



**Tahir Sheikh Said Investments Limited v KCB Bank Kenya Limited & another
(Civil Suit E013 of 2020) [2024] KEHC 15861 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E013 OF 2020
JK NG'ARNG'AR, J
DECEMBER 16, 2024**

BETWEEN

TAHIR SHEIKH SAID INVESTMENTS LIMITED PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

JAMII FLOUR MILLERS LIMITED 2ND DEFENDANT

RULING

1. The 2nd Defendant filed Chamber Summons application dated 10th June 2024 pursuant to Rule 11(2) of the Advocates (Remuneration) Order seeking for orders that the court be pleased to review and/or set aside the assessment of the Taxing Officer on instruction fees item numbers 1 and 2 with respect to the 2nd Defendant's Bill of Costs dated 22nd September 2023. That the court be pleased to assess instruction fees due to the 2nd Defendant at Kshs. 21,350,000.00 and getting up fee at Kshs. 7,116,667.00 or at such sum as it deems reasonable and just. That in the alternative to prayer 2 above, this court be pleased to remit the 2nd Defendant's Bill of Costs dated 22nd September 2023 to the Taxing Officer for the instruction fees to be taxed afresh. That costs of this application be provided for.
2. The application is premised on grounds on its face and the affidavit of Rakesh Kumar Bvats sworn on 11th June 2024 that on 13th May 2024, the Taxing Officer delivered her ruling with respect to the 2nd Defendant's Bill of Costs dated 22nd September 2023. That she assessed instruction fees at Kshs. 3,000,000.00 and taxed off Kshs. 18,350,000 hereby reducing the getting up fee by Kshs. 6,116,667.
3. That in assessing instruction fees at Kshs. 3,000,000, the Taxing Officer erred in principle as she failed to consider that the value of the subject was ascertainable as it had been set out at paragraph 32 and 33 of the Plaint dated 3rd November 2020, that the value of the subject matter can only be ascertained from pleadings, judgment or settlement, that the Plaintiff's suit was dismissed on 10th May 2023 under Order 12 Rule 3 of the Civil Procedure Rules 2010 and the matter having been dismissed, the only way



of determining the value of the subject matter was in the pleadings, that the proper schedule under the Advocate Remuneration (Amendment) Order 2014 upon which the instruction fees ought to have been taxed under is Section 6 A1 (b) of the Order and not under 'other matters' of Schedule 6 of the order, that the sum is very low having regard to the fact that the general level of remuneration of advocates must be such as to attract worthy recruits to the legal profession.

4. The 2nd Defendant/Applicant stated that the assessment of the Taxing Officer is grossly unjust and goes against the legal principles that a successful litigant is entitled to reasonable costs. That it is fair and just that the assessment of the Taxing Officer on instruction fees is disturbed and substituted with an award of Kshs. 21,350,000.00 and getting up fee at Kshs. 7,116,667.00 or with such sum that this court deems reasonable.
5. The Plaintiff also filed a Chamber Summons application dated 4th September 2024 pursuant to Rule 11 (1) and (2) of the Advocates (Remuneration) Order seeking for orders that this court sets aside the ruling made by the Deputy Registrar Hon. Akee dated 13th May 2024, which awarded the 1st and 2nd Defendants instruction fees in the sum of Kshs. 3,000,000 each and getting up fees in the sum of Kshs. 1,000,000 each. That this court be pleased to remit the matter back to the Deputy Registrar for re-taxation of the Defendant's Bill of Costs dated 1st August 2023 and 22nd September 2023 respectively with proper and appropriate directions thereon. That in the alternative, this court exercises its inherent jurisdiction and be pleased to retax items relating to instruction fees and getting up fees in the Defendant's Bill of Costs dated 1st August 2023 and 22nd September 2023 respectively afresh. That this court be pleased to grant any other orders that it deems fit and just and that costs of this application be provided for.
6. The application is based on grounds therein and the Supporting Affidavit of Nurein Tahir Sheikh Said sworn on 4th September 2024 that bearing in mind that the basic instruction fees under Schedule 6 Paragraph 1(j)(iii) of the Advocates (Remuneration) Order, 2014 in any other proceedings is Kshs. 75,000, the Deputy Registrar erred in principle by awarding inordinately high instruction fees in the sum of Kshs. 3,000,000 and getting up fees of Kshs. 1,000,000 to each Defendant. That the Deputy Registrar erred in principle when she relied on the value of the subject matter quoted in the Plaint, rather than relying on the judgment to ascertain the value of the subject matter herein. That as a result of the said error in principle, the Deputy Registrar awarded party and party costs that was so manifestly high as to be highly unjust and detrimental to the Plaintiff/Applicant.
7. The Plaintiff/Applicant further stated that the ruling delivered by Hon. Justice Kizito Magare dated 10th May 2023 did not disclose any monetary value upon which the instruction fees could be based, hence the instruction fees should have been taxed under Schedule 6 Paragraph 1(j)(iii) of the Advocates Remuneration (Amendment) Order, 2014 at Kshs. 75,000. That the Deputy Registrar failed to provide reasons for her award of the said instruction fees and getting up fees, making it difficult to ascertain the basis upon which such high fees were awarded. That the Deputy Registrar did not exercise her discretion in taxing the said bill of costs judiciously. That this court has the jurisdiction to set aside the said ruling by the Deputy Registrar and remit the matter for fresh taxation in accordance with the law. That the application is therefore well merited.
8. The application was canvassed by way of written submission. The 2nd Defendant in their submissions dated 18th October 2024 relied on the holding in the case of First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others (2002) eKLR where the Court of Appeal held that a Taxing Officer's decision would not be interfered with unless it was based on an error of principle, or the fee awarded was so manifestly excessive that it justified interference. The 2nd Defendant argued that there was both an error of principle and the instruction fees are manifestly low having regard to the effect that the case had



- been prepared for trial and was in fact dismissed on the date set for trial. That there is no dispute that there is jurisdiction to interfere where the costs awarded are manifestly inadequate as was stated in *Rogan-Kamper v Grosvenor* (1978) eKLR. That the Taxing Officer erred in principle in holding that the value of the subject matter was not ascertainable, and therefore relying on Paragraph 6 (1)(j) under the subheading 'other matters' instead of 61A (b) of Schedule 6. The 2nd Defendant cited the case of *Kamuyori & Company Advocates v Development Bank of Kenya Limited* (2015) eKLR.
9. The 2nd Defendant submitted that in prayer (c) of the plaint dated 3rd November 2020, the Plaintiff sought a declaration that the purported sale and transfer of Mombasa/Block 1/316 to the 2nd Defendant be declared illegal, unlawful, and void. That in prayer (d), the Plaintiff sought an order to cancel all entries in the register made in furtherance of the purported sale to the 2nd Defendant and for an order restoring the Plaintiff as the registered owner of the suit property. That the Plaintiff wanted the suit property back, if it succeeded then the 2nd Defendant would have lost the suit property. The 2nd Defendant purchased the suit property for Kshs. 650,000,000 and the said value is pleaded at paragraph 32 of the Plaint. That the milling plant and the suit property were sold by the administrator appointed under the statutory power of sale by the 1st Defendant as charge to the 2nd Defendant for Kshs. 650,000,000. That the sale agreements are found in the Affidavit of Tauhida Tahir Sheikh Said sworn on 3rd March 2020. That at paragraph 33 of the Plaint, the Plaintiff states that had the 1st Defendant accepted the offer from Bakhresa Grain Milling Kenya Limited, it would have received 1,410,000,000 for the milling plant and suit property. That the offer letter from Bakhresa dated 27th July 2017 is in the affidavit of Tauhida Tahir Sheikh Said sworn on 3rd March 2020.
 10. The 2nd Defendant argued that there is no dispute that there are two competing figures for the value of the subject matter that is Kshs. 650,000,000 and Kshs. 1,410,000,000. That the instruction fees on the sale price of the former figure is Kshs. 9,950,000 and the instruction fees on the latter value of the subject matter under Schedule 6 1A (b) are Kshs. 21,350,000. That an award of Kshs. 3,000,000 was manifestly low. The 2nd Defendant stated that the dispute was whether the 1st Defendant was entitled to sell the suit property at Kshs. 650,000,000 and who between the Plaintiff and the 2nd Defendant was the rightful owner. The 2nd Defendant cited the case of *Joreth Limited v Kigano & Associates* (2002) eKLR and *Peter Muthoka & Another v Ochieng & 3 Others* (2019) eKLR.
 11. The 2nd Defendant submitted on getting up fees by relying on Paragraph 2 of Schedule 6. That the matter came up for hearing on 10th May 2023. The advocates for the Plaintiff, the 1st and 2nd Defendants indicated that they were ready to proceed with the hearing at 11.30 am but when the hearing was supposed to start, the Plaintiff sought an adjournment on the grounds that its witnesses were unavailable. That the judge having considered the request dismissed the Plaintiff's suit under Order 12 Rule 3 of the Civil Procedure Rules 2010 and awarded costs of the suit to the Defendants. The 2nd Defendant placed reliance on the case of *Lucy Waitira, John Irungu Gitugi and Julius Kariuki v Edwin Njagi t/a E. K. Njagi & Company Advocates* (Appeal 292 of 2012) (2017) KECA 272 (KLR) (Civ) September 29, 2017. That the Taxing Master was correct in holding that the 2nd Defendant is entitled to a getting up fee. That had the High Court assessed the getting up fee based on the instruction fees of Kshs. 21,350,000, the getting up fees would have been Kshs. 7,116,667 or in the alternative based on Kshs. 9,950,000 the getting up would have been Kshs. 3,316,667.
 12. The 2nd Defendant therefore prayed that their reference dated 10th June 2024 be allowed, that the bill of costs dated 22nd September 2023 be retaxed, that the decision of the Taxing Officer be reviewed and that the 2nd Defendant's instruction fees be assessed at Kshs. 21,350,000 or alternatively at Kshs. 9,950,000. That the judge should instead of sending the matter back to a different taxing officer should simply substitute the erroneous sums with the figures proposed herein or such other figures as the judge may



consider reasonable in the circumstances. That the Plaintiff's reference dated 4th September 2024 has no merit and should be dismissed with costs.

13. The Plaintiff in their submissions dated 24th October 2024 argued that Hon. Justice Kizito Magare's judgment dated 10th May 2023 did not disclose any monetary value of the subject matter. That in such instances the Advocates (Remuneration) Order, 2014 provides clear guidance under Schedule 6, paragraph 1(j)(iii) which stipulates that where the value of the subject matter cannot be determined from the judgment or decree, instruction fees should be assessed at a basic fee of Kshs. 75,000. That it is a well established principle in taxation of costs that where a judgment has been delivered, the value of the subject matter ought to be ascertained from the judgment itself, not from the pleadings. The Plaintiff relied on the holding in *Peter Muthoka & Another v Ochieng & 3 Others* (2019) eKLR. That any lingering doubts with regard to assessment and/or taxation of costs has now been resolved in the recent decision by the Supreme Court in the case of *Kenya Airports Authority v Otieno Ragot & Company Advocates* (Petition No. E011 OF 2023) (2024) KESC 44 (KLR) (2 August 2024) (Judgment).
14. The Plaintiff submitted that the bill of costs must align with the actual work performed rather than being predicated on speculative figures cited in the pleadings as the foundation for calculating the instruction fees. That in this instance, the suit was dismissed for want of prosecution which undermines the justification for exorbitant fees proposed. That the instruction fees and/or getting up fees sought by the Defendant's advocates are not only disproportionately high but also manifestly excessive when considered against the limited scope of work undertaken. That any assessment of costs is grounded in the reality of the services rendered, upholding the principles of fairness and equity. The Plaintiff relied on the decision by the Court of Appeal in *Moronge & Company Advocates v Kenya Airports Authority* (2014) eKLR and *Kenya Airports Authority v Otieno Ragot and Company Advocates* (Petition E011 of 2023) (2024) which cited with approval the guiding principles in assessing costs under the Advocates Remuneration Order in *Premchand Raichand Limited v Quarry Services of East Africa Ltd* (1972) EA.
15. The Plaintiff argues that pursuant to provisions under Schedule 6, paragraph 1 (j)(iii) of the Advocates (Remuneration) Order, 2014 which stipulates that where the value of the subject matter cannot be ascertained from the judgment or decree, instruction fees should be assessed at a basic fee of Kshs. 75,000. The Plaintiff relied on the decision in *Rosco Kibara Mangaara v Deputy County Commissioner Tharaka South Subcounty & 3 Others, Paul Kirimi Kiria (Interested Party)* (2021) eKLR and submitted that the purpose of the court in determining legal costs is to strike a balance between fairly compensating legal professionals for their work and ensuring that litigation costs remain reasonable so that access to justice is not hindered. The Plaintiff also cited the case of *Republic v Minister for Agriculture & 2 Others Ex-parte Samuel Muchiri W'Njuguna & 6 Others* (2006) eKLR.
16. The Plaintiff stated that in the interest of fairness and proportionality, the instruction fees in this matter be capped at a maximum of Kshs. 300,000 which should be allowed as each of the Defendants' instruction fees. That the getting up fees should be assessed accordingly in line with provisions of Schedule 6, paragraph 2 of the Advocates (Remuneration) Order, 2014 which stipulates that getting up fees should not exceed one third of the instruction fees where a matter proceeds to trial. The Plaintiff therefore proposed that the reference filed by the 2nd Defendant be dismissed. While the one filed by the Plaintiff be upheld. That the matter be remitted back to any other Deputy Registrar other than Hon. Akee to retax the 1st Defendant's bill of costs dated 1st August 2023 and the 2nd Defendant's bill of costs dated 22nd September 2023 only with regard to the instruction fees and getting up fees.



17. The 2nd Defendant filed further submissions dated 6th November 2024 that it is not in dispute that the value of the subject matter for the purpose of taxation should be determined from the pleadings, judgment or settlement. That in *Peter Muthoka & Another v Ochieng & 3 Others* (2019) eKLR as quoted by the Plaintiff's advocate is incomplete and does not demonstrate the entire reasoning and holding of the court. That the exercise of discretion by the Taxing Officer arises only where no value can be ascertained from the pleadings, judgment or settlement. That the suit was dismissed as the Plaintiff did not offer evidence and no judgment was delivered in the normal sense. That the plaint alone has to be considered in determining the instruction fees.
18. The 2nd Defendant submitted that where the value of the subject matter can be ascertained, the taxing officer is required to determine the fees based on Schedule 6, Part A. That in *Prechand Raichand Limited v Quarry Services of East Africa Limited* (1972) EA, it was held that a successful litigant ought to be fairly reimbursed for the costs incurred. That the 2nd Defendant had to defend itself against a suit instituted on a property it had purchased legally from the administrator appointed by the 1st Defendant for the sum of Kshs. 650,000,000. That the 2nd Defendant is entitled to the instruction fees based on the value of the subject matter.
19. I have considered the 2nd Defendant's Chamber Summons application dated 10th June 2024, the Plaintiff's Chamber Summons application dated 4th September 2024, and submissions by the 2nd Defendant and the Plaintiff. The issue for determination is whether the application is merited for grant of the orders sought.
20. In taxing a bill of costs, the principles that a taxing officer ought to apply in assessing instruction fees are well set out. The Court of Appeal in *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No. 66 of 1999 (2002) eKLR outlined the principles as follows: -

“We would at this stage point out that the value of the subject matter of a suit for the purpose 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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 matter came up for hearing on 10th May 2023 where counsels for the Plaintiff and the Defendants indicated that they were ready to proceed. When it was called out at 11.30 am, the time it had been allocated for hearing, the Plaintiff sought an adjournment because of unavailability of its witnesses. Hon. Justice Magare then dismissed the Plaintiff's suit under Order 12 Rule 3 of the Civil Procedure Rules 2010 and awarded costs of the suit to the Defendant.
22. The 1st Defendant filed their Bill of Costs dated 1st August 2023 while the 2nd Defendant filed their Bill of Costs on 22nd September 2023. The Bill of Costs were assessed and the Taxing Officer delivered a ruling on 13th May 2024 where she awarded the 1st and 2nd Defendants instruction fees in the sum of Kshs. 3,000,000 each and getting up fees in the sum of Kshs. 1,000,000 each.
23. The 2nd Defendant filed an objection and taxation reference dated 10th June 2024 that the instruction fees and getting up fees were very low. That the value of the subject matter was ascertained and set out in the Plaint dated 3rd November 2020 and that the suit having been dismissed, the only way to determine the value was in the pleadings. That the proper scale upon which the instruction fees ought



to have been taxed is Section 6 A1(b) of the Advocate Remuneration (Amendment) Order, 2014 and not under 'other matters' of Schedule 6 of the Order.

24. The 2nd Defendant submitted that they purchased the suit property for Kshs. 650,000,000 and the value is pleaded at paragraph 32 of the Plaintiff. That the milling plant and the suit property were sold by the administrator appointed under the statutory power of sale by the 1st Defendant as charge to the 2nd Defendant for Kshs. 650,000,000. That had the 1st Defendant accepted the offer from Bakhresa Grain Milling Kenya Limited, it would have received 1,410,000,000 for the milling plant and suit property. That the instruction fees on the sale price of the former figure is Kshs. 9,950,000 and the instruction fees on the latter value of the subject matter is Kshs. 21,350,000. That the award of Kshs. 3,000,000 was therefore manifestly low. That had the court assessed the getting up fees based on the instruction fees of Kshs. 21,350,000, the getting up fees would have been Kshs. 7,116,667, or in the alternative based on Kshs. 9,950,000, the getting up fees would have been Kshs. 3,316,667.
25. The Plaintiff also filed an objection and taxation reference dated 4th September 2024 that the instruction fees and getting up fees awarded were inordinately high. That the Deputy Registrar ought to have relied on the judgment and that the said decision of Hon. Justice Magare dated 10th May 2023 did not disclose any monetary value and hence instruction fees ought to have been taxed under Schedule 6 Paragraph 1 (j)(iii) of the Advocates Remuneration (Amendment) Order, 2014 which stipulates that where the value of the subject matter cannot be ascertained from the judgment or decree, instruction fees should be assessed at a basic fee of Kshs. 75,000. That instruction fees ought to be capped at a maximum of Kshs. 300,000 and allowed for each of the Defendants and that the getting up fees should not exceed one third of the instruction fees.
26. In *Peter Muthoka & another v Ochieng & 3 others* (2019) eKLR, the Court of Appeal set down the basis for taxing instruction fees as follows: -

“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.”

27. It is clear to this court that the matter was dismissed by Hon. Justice Magare in a ruling on 10th May 2023. There was therefore no judgment with an ascertained amount. The Taxing Officer therefore ought to have determined the value of the subject matter from the pleadings. This court has established from the Plaintiff dated 3rd November 2020 under paragraph 32 that the suit property was purchased for the value of Kshs. 650,000,000. The proper scale for taxing instruction fees ought to have been Schedule 6 A1(b) of the Advocates Remuneration (Amendment) Order, 2014 which provides as follows: -

To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).

28. The Defendants had prepared the matter for hearing before the same was dismissed under Order 12 Rule 3 of the Civil Procedure Rules, 2010. The Defendants are therefore entitled to the getting up fees under Schedule 6A2 of the Advocates Remuneration (Amendment) Order, 2014 which provides that: -



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 be not less than one-third of the instruction fee allowed on taxation.

29. In conclusion, I make the following orders: -

- a. The ruling of the Taxing Officer delivered on 13th May 2024 is hereby set aside.
- b. This matter is remitted back to the Taxing Officer for retaxation of the 1st Defendant's Bill of Costs dated 1st August 2023 and the 2nd Defendant's Bill of Costs dated 22nd September 2023.
- c. Each party to bear its own costs.

DATED AND DELIVERED VIA TEAMS CTS TO PARTIES WITH PRIOR NOTICE THIS 16TH DAY OF DECEMBER 2024

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J.K. NG'ARNG'AR, HSC

JUDGE

