



**Omulele & Tollo Advocates v Magnum Properties Limited (Civil Miscellaneous Application 590 of 2014) [2024] KEHC 12653 (KLR) (Civ) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12653 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL MISCELLANEOUS APPLICATION 590 OF 2014**  
**AN ONGERI, J**  
**OCTOBER 17, 2024**

**BETWEEN**

**OMULELE & TOLLO ADVOCATES ..... APPLICANT**

**AND**

**MAGNUM PROPERTIES LIMITED ..... RESPONDENT**

**RULING**

1. The application dated 18/4/2024 is a reference brought under Articles 162(1), 165(3)(d) (i) (ii), 159(2) (b)(d), 169(1) of the Constitution of Kenya Section 5 of the Magistrates' Court Act Cap 10, Section 3(1)(a)(b)(c) of the Judicature Act, Cap 8, Rule 11 (a) and (b) of the Advocates Remuneration Order, Advocates Act, Cap 16, Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Cap 21, Laws of Kenya was filed by Advocate on the bill of costs dated 25/8/2014 filed on 27/8/2014.
2. The advocate is seeking for retaxation of the bill of costs or that the same be referred back for retaxation by a different taxing master than the one who taxed it.
3. The reference is based on the following grounds;
  - i. That the Applicant only objects to the instructions fees and getting up fees assessed by the Taxing Officer in her decision of 5 April, 2024.
  - ii. That the Taxing Officer failed to consider the material and relevant issue which is that the subject matter of the main suit Nairobi ELC No. 559 of 2011 – Greenview lodge Limited versus Harit Sheth t/a Harit Sheth Advocates and Magnum Properties Limited was kes.1,200,000,000.00 One Billion and two hundred Million Kenya Shillings.)
  - iii. That the Taxing Officer irregularly departed from the figure that was given by this honourable court on 22 September, 2017 by the Honourable Lady Justice M. Gitumbi in her ruling on



the Respondent's Notice of Motion dated 27 January, 2016 for security of costs which was successful and ultimately caused dismissal of the main suit against the Respondent in Nairobi ELC No. 559 of 2011-Greenview Lodge Limited versus Harit Sheth t/a Harit Sheth Advocates and Magnum Properties Limited, when the Plaintiff therein failed to deposit the security for costs of Kes.15,000,000.00 (Fifteen Million Kenya Shillings) in respect to the Respondent who was the 2<sup>nd</sup> Defendant in the main suit and Kes.10,000,000.00 (Ten Million Kenya Shillings) in respect to the 1<sup>st</sup> Defendant as was ordered and which order for security for costs has never been appealed against by any party in the main suit including the Respondent herein.

- iv. That the main suit was dismissed on 9 October, 2018 by the Honourable Justice L. Komogoi in favour of the Respondent for the Plaintiff's failure to comply with the order for deposit of security for costs.
  - v. That without an appeal having ever been lodged against the order of 22 September, 2017 the Taxing Officer was bound by Section 3 of the Judicature Act to conform to the order and ruling of the High Court of 22 September, 2017 that was delivered by the Honourable Lady Justice M. Gitumbi.
  - vi. That therefore the Taxing Officer's decision and ruling of 5th April, 2024 is inconsistent with and in contravention of the system and hierarchy of courts as provided in the Constitution of Kenya at Articles 162(1) and 165(3)(d).
  - vii. That the Taxing Officer despite considering the Applicant's written submissions that emphasized and provided precedence set by this Honourable Court on the nexus between an order for security of costs and taxation without distinguishing or overruling the precedence failed to consider the material and relevant issue of there having been an order for security for costs which she could not deviate from in her taxation of instructions fees and getting up fees.
  - viii. That the Respondent has unconscionably and unfairly concealed from this Honourable Court and the Court of Appeal of its filed motion for security for costs that was successful in having the main suit dismissed in its favour.
  - ix. That the Respondent has been litigating in court with unclean hands.
  - x. That the Respondent has abused court process.
  - xi. That the interest of justice leans towards granting the orders sought.
4. The application is supported by the affidavit of Mududa took sworn on 18/4/2024. In it he deponed that he is an advocate of the high court, a partner in Omulele & Tollo Advocates and the advocate in conduct of the matter herein. He indicated that by the Court of appeal delivered it judgement dated 28/4/2022 in Civil Appeal No. 301 of 2018 between the applicant and the respondent that directed that the applicant's bill of costs be taxed afresh by different Taxing Master, the respondent had not disclosed to the court of appeal nor the applicant that it had filed a motion dated 27/1/2016 seeking security of costs from the plaintiff in the main suit for Kshs, 30,887,920.
5. The respondent filed a replying affidavit dated 29/4/2024. In it he stated that the award by the Deputy Registrar is sufficient due to the fact that the main prayers in the plaint ELC No. 559 of 2011 could not be ascertained. The costs awarded were derived from the pleadings in the main suit and in this instance, there was no evidence of a valuation report or any other document in the pleadings to support the applicants claim.



6. He deponed that when a matter does not take off for hearing, the issue for getting up fees in this instance is commensurate to the instruction fees awarded by the taxing master of Kshs. 1,000,000 therefore the amount allowed of Kshs. 333,333 in her ruling of 5/4/2024 is sufficient. The issue of taxing the applicant's bill of costs dated 25/8/2014 is not a constitutional issue or question before this court as the applicant claims but an issue of assessment of costs owing. Therefore, it is clear that there was never contravention of Articles 162 (1) and 165 (3) (d) of the Constitution of Kenya.
7. The parties filed written submissions as follows; the applicant submitted on the instruction fees that amount taxed is Kshs. 15,112,000.00. In the plaint dated 14/10/2011, ELC No. 559 of 2011 Greenview Lodge Limited versus Harit Sheth t/a Harit Sheth Advocates versus Magnum Properties Limited under prayer (d), the plaintiff had in the alternative, prayed for judgment against the defendants jointly and severally for the current market value of LR No. 209/3850 (I.R. NO. 56396) Processional Way, Nairobi, being Kshs. 1,200,000,000.00 plus interest at commercial rates from the date of filing suit. The applicant argued that even though no document was filed in support of the value of the property, the amount quoted represented an estimate which the plaintiff believed was the value of the property as at that time.
8. The court vide its ruling dated 22/9/2017 determined two applications; one by the 1<sup>st</sup> defendant dated 18/11/2015 seeking security for costs of Kshs. 20,000,000 from the plaintiff while the other application was by the 2<sup>nd</sup> defendant dated 27/1/2016 also seeking security for costs of Kshs. 30,887,920. In her ruling the learned judge made orders that the plaintiff deposits security for costs of Kshs. 10,000,000 in respect of the 1<sup>st</sup> defendant's application and Kshs. 15,000,000 in respect the the 2<sup>nd</sup> defendants application.
9. In an application dated 25/1/2018 the 2<sup>nd</sup> defendant moved the court in the main suit for an order that the suit be dismissed with costs to the defendants on the ground that the plaintiff failed to comply with the court order of 22/9/2017. The application was allowed and the matter was dismissed with costs to the defendants.
10. The applicant submitted that it is trite law that once a party instructs an advocate to represent him/her in a matter and the advocate proceeds to file the necessary documents in court on behalf of the client in furtherance of those instructions, the instructions fee owing to the advocate becomes due immediately. It matters not whether the advocate is retained until the matter is concluded or his/her services are otherwise terminated before the matter is concluded.
11. However, before this suit could be heard and concluded the relationship between the applicant and respondent broke down and the respondent subsequently refused to settle the legal fees that was due to the applicant despite demand being issued. It was the submission of the applicant that he is entitled to the instruction fees of Kshs. 15,112,000 as taxed in its Bill of Costs.
12. The applicant argued that the Taxing officer ought not to have a lower assessment for taxed costs in exercising its discretion while determining the instruction fees payable to the applicant by the respondent. Had the respondent disclosed that the High Court had already assessed the costs in this matter by its ruling of 22/9/2017, the Court of Appeal would not have deemed it fit to order for a fresh taxation on grounds that the ruling and order of 22/9/2017 for security of costs had never been appealed against by any party including the respondent and therefore Article 162(1) of the Constitution of Kenya and the principle of stare decisis apply, such that the only matter for the Taxing Master would have been to add getting up fees, court attendances and disbursements to which sum the Applicant has duly arrived at the total sum of Ksh. 30,210,217.33 which is strikingly similar to the sum the respondent requested for in its successful application for security for costs.



13. The respondent alternatively submitted that the bill of costs is taxed to scale. the bill of costs dated 25/8/2014 was properly taxed at Kshs. 2,412,825.24 and the applicant’s application dated 18/4/2024 is a pleading that is over litigating an issue that has already been settled by Deputy Registrar.
14. The respondent submitted further that the taxing court in awarding the instruction fee of Kshs. 1,000,000 took into account that taxation should be only done by considering the main prayers. The respondent argued that the award was therefore justifiable considering the main prayers were injunctive in nature. That the alternative prayer d in the main suit cannot be relied upon in this instance because the amount of Kshs. 1.2 Billion cannot be determined or supported by the pleadings filed in the main suit. That further on the basis that there is no valuation report in support of the amount, the estimated amount does not and could not in itself mean to be the correct and the indisputable valuation of the property in question on the main suit and thus cannot be relied upon.
15. The sole issue for determination is whether the bill was taxed to scale.
16. I have considered the submissions filed herein. The applicant submitted that he is entitled to the instruction fees of Kshs. 15,112,000 as taxed in its Bill of Costs.
17. The respondent maintained that the bill of costs was taxed to scale and further that the taxing court in awarding the instruction fee of Kshs. 1,000,000 considered that taxation should be only done by considering the main prayers.
18. In the case of *Republic vs Minister for Agriculture & 2 others ex parte Samuel Muchiri Wanjuguna & others* (2006) eKLR, it was held as follows;

“ 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 award was manifestly excessive as to justify an inference that it was based on an error in principle or the fee awarded was manifestly excessive as to justify an inference that it was on an error of principle. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.”
19. In the case of *Nguruman Limited vs Kenya Civil Aviation Authority & 3 others* (2014) eKLR , which cited *Premchand Raichand Ltd vs Quarry Services of East Africa Ltd* (1972) EA, 162, the Court outlined the principles of taxation as follows;-
  - a) That costs should not be allowed to rise to a level as to confine access to justice to the wealthy;
  - b) That a successful litigant ought to be fairly reimbursed for his costs;
  - c) That the general level of remuneration of Advocates must be such as to attract recruits to the profession;
  - d) 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.
20. I find that the value of the subject matter is the basis of determining the instruction fees.
21. Instruction fees as observed in the case of *Joreth Limited vs Kigano and Associates*, Civil Appeal No. 66 of 1999 is ascertained from the pleadings, judgment or settlement (if any).
22. I find that the value of the subject matter is ascertainable in this case and it should be applied to determine the instruction fees.



23. The reference herein has merit and I allow it and set aside the bill of costs and refer the case to the taxing master for re-taxation.
24. If there is any reference from the second taxation, the same to be heard in the ELC since this is a land matter.
25. Each part to bear its own costs of this reference and this file to be marked as closed.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
17<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent

