



**Family Bank Limited v Mwarania & 6 others; Mount Kenya University (Interested Party) (Civil Suit 201 of 2012) [2023] KEHC 21171 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21171 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 201 OF 2012  
HM NYAGA, J  
JULY 24, 2023**

**BETWEEN**

**FAMILY BANK LIMITED ..... PLAINTIFF**

**AND**

**BERNARD GIKUNDI MWARANIA ..... 1<sup>ST</sup> DEFENDANT**

**MARGARET KARWIRWA MWONGERA ..... 2<sup>ND</sup> DEFENDANT**

**STEP UP HOLDING (K) LTD ..... 3<sup>RD</sup> DEFENDANT**

**PETER MURITHI MWARANIA ..... 4<sup>TH</sup> DEFENDANT**

**CECILIA NYARUAI KIRAGURI ..... 5<sup>TH</sup> DEFENDANT**

**JOHN MUTHAMI MURIITHI ..... 6<sup>TH</sup> DEFENDANT**

**BANK OF AFRICA LIMITED ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**MOUNT KENYA UNIVERSITY ..... INTERESTED PARTY**

**RULING**

1. There are three summonses for determination before court. i.e. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Chamber Summons dated 17<sup>th</sup> June,2022; 3<sup>rd</sup> Defendant's Chamber Summons dated 20<sup>th</sup> June,2022; 4<sup>th</sup> Defendant's Chamber summons dated 29<sup>th</sup> June,2022; & 5<sup>th</sup> and 6<sup>th</sup> Defendants' Chamber summons dated June 17, 2022.
2. All the Defendants are challenging the decision of the taxing officer delivered on June 7, 2022.



3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants summons is brought under Paragraph 11(2) of the Advocates (Remuneration) Order and they are seeking for orders:-

1. That this Honourable Court be pleased to re-tax items 1,2,3,4,15,16,17,18,19,20,21,22,23,24,25,26,27,28,29,30,31,32,34,35,36,37,39,41,42,43,44,45,46,48,49, and 225 or issue directions relating to those items as it deems fit.
2. That in the alternative this Honourable Court be pleased to issue specific directions regarding the value of the subject matter of the suit and instructions fees payable and fees for getting up to prepare for trial for the two occasions.
3. That in the alternative the said decision of the taxing officer on the aforesaid items be set aside and the bill of costs be remitted back for taxation of those items before another taxing officer.
4. That the costs of this Application be provided for.

4. The Application is premised on the grounds on its face and supported by an affidavit sworn by Wilfred Nyaundi Konosi, Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the even date.

5. He deposed that the taxing officer taxed the 1<sup>st</sup> and 2<sup>nd</sup> defendants bill of costs in the sum of Ksh.653,432/= and that vide a Notice of Objection to taxation dated 14<sup>th</sup> June, 2022 the 1<sup>st</sup> and 2<sup>nd</sup> defendants requested the taxing officer to furnish them with reasons for the decisions on the aforesaid impugned items and have obtained a ruling containing those reasons.

6. He deposed that the impugned items were taxed at Ksh.425,652/= and that the taxing officer erred in her total addition as she arrived at a figure of Ksh.653,432/= instead of Ksh.740,682/=

7. He contended that the taxing officer erred in principle in holding that the value of the subject matter could not be ascertained yet the value of the subject matter could be ascertained from either paragraph 5 of the pleading or prayer (k) under the orders sought.

8. He averred that it is discernable from the plaint the very minimum claim was for the reversal of Ksh.267,497,878.80 that attracted a sum of Ksh 3,500,000/= as the basic instruction fees plus there were more prayers and that other circumstances which ought to have been considered were the care and labour required, the complexity of the matter, the number and length of the papers perused, the difficulty and novelty of the questions raised, the interest of the parties, the time expended and all the things done in execution of the instructions.

9. He stated that the taxing officer erred in law and in fact in taxing off item no.169 in the sum of Ksh.2,170,000/= and holding that it was a repeat of item 103 and in not awarding the 1<sup>st</sup> and 2<sup>nd</sup> defendants fees for getting up to prepare for the trial considering that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had to prepare for the hearing a fresh after the order dismissing the suit had been set aside and the suit reinstated for hearing.

10. He faulted the taxing for taxing item no.53 twice. First as a court attendance and secondly as fees for perusal.

11. He deposed that the taxing officer erred in law and in fact in taxing items 15, 19, 20, 22, 27, 29, 32, 35, 39, 36, 37, 39, 42, 43, 44, 45, 46, 48, 49, 51, 54, 58 and 59 at a flat rate of Ksh.840/= on the ground that those attendances did not take more than one hour yet some of the attendances were for the hearing of applications which took more than one hour.



12. He deposed that the taxing officer erred in taxing items 60, 61, 64, 68, 69, 75, 77, 78 and 80 at a flat rate of Ksh.1, 100/= ; items 180,196,222 and 223 at a flat rate of Ksh.2,300.00; & items 105,145,172 at a flat rate of Ksh.5,000.00 without giving any reason for doing so.
13. He contended that the taxing officer misapprehended the meaning of a folio when taxing items 16,17,18,21,23,24,25,26,28,20,31,34,41,52,53,56,71,74,76,99,100,102,103,150,151,179,181,182,183,192,193,194,20 and 225.
14. It was his deposition that the taxing officer erred in law and fact in taxing off items 154,155,156,157 and 158 for failing to realize that even though indicated that they were for perusal, making copies and attending court for filing, the amount charged was for drawing the documents, making copies and filing them in court, yet fees for serving those documents was allowed.
15. He averred that the taxing officer erred in law and fact, in taxing off items 184 and 185 and holding that they fell under an unnamed item.
16. He averred that the taxing officer erred in taxing off VAT completely without any reasons.
17. He believes that it is in the interest of justice that this application be allowed as prayed.
18. The 3<sup>rd</sup> Defendant summons is brought under Paragraph 11(4) of the Advocates(Remuneration) Order and it seeks for review, variation and or setting aside of items 1, 2, 3, 4, 5, 6,7, 9, 10, 11, 13, 14, 15, 16, 19, 21, 22, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35,36,38,44,45,46,49,52,53,55,57,59,61,64,66,67,71,73,74,75,79,80,81,85,87,88,89,90,91,92,104,109,122,123,129,1 and 302 of the its Bill of costs dated 2<sup>nd</sup> June,2022 and for costs of this Application.
19. The Application is predicated on grounds on its face and supported by an affidavit of Bernard Gikundi Mwarania, the 3<sup>rd</sup> Defendant's chairman of the Board of Directors.
20. He averred that on June 7, 2022 ,the 3<sup>rd</sup> defendant applicant's Bill of Costs dated June 2, 2020 was taxed in the sum of Ksh.759,107/=
21. He stated that the taxing officer erred in law and in fact in finding that the 3<sup>rd</sup> Defendant's Bill of Costs was opposed and that submissions were filed in opposition of the said bill when none were filed.
22. He contended that submissions having not been filed in opposition of the Bill of costs there was nothing before the taxing master to consider and that the taxing officer considered irrelevant considerations in taxing the said bill of costs.
23. That in taxing item 1 the taxing officer erred in law, principle and in fact in finding that the value of the subject matter of the suit could not be ascertained from the pleadings.
24. He averred that in taxing items 2,7,19,26,27,29,30,31,32,33,35,36,38,44,45,46,49,53,55,57,59,61,64,66,67,71,73,74,75,79,80,85,87,88,89,90,91,92,1 and 302 of the 3<sup>rd</sup> defendant's bill of costs, the taxing officer misdirected herself when she equated the pages of the documents to be the same as folios contrary to the express terms of Rule 17 of the Advocates Remuneration Order which provides that a folio means 100 words or in some cases part of 100 words and thus reached erroneous taxations on the said items.
25. He deposed the taxing officer erred in law in not considering all relevant factors when taxing items 3,52 and 129 of the 3<sup>rd</sup> defendant's bill of costs.
26. He stated that the taxing officer erred in taxing item 44 of the 3<sup>rd</sup> Defendant bill of costs twice.



27. He contended that the taxing officer erred in law in taxing items 44 and 81 of the 3<sup>rd</sup> defendant's bill of costs together when item 44 of the said Bill of Costs related to perusal of the 7<sup>th</sup> defendant's replying affidavit while item 81 of the said bill of costs related to attending the court registry to file the 3<sup>rd</sup> defendant/applicant's Replying Affidavit.
28. He stated that the taxing officer erred in law and in fact in taxing off item 66 completely as the item related to service of the 3<sup>rd</sup> defendant's/applicant's application upon the advocates for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and had nothing to do with a perusal.
29. He deponed that the taxing officer erred in law and in fact in taxing off item 66 completely as the 3<sup>rd</sup> defendant/applicant was not the 4<sup>th</sup> defendant and it was not therefore receiving and perusing its own documents.
30. He averred that the taxing officer erred in law and in fact in taxing off items 122 and 123 of the 3<sup>rd</sup> defendant/applicant's Bill of Costs on account of being a repeat of items 120 and 121 of the said bill of costs when they were not.
31. He stated the taxing officer erred in law and in fact in taxing three amounts for item 217 and the 3<sup>rd</sup> defendant/applicant's bill of costs.
32. He contended that the taxing officer erred in law and in fact in taxing off item 273 of the 3<sup>rd</sup> defendant's/applicant's bill of costs for being a repeat of item 93 of the said bill of costs when it was not since item 93 of the said bill of costs was on drawing a letter to the plaintiff's advocates while item 273 of the said bill of costs was on getting up fees.
33. He averred that the taxing officer erred in law and in fact in allowing items 9 and 16 of the 3<sup>rd</sup> defendant's/applicant's bill of costs and at the same time disallowing the said items in the same decision.
34. The 4<sup>th</sup> Defendant's summons is brought under Paragraph 11(2) of the Advocates (Remuneration) orders and he seeks for orders that this court be pleased to set aside and or vary the impugned decision with regard to item no.1 on instructions fees to Ksh.1,500,000/= as opposed to a summon Ksh.150,000/= averced; that this court be pleased to set aside and or vary the impugned decision with regard to item no.32 on instructions fees to project a counter claim to Ksh.2,000,000/= as opposed to Ksh.122,000/= averced; that this court do issue specific directions regarding the value of the subject matter of the suit, counterclaim and instruction fees for getting up to prepare for trial for the two summons; that this court be pleased to retax items 30,31,32,33,34,35,36,37,38,39,40,41,42,43,44,45,46,47,48,49,50,51,52,53,54,55,56,57,58,60,61,62,64,66,67,68,69,70,71,72,81,82,84,85,87,89,90,91,92,93 and 104 and issue directions on those items as it deems fit; that in the alternative the impugned decision on the bill of costs dated 28<sup>th</sup> August, 2022 on the above items be set aside and the bill of costs be reunited back to taxation of those items before another officer.
35. The application is premised on the grounds on its face and supported by an affidavit sworn by Wambeyi Makomere, an Advocate for the 4<sup>th</sup> Defendant sworn on 29<sup>th</sup> June, 2022.
36. He deposed that the taxing officer erred in principle in holding that the value of the subject matter could not be ascertained yet the value of the same was ascertainable from the pleadings and the judgement itself.
37. He stated that the taxing officer erred in taxing and failing to acknowledge and consider the complexity of the matter in assessing the bill and that in the interest of justice that this Honourable court should allow the reference as prayed.



38. The 5<sup>th</sup> and 6<sup>th</sup> Defendants in their summons prayed for orders that the learned taxing officer's decision dated 7<sup>th</sup> June, 2022 taxing items 1-83 of the 5<sup>th</sup> and 6<sup>th</sup> Defendants' party and party bill of costs dated 19<sup>th</sup> August, 2020 in the sum of Ksh.332, 527.00 be set aside; that the 5<sup>th</sup> and 6<sup>th</sup> defendants' bill of costs be remitted to a different taxing officer for fresh taxation; & that the 5<sup>th</sup> and 6<sup>th</sup> defendants' be awarded costs for the reference.
39. The application is premised on the grounds on its face and supported by an affidavit sworn by Henia Ruara, an advocate for the 5<sup>th</sup> and 6<sup>th</sup> defendants.
40. He averred that the taxing officer erred in finding that the value of the subject matter could not be ascertained from the pleadings .According to him both the plaint and the judgement had values that could be ascertained.
41. He deponed that as a result of the above error, the taxing officer's assessment of the instruction fees and getting up fees is grossly low and not commensurate to the man hours put in defending the suit.
42. He averred that the taxing officer failed, refused and or neglected to consider the complexity and importance of the matter in assessing the instruction fee.
43. He deponed that the taxing master erred by assessing attendances on the lower scale without taking into account the complexity of the brief.
44. He contended that the taxing master erred in failing to consider that the 5<sup>th</sup> and 6<sup>th</sup> defendants' advocate attended court on 12<sup>th</sup> March, 2013 for the hearing of the application dated 11<sup>th</sup> June 2012.
45. He asserted that In view of the foregoing, it is clear that the taxing officer erred in principle in her said decision and it is therefore just that this honourable court sets aside that decision and be pleased to refer the matter back for re-taxation of the bill of costs.
46. The plaintiff did not file any response to summonses.

#### **1<sup>st</sup> and 2<sup>nd</sup> Defendants' Submissions**

47. The Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted that that in view of lack of response to their reference, the plaintiff had no business in filing submissions. He argued that legal consequences of failing to file a replying affidavit was addressed in the case of Daniel Kibet Mutai & 9 others vs Attorney General [2019] eKLR where the court of appeal cited with approval the cases of Phillip Tirop Kitur vs Attorney General [2018] eKLR, & Peter O. Nyakundi & 68 others vd Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR where both courts inter alia concurred that failure to file a replying affidavit to the petitioner's case could only mean that the petitioner's evidence stood unchallenged.
48. Based on the above precedents, the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted that the factual depositions in the Supporting Affidavit have not been controverted and they must therefore, be deemed to be true, and urged this court to so find and hold.
49. On whether a party who has not filed a replying affidavit can file submissions, the Counsel relied on the Supreme Court Case of Gideon Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR where the court inter alia expressed itself as follows: "A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed." Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1<sup>st</sup> Respondent on August 17, 2018 are of no effect.



50. In view of the above, the counsel urged this court to disregard the submissions filed by the Plaintiff.

### **The 3rd Defendant's Submissions**

51. On whether the court should interfere with the decision of the taxing master on the aforesaid impugned items, the Advocate for the 3<sup>rd</sup> defendant submitted in the affirmative on grounds that the reference is unopposed.

52. On merit, specifically regarding the instruction fee, the counsel submitted that the subject matter could be ascertained from paragraphs 5,11,28(e),(f),(g),(h), & (i),30,31, 32,33(g),43,44, 48,50,51 of the plaint and from prayers (a), (b) and (c) of the plaint.

53. The Counsel also submitted that the 3<sup>rd</sup> defendant put in a lot of effort to counter the claim as filed and successfully defended the subject matter after a full trial.

54. He contended that paragraph 1(m) of Schedule 6 of the Advocates Remuneration (Amendment) Order 2006 applied by the taxing officer in taxing item 1 applies to an appeal yet the matter herein is not an appeal.

55. He argued that the taxation of item 1 was erroneous as it ignored the law and all the principles applicable in taxation of instruction fees laid down in Premchand Raichand Ltd vs Quarry Services of East Africa Ltd (No. 3) [1972] EA 162 & Joreth Limited vs Kigano & Associates [200] 1 EA 92

56. On the definition of a folio the Counsel referred the court to the Paragraph 17 of the Advocates (Remuneration) Order and the cases of Nicholas Angwenyi Siro t/a Riverside Continental Resort vs Finlay Kirui & another [2020] eKLR and Amalo Company Limited v B.N.Kotecha & Sons Ltd & another [2019] eKLR and submitted that in taxing items 2,7,19,26,27,29,30,31,32,33,35,36,38,44,45,46,49,53,55,57,59,61,64,66,67,71,73,74,75,79,80,81,85,87,88,89,90,91,92 and 302 the taxing officer did not verify the number of folios contrary to the terms of Rule 17 of the Advocates Remuneration Order and the established jurisprudence of our superior courts.

57. Regarding items 3,52 and 129 the counsel submitted that the same relate to instruction fees to oppose or prosecute interlocutory applications and the award of Ksh. 5000.00 made by the taxing officer did not specify whether the amount is for all applications or each application.

58. The counsel also submitted that the taxing officer did not give reason for taxing the said items at that amount and that there was no indication that she considered the value of the subject matter of the said applications and as such she erred in principle.

59. In regards to item 35, the counsel submitted that the taxing officer erred by taxing it off completely on grounds that it was part of item 26. The counsel stated that item 35 was for drawing a verifying affidavit for the counterclaim and item 26 was for drawing a defence and counterclaim.

60. The counsel relied on the case of Amalo Company Limited vs B N Kotecha and Sons Limited & another [2022] eKLR where the court cited the provision of Order 4 Rule 1 and 2 and inter alia opined that a verifying affidavit is separate and distinct document from the plaint which it was verifying.

61. The counsel then submitted that above position similarly applies to counterclaim as well for Order 7 Rule 5(a) of the Civil Procedure of the Civil Procedure Rules requires that the defence and counterclaim be accompanied by an affidavit under Order 4 Rule 1(2) where there is a counterclaim. He submitted therefore that the 3<sup>rd</sup> Defendant properly charged for the verifying affidavit separately from the defence and counterclaim



62. In regard to Items 44 and 81, the counsel submitted that the taxing officer erred in law and in taxing items 44 and 81 together when item 44 related to perusal of the 7<sup>th</sup> Defendant's Replying Affidavit while item 81 related to attending the court registry to file the 3<sup>rd</sup> Defendant's Replying Affidavit.
63. With regards to item no. 66, the counsel submitted that it relates to service of the 3<sup>rd</sup> defendant's application dated 12<sup>th</sup> September, 2021 upon the advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and had nothing to do with perusal.
64. The counsel submitted that the taxing master erred in taxing off completely item 122 as it was not a repeat of any item.
65. In regards to item 217, the counsel submitted that the taxing officer erred in taxing three amounts for this item.
66. In respect to item 273, the counsel submitted that it was not a repeat of item 93 as held by the taxing officer.
67. With respect to items 9 and 16, the counsel submitted that the taxing officer erred in allowing and disallowing the same in her ruling. He urged this court to allow the same.
68. On costs, the counsel submitted that the same follow the event. He prayed for costs of the reference.

#### **The 5th and 6th Defendant's Submissions**

69. In regards to whether subject matter could be ascertained, the Counsel for the 5<sup>th</sup> and 6<sup>th</sup> Defendants concurred with the submissions of the above defendants.
70. The counsel argued that the value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement 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 matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances as was held by the court of appeal in *Joreth Limited vs Kigano & Associates* [200] 1 EA 92
71. The counsel submitted that the instruction fee of Ksh. 2,000,000/= was justified as the defendants herein successfully defended the suit herein.
72. On whether the instruction fee and getting up fees awarded was justified, the counsel submitted in the negative. He stated that the said amount is manifestly low taking into account the subject value of the matter, circumstances of the case and the man hours taken.
73. He argued that the taxing officer has discretion to assess the instruction fees taking into account the value of the subject matter, the nature and importance of the matter and interest of parties as was held in the case of *Ochieng, Onyango, Kibet & Another V Adopt A Light Limited* [2007] eKLR
74. In regards to whether this court should interfere with the aforesaid Taxing officer's decision, the counsel for the 5<sup>th</sup> and 6<sup>th</sup> Defendants submitted in the affirmative. To buttress his submissions, he referred this court to the principles under which the Judge of the High Court would interfere with the taxing master exercise of discretion as were stated in the case of *First American Bank of Kenya vs. Shah and Others* [2002] 1 EA 64 which was quoted in the case of *DK Law Advocates vs Zhong Gang Building Material Co. Ltd & Another* [2021] eKLR



75. The 4<sup>th</sup> defendant did not file submissions and if he did, they were not available at the time of writing this ruling.

### **Analysis & Determination**

76. The issues that arise for determination are: -

- a. Whether the value of the subject matter was ascertainable.
- b. Whether or not to interfere with the Ruling of a taxing master given on 7<sup>th</sup> June, 2022.

77. Matters of quantum of taxation are purely within the province, competence and judicial discretion of the taxing officer. This Court will not hurriedly interfere with an award of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised, resulting in injustice. The Court in the case of *Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board* [2005] eKLR was categorical that;

“On 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.”

78. The proper exercise of discretion by the Taxing Officers was restated in *Kamunyori & Company Advocates vs Development*

*Bank Of Kenya Limited* (2015) Civil Appeal 206 of 2006, where it was held that;

“.. Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded

was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside”

79. The principles of setting aside the decisions of Taxing Master were well established in the cases of *Premch and Raichand Limited & Another vs Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya vs Shah and Others* (2002) EA 64 and *Joreth Ltd vs Kigano and Associates* (2002) 1 EA 92. These includes

- a. That there was an error of principle
- b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
- c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
- d. That so far as practicable there should be consistency in the award.

80. With the above principles in mind, I will now proceed to consider the first issue.

81. The Advocates for the 1<sup>st</sup> to 6<sup>th</sup> defendants averred that the taxing officer erred in holding that the value of the subject matter could not be ascertained.



82. According to them, the same was ascertainable from the pleadings and Judgement delivered by the court.

83. In *Mwangangi & Company Advocates vs Machakos County* [2018] eKLR, Misc. Civil Application No. 318 of 2016, Nyamweya J. cited the holding in *Joreth Limited vs Kigano & Associates* [2002] eKLR, and reiterated as follows;

“The factors to be considered in ascertaining the value of the subject matter of a suit were set out by the Court of Appeal in *The Joreth Case* 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, 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”.

The Taxing Officer is thus not only limited to the pleadings, judgment and settlement in determining the value of the subject matter of a suit, and is granted such discretion by paragraph 13A of the *Advocates (Remuneration) Order* which provides as follows;

“For the purpose of any proceeding before him, the Taxing Officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him”.

84. I have perused the plaint dated June 8, 2012 and Judgement delivered on May 14, 2020 and I have to agree with the taxing officer that as regards the 1<sup>st</sup> to 6<sup>th</sup> defendants, the subject matter was indeed not ascertainable. Why do I say so? I will give my reasons.

85. The alleged claim of Ksh. 35,300,00/- in prayer (b) of the plaint was directed at the 7<sup>th</sup> defendant only. It is only the 7<sup>th</sup> defendant who stood to lose that amount had the plaintiff's claim succeeded. The other defendants' assertion that the subject matter against them was that amount is clearly wrong because none of them stood to lose the said amount. The plaintiff's claim against them is as can be seen from prayer (c) to (i). In the said prayers there is no reference to Ksh. 35,300,000/-. Therefore, they cannot ogle at and attempt to ride on the claim against the 7<sup>th</sup> defendant to justify their bills of costs. When the 7<sup>th</sup> defendant was removed from the proceedings, that claim was extinguished and the 1<sup>st</sup> to 6<sup>th</sup> defendants cannot attempt to lay claim to it.

86. Put in another way, if the plaintiff's claim against the 1<sup>st</sup> to 6<sup>th</sup> defendants succeeded, would any one of them have been liable to pay Ksh. 35,300,000/- ? The answer is an emphatic “NO”.

87. It is trite law that where the value of the subject matter is not ascertainable in the pleadings or the judgment or settlement of the parties the Taxing Officer has discretion on the instruction fees, taking into account the complexity of the matter, the importance of the subject matter and work done by the advocate.

88. The Taxing Officer did not find that the matter was complex nor protracted and she held that the figures that were presented in the bills of costs as instruction fees as unconscionable. I am of the view that the Taxing Officer did not use wrong principles of law in arriving at the taxed amounts as regards the instruction fees to defend the plaintiff's suit.



89. My finding on the above issue settles the issue on instructions fees to defend the suit awarded to all parties. I will address the issue of The 4<sup>th</sup> Defendant's counter-claim later.
90. In conclusion, on this item I find that the taxing master exercised her discretion reasonably and there is no basis for interfering with her discretion.
91. I will now consider whether the taxing officer aforesaid decision in relation to the other impugned items should be set aside.

### **Bill of Cost by the 1st and 2nd Defendants**

92. The Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants faulted the trial magistrate for taxing items 15, 19, 20, 22, 27, 29, 32, 35, 39, 36, 37,39,42,43,44,45,46,48,49,51,54,58, and 59 at a flat rate of Ksh.840/= on grounds that those attendances took more than one hour.
93. I have perused the proceedings and I do confirm in regards to item 35 that hearing of an application proceeded on such a date and therefore the court ought to have awarded Ksh.1680/= and not 840/= . The other attendances were for mentions which ordinarily are expected to take half an hour or less. Regarding item 46 there was no such attendance and therefore the attendance fee of Ksh.840/= ought not to have been awarded.
94. Regarding items 60,61,64,68,69,75,77,78 and 80 the taxing officer taxed the same at Ksh.1100/= based on paragraph 7 of the ARO 2014. I have perused the proceedings of the dates in issue and I note that no hearing proceeded and as such the taxing officer exercised her discretion reasonably. Regarding item no. 64, there are no proceedings for 25.9.2014 and as such taxed fee of Ksh. 1100 ought not to have been awarded.
95. I similarly associate myself with the taxing officer finding in regards to items 105,145 and 172. Hearing proceeded only on the date stated in item 145. The awarded sum of Ksh 5,000/= for each item herein was reasonable and was in accordance with the ARO 2014 provisions under Paragraph 7.
96. I also concur with the taxing officer's decision with regard to items 180,196 and 222 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' bill of costs. On the dates indicated on those items, parties highlighted submissions and attended court for ruling and judgement. The sum awarded of Ksh.2300.00 for each item was reasonable.
97. Items 184 and 185 were taxed off. They relate to drawing of list of authorities and making 6 copies respectively. Item 184 is not provided for under the ARO.
98. The Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants further fault the taxing master for taxing off completely items 154,155,156,157 and 158 of the bill of costs. There are no grounds for interfering with the decision on this. These were documents prepared by the 1<sup>st</sup> and 2<sup>nd</sup> defendants as was rightly observed by the taxing master.
99. I have also perused the documents listed under items 16,17,18,21,23,24,25,26,28,30,31,34,41,52,53,56,71,74,76,99,100,102,103,150,151,179,181,183,192,193,194,200,225 and paragraph 8 of the ARO and I concur with the taxing master decision on these items.
100. In regards to item 53, I have perused the ruling and I note that the same was taxed twice but that was not fatal as the defendants herein was still awarded the requisite attendance costs as provided for under the ARO of Ksh.840/=.



101. I also concur with the taxing master findings and reasons given with respect to items 154,155,156,157,158 no.169.

102. The counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants also faulted the taxing officer for taxing off VAT completely. It is my position that party and party Bill of costs does not attract an aspect of taxable supply as an Advocate-Client Bill of Costs would.

103. Section 6 (1) of the VAT Act 2015 provides as follows-

“Tax shall be charged on any supply of goods or services made or provided in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried on by him.”

104. Section 2 of the Act defines “supply” to include the sale or provision of taxable services to another person and “a taxable service” as that which has not been specified in the Third Schedule. Legal services are not listed amongst exempt supplies in the Third Schedule of the Act.

105. For Party and Party Bill of Costs, the winning party is merely compensated for the costs they incurred in prosecuting or defending a case while for Advocate-Client Bill of Costs, an advocate is compensated for the services rendered to the client. The Court in the case of Pyramid Motors Limited v Langata Gardens Limited [2015] eKLR distinguished the two as follows-

“ 30. On the final issue of VAT, I hold the simple view that in allowing the same the Master erred under the *Value Added Tax Act*, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the Plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the Plaintiff was a taxable person. I would vacate the award on VAT as the Master erred.”

106. Similarly, the Claimants did not provide any evidence indicating that they had paid VAT on the legal fees they had paid to their advocates hence are not entitled to an indemnity. The Court in Kenya Commercial Bank Limited vs Stagecoach Management Limited [2017] eKLR cited by the Claimants held that a winning party should be allowed to recoup VAT on the party to party bill of costs where they paid out VAT to an advocate. As such, the taxing officer’s decision to tax off VAT was sound in law and in principle.

### **Defendant’s Bill of Costs**

107. With regard to item 35, the taxing officer taxed off the same on grounds that it was part of counter claim. The argument advanced by the 3<sup>rd</sup> defendant regarding this issue is sound. The taxing master ought to have taxed this item separately. The 3<sup>rd</sup> defendant is therefore entitled to the reasonable sum prayed therein.



108. In regards to item 66, the same relates to service of application and not perusal as it was held by the taxing master. This item was drawn to scale and the 3<sup>rd</sup> defendant is entitled to the sum claimed therein.
109. It is my view that the taxing master erred in her decision regarding items 44 and 81. Item 44 was taxed twice. Item 81 is not on perusal but on court attendance to file a replying affidavit. In regards to item 44 the 3<sup>rd</sup> defendant is entitled to a sum of ksh.294(i.e. 7 folios x 42 = Ksh.294). The sum claimed in item 81 is reasonably fair and the same should be allowed as prayed.
110. Item 273 is on getting up fees. Getting up fees is 1/3 of the instruction fee. The 3<sup>rd</sup> defendant is thus entitled to Ksh. 50,000/=. Item 93 is on drawing a letter. The 3<sup>rd</sup> defendant is entitled to the sum claimed therein. The taxing officer therefore erred in finding that item 273 was a repeat of item 93.
111. Whereas it is true that item no. 122 is not a repeat of item 121 I do not find any reason to interfere with the taxing master's decision on this item because there are no proceedings of 4<sup>th</sup> April,2013.
112. In regards to items 9 and 16, the taxing officer allowed and disallowed the same. This was an error apparent on the face of the record. In the interest of justice this court should review the same and award the 3<sup>rd</sup> defendant Ksh. 840/= and Ksh.3000/= respectively.
113. I concur with the taxing officer regarding the other impugned items i.e. items 2, 3, 7, 19, 26, 27, 29, 30, 31, 32, 33, 35,36,38,44,45,46,49,52,53,55,57,59,61,64,66,67,71,73,74,75,79,80,81,85,87,88,89,90,91,92,104,109,129,130,131,132 and 302.

#### **Bill of costs by the 4th Defendant**

114. Having perused the supporting affidavit by the 4<sup>th</sup> defendant, it is clear that he is challenging only the instruction fees to defend the suit and to prosecute a counterclaim. i.e. the decision of the taxing master in regards to items 1 and 2 of their bill of costs.
115. I have already addressed item 1 of the 4<sup>th</sup> defendant's bill of costs.
116. Having perused Paragraph 1(b) of the Advocates Remuneration Order 2006, I do not see any need to interfere with the taxing officer's decision regarding item 2. The same is sound.

#### **Bill of costs by the 5th & 6th Defendants**

117. The 5<sup>th</sup> and 6<sup>th</sup> defendants are only challenging the instructions fee to defend the plaintiff's suit and getting up fees awarded by the taxing officer as can be gleaned from their submissions.
118. I have already opined that instruction fee could not be ascertained from the pleadings and as such the decision of the taxing master regarding these issues was apt and sound in law.
119. In the end, the references by the 1<sup>st</sup>,2<sup>nd</sup>,4<sup>th</sup>,5<sup>th</sup> and 6<sup>th</sup> Defendants herein are dismissed with costs. The Application by the 3<sup>rd</sup> defendants partially succeeds. Correction of the errors on items 9,16,35,44,81,93 and 273 of the 3<sup>rd</sup> Defendant's Bill of Costs should be included in the certificate of costs.
120. Each party to bear their own costs.

**Dated, Signed and Delivered at NAKURU this 24<sup>th</sup> day of July, 2023.**

**HESTON M. NYAGA**

**JUDGE**

**In the presence of;**



C/A Jeniffer

Mr. Konosi for Applicant

Mr. Wambeyi for Applicant

Mr. Ratemo for Cheloti – Applicant

N/A for others

Nakuru H.C. Civil Case Number 201 of 2012 Page 9 of 9

