findings that disbursements are not payable.

F. Conclusion and Disposition.

75. Costs are awarded, having regard to such factors as

- (a) the difficulty and complexity of the issues;
- (b) the length of the trial;
- (c) the value of the subject matter; and
- (d) other factors which may affect the fairness of an award of costs. The law obligates the taxing master to take into account the above principles (See *KANU National Elections Board* (supra).

76. The Taxing Master is given discretion and may increase the instruction fees upon considering the nature and importance of the case, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances (see *Opa Pharmacy Limited v Hse & McGeorge Limited* [1972] EA 23).

77. To that end, having reached the finding that the learned Taxing Master erred in principle in holding that the value of the subject matter could not be ascertained from the pleadings, and having reached the further finding that the value of the subject matter as ascertainable from the pleadings is Ksh.899,426.085/-, I will proceed to allow the Applicant’s reference only to the extent that the award of the learned Taxing Master on instruction fees is set aside.

78. I order that the bill of costs be remitted to a Taxing Master, other than Hon. P.W. Mbulikah and Hon. L. Akoth for purposes of determining the instruction fees, which will then inform what the total amount due to the Advocate/Applicant will be.

79. This matter will be placed before the succeeding Taxing Master on 14th August, 2025 for purposes of taking further directions.

80. The orders issued herein to apply to HMMISC No. 32 of 2017 and HCMISC No. 33 of 2017. A copy of this ruling to be placed in the said files.

81. Section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya dictates that costs shall follow the event. To that end, the Respondent shall bear the costs of the reference.

82. Orders accordingly.

DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 24TH DAY OF JULY 2025.

JOE M. OMIDO

JUDGE

For the Applicant: Ms. Msando.

For the Respondent: No appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

