



**Erdermann Property Limited v London Distillers (K) Limited (Environment and Land  
Judicial Review Case 41 of 2019) [2024] KEELC 5940 (KLR) (17 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5940 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 41 OF 2019  
CA OCHIENG, J  
SEPTEMBER 17, 2024**

**BETWEEN**

**ERDERMANN PROPERTY LIMITED ..... APPLICANT**

**AND**

**LONDON DISTILLERS (K) LIMITED ..... RESPONDENT**

**RULING**

1. By a Chamber Summons application dated the 22<sup>nd</sup> November, 2023, brought pursuant to Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act; Section 51 of the Advocates Act, Order 22 of the Civil Procedure Rules and Rule 11(2) of the Advocates (Remuneration) Order 2014. The Applicant seeks the following Orders:-
  1. Spent
  2. Spent
  3. That the Honourable Court be pleased to stay, set aside, and/or annul the warrants of attachment and sale of property issued to M/S Bealine Kenya Auctioneers dated 21<sup>st</sup> November, 2023 and the proclamation notice dated 22<sup>nd</sup> November, 2023 and all actions consequent thereon.
  4. That the Honourable Court be pleased to issue a declaration that the Warrants of Attachment and Sale of property issued to m/s Bealine Kenya Auctioneers dated 21<sup>st</sup> November, 2023 and consequent proclamation done on 22<sup>nd</sup> November, 2023 are premature, illegal, unprocedural and unlawful as the same were obtained fraudulently and arose from a non – existent judgement and/or decree of this Honourable Court.
  5. That the Honourable Court be pleased to vacate and set aside in its entirety the Ruling and reasoning of the learned Taxing Master Honourable A. Nyoike (DR) dated and delivered on



7<sup>th</sup> November, 2023 taxing the Respondent's Bill of Costs dated 31<sup>st</sup> August, 2023 at Kshs. 37, 854, 490.

6. That the Honourable Court be pleased to re-assess the quantum of total instruction fees and getting up fees in the Party to Party's Bill of Costs.
  7. That in the alternative to prayer (6) above, the Honourable Court be pleased to remit the Bill of Costs dated 31<sup>st</sup> August, 2023 for re-assessment of the quantum of total instruction and getting up fees chargeable before a different Taxing Master with appropriate directions thereof.
  8. That costs of this Application be borne by the Respondent.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Beatrice Mumo, its Legal Officer. The Applicant confirms that on 7<sup>th</sup> November, 2023, the Taxing Master taxed the 2<sup>nd</sup> Interested Party's Bill of Costs at Kshs. 37,854,590. Further, that Instructions fees was Kshs. 29,000,000 while Getting Up fees was Kshs. 8,700,000. The Applicant states that it lodged an Objection to the taxation and requested reasons for item 1. It explains that on 21<sup>st</sup> November, 2023, the Respondent without any Decree obtained Warrants of Attachment and Sale of Property and instructed M/S Bealine Kenya Auctioneers to proclaim its movable assets. Further, that the Auctioneer proceeded to its premises on 22<sup>nd</sup> November, 2023 purporting to proclaim its movable assets in execution of the Warrants. It argues that the Certificate of Costs is not an executable legal instrument. Further, there is no Decree ensuing from a Judgment. It reiterates that the Ruling and Taxation should be set aside because the Taxing Master acted contrary to set principles of law and misdirected herself on the principles of law applicable. Further, that her decision was erroneous as she disregarded the fundamental principle in law, that in constitutional and judicial review matters, the Instructions fees is not pegged on the value of the subject matter. It contends that the Taxing Master arrived at an erroneous and unreasonable decision by relying on the financial loss report pegging losses at Kshs. 2,400,000,000. Further, she misdirected herself by finding that the financial loss report it availed formed the crux of the judicial review proceedings, disregarding the uncontroverted averments that the judicial review motion revolved on whether the Respondent (NET) could apply a suspended law to the proceedings, then pending being it. It insisted that it was not seeking compensation against the losses pleaded. It reaffirmed that the learned Taxing Master erred in principle by arriving at an erroneous decision on the taxation for reason of her awarding getting up fees when in fact the judicial review proceedings were undefended and neither did the substantive motion even proceed to hearing as it was not concluded by way of a full Judgment of the Court as the ex parte leave granted was withdrawn by the Court, barely a month after institution of the judicial review proceedings.
3. The 2<sup>nd</sup> Interested Party/Respondent opposed the instant Application by filing a Replying Affidavit sworn by PUSHPINDER SINGH MANN, its General Manager where he confirms that the 2<sup>nd</sup> Interested Party's Bill of Costs was taxed at Kshs. 37,854,590 on 7<sup>th</sup> November, 2023. He denies that Warrants of Attachment and Sale were issued fraudulently. He contends that the deponent Beatrice Mumo has alleged that no Certificate of Costs was issued by the Court, yet the same was issued on 15<sup>th</sup> November, 2023 by Hon. M.A. Otindo. He avers that the deponent Beatrice Mumo has committed acts of perjury. He insists that a Certificate of Costs is an executable legal instrument. Further, that when a Bill of Costs has been taxed, the only bar to its execution, is where the same has been set aside or stayed. He explains that there was an Order dated the 18<sup>th</sup> October, 2019, which was issued on 29<sup>th</sup> October, 2019. He reiterates that the Applicant participated in the taxation proceedings precipitating the issuance of the Certificate of Costs and the deponent Beatrice Mumo has hence concealed relevant facts to court. He states that the 2<sup>nd</sup> Interested Party provided a justification of the item on Instructions fees in its Supporting Affidavit filed on 24<sup>th</sup> August, 2023 and enclosed the ex parte Applicant's own



documents in support thereof. Further, the ex parte Applicant never filed any response by way of Replying Affidavit challenging and or controverting the factual basis thereof. He reaffirms that the Taxing Officer did not act contrary to the settled principles and equally did not misdirect herself on the principles of law applicable as the fees charged was clearly explained by the 2<sup>nd</sup> Interested Party. He further insists that the issue of the value of loss and prejudice were ascertainable from the documents before the Taxing Master and was thus material for purposes of being taken into account amongst other things including the nature and importance of the cause or the matter, interest of the parties and conduct of the proceedings. Further, that the Taxing Master could therefore not ignore the same and looked at the relevance of the said documents which have not been, denied emanated from the ex parte Applicant as the value of the subject matter was stated to be Kshs. 2.4 billion. He contends that it is well established in law that matters of quantum of costs are purely within the province, competence and judicial discretion of the Taxing Officer and the Court will not lightly interfere with the award. He argues that the proceedings in the judicial review were defended. He explains that no evidence has been brought forth that the 2<sup>nd</sup> Interested Party is impecunious and will be unable to repay the decretal sums in the execution proceeds and there is no basis of grant of stay pending the determination of the Reference. Further, that the ex parte Applicant has not furnished or offered security as a precondition for stay.

4. The Reference was canvassed by way of written submissions.

#### **Analysis and Determination**

5. Upon consideration of the Chamber Summons Application dated the 22<sup>nd</sup> November, 2023 and the respective Affidavits, annexures including submissions, the following are the issues for determination:-
  - a. Whether the Ruling of Honourable A. Nyoike (DR) dated and delivered on 7<sup>th</sup> November, 2023 taxing the Respondent's Bill of Costs dated 31<sup>st</sup> August, 2023 at Kshs. 37,854,490 should be set aside.
  - b. Whether the Warrants of Attachment and Sale should be stayed.
6. The Applicant in its submissions reiterated its averments as per the Supporting Affidavit and relied on very many authorities which I have considered.
7. The Respondent in its submissions also relied on the averments in its Replying Affidavit, insisted that the Learned Taxing Officer properly exercised her discretion by awarding the correct figure on Instructions and Getting Up fees. Further, it relied on several authorities which I have duly considered.
8. The Applicant contends that the Taxing Officer in her Ruling awarded very high Instructions fees and Getting Up fees. Further, that the Taxing Officer relied on the valuation report when the fulcrum of the dispute did not revolve around it but on NET's reliance on a repealed law.
9. On the issue of the Instructions' fees, Schedule 6 of the Advocates Remuneration Order 2014 provides that:-

“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—(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and (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...”

10. In *Nyangito & Co. Advocates vs. Doinyo Lessos Creameries Ltd., HC Misc No. 843 of 2013*; [2014] eKLR the learned Judge held inter alia:-

“... the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.”

11. While in *Peter Muthoka & Another vs. Ochieng & 3 Others, Civil Appeal No. 328 of 2017*; [2019] eKLR, it was held that:-

“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court. Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.”

12. Further, in the *Kenya Airports Authority v Otieno Ragot and Company Advocates (Petition E011 of 2023)* [2024] KESC 44 (KLR) (2 August 2024) (Judgment) the Supreme Court observed that:-

“We are of a considered opinion that a claim in a suit which is struck out at the preliminary stage does not ipso facto render that claim or amount pleaded therein without more the value of the subject matter. The position still remains that the amount therein has not been ascertained or determined, and as such, it cannot be applied as the value of a subject matter in a disputed taxation. The application of such a claim or amount as the value of the subject matter would go against the rationale that the fees/costs paid to an advocate and a successful party should be reasonable. Consequently, we are not persuaded by the respondent’s contention that even where the amount claimed in a pleading which is struck out by a court, as in the instant appeal, the said amount would still act as the value of the subject matter when it comes to taxation of instruction fees. 60. Be that as it may, where the value of the subject matter can be determined, the Taxing Officer is required to set out the basic fees prescribed under Schedule VI Part A. Similarly, where the Taxing Officer assesses instruction fees based on the nature of a matter as stipulated in Paragraph 1, for instance like, bankruptcy proceedings or matrimonial causes she/he is required to set out the basic fees prescribed thereunder. It is after setting out the basic fees that the Taxing Officer can exercise his/her discretion to increase or (unless otherwise provided, like in matrimonial causes) reduce the said basic fees. ... The instruction fees in the Party-Party certificate of costs



once disputed must be ascertained and the certificate cannot be applied hook, line and sinker in the assessment of instruction fees under Part B.”

13. See the decisions of *Republic v Ministry of Agriculture and 2 others and Joreth Limited v Kigano & Associates* [2002] eKLR *Exparte Muchiri W’Njuguna & others* [2006] eKLR.
14. In this instance I note the fulcrum of the dispute revolved around a Judicial Review Application. The Judge had granted leave to the Applicant to file a substantive motion on Judicial Review but later withdrew the leave and granted costs to the Respondent vide an Order dated 18<sup>th</sup> October, 2019. From this fact alone, it is evident there was no substantive motion that was dealt with. From the Ruling of the Taxing Officer, she proceeded to award the Respondent Instruction Fees and pegged her calculation on the valuation report which had been filed by the Applicant to demonstrate the losses it was suffering from, which amounted to Kshs. 2 billion. Further, she proceeded to award the Respondent Getting Up Fees. The Applicant’s main contention is that the Taxing Officer erred in principle and arrived at an erroneous decision since the substantive motion never proceeded. Looking at the Court Record, it is evident that the issue in dispute was a Judicial Review and not the losses incurred by the Applicant based on the decision of NET. Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014 clearly provides on how the value of the subject matter should be determined while assessing Instructions fees and these are from the pleadings, Judgment or settlement between the parties. However, in the Judicial review there was no Judgment nor settlement of the parties. Further, from the pleadings, there was no indication of any costs of value of the suit land.
15. In the foregoing while relying on the legal provisions I have cited, and associating myself with the quoted decisions, I find that the amount the Taxing Officer awarded as Instruction Fees was based on an error of principle culminating in the fees awarded being manifestly excessive taking into account that the substantive motion did not proceed and the matters which were dealt with, were application for leave to file a judicial review and for setting aside the leave so granted.
16. On Getting up fees, Schedule 6 Paragraph (2)(i) of the Remuneration Order provides as follows:-

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one-third of the instruction fee allowed on taxation.

Provided that this fee may be increased as the taxation officer considers reasonable but it does not include work comprised in the instruction fees...”
17. From the Applicant’s averments in the Supporting Affidavit, I find that since there was no substantive motion dealt with as leave had been withdrawn, there was no complexity in the matter that warranted preparation before the hearing of the Judicial Review. In relying on the legal provisions, I have quoted, I find that the Taxing Officer erred in principle by Awarding the amount of Kshs. 8,700,000 as Getting Up fees for a matter that never proceeded.
18. On the issue of setting aside the Warrants of Attachment and Sale, since I have held that the Taxing Officer erred in principle by taxing the Bill of Costs as she did, I have no recourse but to set aside the said Warrants pending the re-assessment of the Bill of Costs by a different Taxing Officer.
19. It is against the foregoing that I find the Chamber Summons Application dated the 22<sup>nd</sup> November, 2023, merited and will allow it. I remit the Respondent’s Bill of Costs dated the 31<sup>st</sup> August, 2023 to a different Taxing Officer for fresh taxation.



20. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF  
SEPTEMBER, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of:**

Githua for Applicant

Tiego for 2<sup>nd</sup> Respondent

Court Assistant – Simon/Ashley

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