



**Mbijiwe t/a Bealine Kenya Auctioneers v Absa Bank Kenya
Plc (Commercial Miscellaneous Application E066 of 2022)
[2024] KEHC 4602 (KLR) (Commercial and Tax) (9 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E066 OF 2022**

AA VISRAM, J

APRIL 9, 2024

BETWEEN

JOHN M MBIJIWE T/A BEALINE KENYA AUCTIONEERS AUCTIONEER

AND

ABSA BANK KENYA PLC APPLICANT

RULING

1. I have considered the Notice of Motion application dated 18th August, 2023, together with the affidavit in support sworn on even date; and the Replying Affidavit sworn in opposition to the same on 30th October, 2023. I note that the Respondent was not present at the hearing/ highlighting of the application.
2. The circumstances under which a Judge of a superior court interferes with the Taxing Officer's exercise of discretion are well settled. First, a superior court will not interfere with the decision of the Taxing Officer unless it is shown that either the decision was based on an error of principle or the fee awarded was excessively high or manifestly low as to justify an inference that it was based on an error of principle.
3. Secondly, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors, and the relevant factors to be taken into account include the nature and the 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.
4. Third, if the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment.



5. Further, the court is not entitled to upset a taxation because in its opinion, the amount awarded was high or low.
6. Fifth, it is within the discretion of the Taxing Officer to increase or reduce the instruction fees.
7. Sixth, the Taxing Officer ought to set out the basic fees before venturing to consider whether to increase or reduce it.
8. Seventh, the full instruction fee to defend a suit is earned the moment a defence has been filed. (see *First American Bank of Kenya v Shab and others* (2002) 1EA; *Joreth Limited v Kigano & Associates* (2002) 1 EA 92; *R v Minister for Agriculture & 2 others Ex parte Samuel Muchiri W’Njuguna & others* (2006) eKLR; and *B Mbai & Associates Advocates v Clerk, Kiambu County Assembly & Another* (2017) eKLR.
9. The issue in the present application is whether or not the Applicant was entitled to an instruction fee?
10. The remuneration orders provide for the charging schedule of the order at schedule 6 paragraph 1(b) which provides, inter alia, that:-

1(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

...

(d) To defend any other proceedings; an instruction fee calculated under subparagraph 1(b)

11. It appears plain to me, that the above order contemplates an instruction fee at 1(b) in relation to proceedings that take place after the suit. Put another way, there appears to be no bar to an instruction fee in relation to a Bill of Costs filed by an Auctioneer, in which an Auctioneer appoints an Advocate to act on his behalf in respect of. An instruction fee ought to therefore have been awarded by the Taxing Master. It was not.
12. The question of how much to charge in relation to the instruction fee, is to my mind, an issue that ought to be left up to the discretion of the Taxing Master, but to charge nothing at all, is in my view, an error falling within the grounds upon which a court may interfere with the decision of the Taxing Master, as set out above.
13. Based on the reasons set out above, I find that the application is with merit. The decision of the Taxing Master dated 11th August, 2022, is accordingly set aside. The Applicant’s bill of costs shall be remitted for taxation to a different Taxing Master from the present one. Each of the parties shall bear their own costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 9TH DAY OF APRIL 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

..... For the Auctioneer/Respondent



..... For the Applicant

