Chui & another v Hass Petroleum K Limited & 2 others (Environment and Land Case 197 of 2018) [2025] KEELC 4877 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4877 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE 197 OF 2018

OA ANGOTE, J

JUNE 26, 2025

BETWEEN

ANDREW MWANGI CHUI ..... 1ST PLAINTIFF

SHAURI MOYO DEVELOPERS LIMITED ..... 2ND PLAINTIFF

AND

HASS PETROLEUM K LIMITED ..... 1ST DEFENDANT

THE LANDS REGISTRAR, NAIROBI ..... 2ND DEFENDANT

THE HON ATTORNEY GENERAL ..... 3RD DEFENDANT

RULING

1. Vide a Chamber Summons dated 8th November, 2024 filed pursuant to the provisions of Article 159 of *the Constitution* of Kenya, 2010, Section 3A of the Civil Procedure Rules and Paragraph 11(2) of the Advocates Remuneration Order, the 1st Defendant/Applicant seeks the following reliefs:

    i. That this Honourable Court be pleased to set aside the ruling dated the 3rd July, 2024 of the Taxing Officer in so far as it relates to the taxation of the Bill dated 12th March, 2024.

    ii. That this Honourable Court be pleased to re-assess the Bill of Costs dated 12th March, 2024 and adjust the figures.

    iii. That this Honourable Court be pleased to make such further orders in the interests of justice as it may deem just and fit.

    iv. That the costs of this Application be provided.

2. The Summons is based on the grounds on the face thereof and supported by the Affidavit of Abdulkadir Ahmed Hussein, the Director of the 1st Defendant/Applicant herein of an even date.

3. He deponed that following the judgment of this court dated the 24th [27th] April, 2023 in the Plaintiffs'/Respondents' favour, the Respondents filed a Party-Party Bill of Costs dated 12th March, 2024 setting the bill at an absurdly exaggerated amount of Kshs 72, 670, 561.28 and that a ruling was subsequently delivered on 3rd July, 2024 in which the aforesaid bill was taxed at Kshs 6, 746, 917/= on the basis that the same was un-opposed.

4. Mr. Hussein deponed that in a subsequent ruling dated 6th November, 2024, the Taxing Officer admitted that the court had issued a ruling date on 13th June, 2024 after being informed that the bill had been served on the Applicant and at the time, submissions in opposition were not on record.

5. He deponed that the Taxing Master erred in failing to find that the bill was served upon him on 6th June, 2024 at 1:13 pm together with the ruling notice depriving them of an opportunity to respond in opposition and that in any event, and despite the non-service, acting in good faith, they went ahead and filed submissions in response dated 10th June, 2024.

6. The 1st Defendant/Applicant opined that the Taxing Master's averments that she did not see the submissions were fallacious, the same having been in the system on the 10th June, 2024 before she rendered her decision on the 13th June, 2024, and that their submissions raised pertinent points which would have caused a significant reduction in the cited amounts and that the Taxing Master's failure to consider the submissions, led to her arriving at an erroneous decision and condemning him unheard.

7. Mr. Hussein stated that the amount taxed by the Taxing Master was overstated, biased and unreasonable considering the fact that the claim is unliquidated, the value of the subject matter un-ascertained and the court having found that the suit property could not be linked to the Applicant's property.

8. As advised by Counsel, he stated, failure to ascribe the correct value to the subject matter, as in the instant case was an error of principle and that the sum awarded was manifestly excessive to warrant this court's discretion to interfere and set aside the same.

9. In response to the Motion, the Plaintiffs/Respondents through Andrew Mwangi Karuga, the 2nd Defendant's Director, swore a Replying Affidavit on 28th January, 2025.

10. He deponed that he was underwhelmed by the ruling of the court, more particularly, the Taxing Master's finding that the value of the subject matter was not discernible from the pleadings. It was his contention that contrary to the Taxing Master's finding, the subject matter of the suit was L.R No's 12062/915 and L.R No 26719- I.R No 122352.

11. According to Mr. Karuga, vide its Counterclaim, the Applicant had made an admission that it used the title document of L.R No 26719 to secure a financial facility to the tune of USD 14,000,000/= from Diamond Trust Bank and as such, the value of the property is at least USD 14,000,000/= aforesaid.

12. It was his deposition that by virtue of the foregoing, they converted the USD 14,000,000/= at the rate of Kshs 145 per US Dollar arriving at the sum of Kshs 2,023,000,000 on which they computed the instruction fees guided by Schedule 6(1)(b) of the Advocates Remuneration (Amendment) Order, 2014 and that based on the facts that these documents were supplied by the Applicant themselves, they cannot dispute the valuation.

13. According to Mr Karuga, in any event, the Applicant had lodged an application dated the 24th July, 2024 which raised similar issues and sought similar orders as in the present Summons which was dismissed on the 6th November, 2024 and that no review or appeal has been lodged against the same.

Submissions

14. The Applicant filed submissions on 6th January, 2025. Counsel submitted that the Bill of Costs dated 12th March, 2024 was erroneously taxed in the sum of Kshs 6, 746,917/= and ought to be revised for the reasons that the value of the subject matter was unascertained and not Kshs USD 14,000,000/= as alleged. The aforesaid valuation, it was contended, was in relation to its property known as L.R No 26719, which the court found was not related to the Respondents' parcel L.R No 12062/915.

15. It was submitted that the Respondents' reliance on an irrelevant valuation significantly skewed the assessment of costs undermining the integrity of the Respondents' claims. Counsel referenced the case of Republic vs Minister of Agriculture & 2 Others[2006]eKLR where it was noted that the taxation of an Advocate's instruction fees is to seek no more and no less than reasonable compensation for professional work done.

16. It was submitted that further, the Taxing Officer erred in finding that the Respondents' Party-Party Bill of Costs dated 12th March, 2024 was un-opposed despite the fact that the Applicants had already filed their submissions by 10th June, 2024.

17. Counsel submitted that the taxation culminated in the award of an amount manifestly impractical and inconsistent with previous suits which cannot be allowed to stand. In support, Counsel relied on the cases of Jeremiah Chelanga(Suing as the Guardian Ad litem of John Chelanga Chepkonga vs Board of Management Kamatony Primary School and 3 Others[2021]eKLR, Paul Odhiambo Onyango and Another vs Kalu Works Limited and Outa vs Odoyo & 3 Others[2023]KESC 75 (KLR).

18. The Respondents filed submissions on 17th March, 2025. Counsel submitted that the Respondents partially support the present Summons in so far as it seeks a review of the taxation as they are underwhelmed by the award which was manifestly insufficient. In the circumstances, it was noted, the prayers in the suit were with respect to land parcels L.R No 12062/915 and L.R No 26719 which formed the subject matter of the suit.

19. On whether the value of the subject matter was ascertainable, Counsel answered in the affirmative, contending that they relied on the pleadings filed by the parties to arrive at the figure, being the amount of credit obtained through the use of one of the suit properties as security.

20. It was submitted that it is standard practice for banks to conduct due diligence on property offered as collateral including conducting a valuation of the property to assure themselves that the loan can be recovered by exercising its statutory power of sale as stated in Maithya vs Housing Finance Co of Kenya & Another[2003]1 EA 133 at 139 cited in Cedarwoods Hotels and Resorts Investment Company vs Kenya Commercial Bank Limited & Anor[2022]eKLR.

21. Counsel urged that in view of the foregoing, the Taxing Officer erred in finding that the value of the subject matter was unascertainable, an error in principle and which warrants this court's interference. Reliance in this respect was placed on the case of Elijah Njuguna Njoki CS Peter Muriu Njuguna & 4 Others [2021]eKLR and Non-Governmental Organizations Co-ordination Board vs EG & 5 Others [2023]eKLR.

22. It was submitted that the foregoing notwithstanding, the Applicant has not demonstrated that there was an error of principle warranting the taxing of the bill lower than what was taxed. As regards the submissions, Counsel asserted that the same were filed out of time and the law does not in any event limit the powers of a Taxing Officer who may even tax a bill ex-parte.

Analysis and Determination

23. Having considered the Summons and responses, the issues that arise for determination are:

    i. Whether the present Summons is res judicata? And if not?

    ii. Whether the decision of the Taxing Master delivered on the 3rd July, 2024 in respect to the Party-Party Bill of Costs dated the 12th March, 2024 should be set aside?

24. Vide the response to the Summons, the Respondents contend that the same is res judicata averring that the issues raised herein were similarly raised and determined vide the ruling of 6th November, 2024.

25. The law on res judicata is found in Section 7 of the *Civil Procedure Act*, which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

26. This doctrine applies to bar subsequent proceedings when there has been adjudication by a court of competent and/or concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy or in the case of an application herein, with respect to all issues in the matter.

27. In the case of John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata thus:

> " ...The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.
>
> ...whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision....."

28. As aforesaid, the doctrine of res judicata envisages sameness of the issues, parties and title/claim, concurrence of jurisdiction, and finality of the previous decision.

29. The court has considered the impugned ruling vis the present Summons. The ruling aforesaid was with respect to the Motion dated 24th July, 2024 in which the Applicant sought a review of the ruling of 3rd July, 2024 taxing the Bill of Costs pursuant to the provisions of Sections 80 and Order 45 of the Civil Procedure Rules.

30. It was the Applicant's contention therein that there was an error apparent on the face of the record, the Taxing Master having failed to consider their submissions which were on record resulting in her arriving at an erroneous decision.

31. In rendering her determination, the Taxing Master conceded that the submissions were indeed on record as at the time she delivered the ruling. However, she noted that the same were filed without leave of court and without her knowledge. She indicated that subsequently, her failure to consider the Applicant's submissions did not amount to an error on the face of the record. As regards re-taxing the bill, she declined to do so contending that she was functus.

32. In contrast, what is now before this court is a reference brought pursuant to Paragraph 11(2) of the Advocates Remuneration Order which gives this court jurisdiction to interfere with the decision of a Taxing Master on the basis of established legal principles. Consequently, the Summons is not res judicata.

33. The above notwithstanding, the question of the Taxing Masters' failure to consider the Applicant's submissions having been determined by the Taxing Master in her ruling of 6th November, 2024 and this not being an appeal against the ruling aforesaid cannot be re-examined or re-determined.

34. The Applicant asks this court to set aside the ruling of 3rd July, 2024 in so far as it relates to the Party-Party Bill of Costs of 12th March, 2024 and re-asses the figures. It contends that the same was exorbitant.

35. On its part, while not having filed a cross-reference, the Respondents nonetheless seek to challenge the adequacy of the amount awarded by the Taxing Master, asserting that the figure was manifestly low. It is a well-established principle of law that parties are bound by their pleadings.

36. Having elected not to file a reference of their own, or a cross reference, the Respondents are deemed to have accepted the Taxing Master's decision in so far as it relates to the quantum awarded. As such, they cannot now, through their submissions, seek to enlarge the scope of the Applicant's reference.

37. Nonetheless, it is trite that where a reference is properly before the court, the Judge is mandated to consider whether the Taxing Officer applied the correct legal principles and as such, while the Respondents may be procedurally barred from seeking an enhancement of the award in the absence of a cross-reference, the court retains its discretion to interfere with the Taxing Master's decision if it is satisfied that the decision was based on a misdirection in law or fact. This interference may well result in a higher amount.

38. The procedure for the challenge of a taxation decision is provided under Paragraph 11 of the Advocates (Remuneration) Order which provides that:

> "(1) Should any party object to the decision of the Taxing officer, he may within fourteen days after the decision give notice in writing to the Taxing Officer of the items of Taxation to which he objects.
>
> (2) The Taxing Officer shall forthwith record and forward to the Objector the reasons for his decision on those items and the Objector may within fourteen days from the receipt of the reasons apply to a Judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection."

39. The legal parameters within which the court can interfere with the Taxing Master's decision are well settled. The Court of Appeal in Joreth Ltd vs Kigano & Associates Civil Appeal No. 66 of 1999 [2002]

eKLR was categorical that a judge sitting on a reference against the taxing officer ought not to interfere with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle

40. Similarly, the Ugandan Supreme Court in Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC) stated:

> " Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.
>
> Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.
>
> Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

41. More recently, the Apex Court in Non- Governmental Organizations Coordination Board vs EG & 5 others (Petition (Application) 16 of 2019) [2023] KESC 102 (KLR) (Civ) (8 December 2023) (Ruling) noted:

> " A certificate of taxation would be set aside, and a single judge could only interfere with the taxing officer's decision on taxation if:There was an error of principle committed by the taxing officer.The fee awarded was shown to be manifestly excessive or was so high as to confine access to the court to the wealthy; (and conversely, if the award was so manifestly deficient as to amount to an injustice to one party).The court was satisfied that the successful litigant was entitled to fair reimbursement for the costs he had incurred, (and the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party). The award proposed was so far as practicable, consistent with previous awards in similar cases.
>
> There was no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances. Although the taxing officer exercised unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically. The single judge would normally not interfere with the decision of the taxing officer merely because the judge believed he would have awarded a different figure had he been in the taxing officer's shoes."

42. The foregoing principles will be considered in an examination of the instant reference.

43. The Applicant contends that the Taxing Officer erred in law and principle when taxing the Party-Party Bill of Costs. He argues that the submissions filed were not considered and that the sum awarded was overstated, unreasonable, and biased, particularly given that the subject matter of the suit was unascertained. He relies on the court's judgment of 27th April, 2023, which found no linkage between it and the Respondents' parcels of land.

44. On their part the Respondents opine that the amount was manifestly low. However, they state that the Applicant has not demonstrated any error warranting further reduction of the taxed amount.

45. As aforesaid, the ruling of 6th November, 2024 is not the subject of this Summons and the court cannot venture into a re-consideration of the issue of whether the failure to consider the Applicants' submissions constituted an error. Nonetheless, even if the submissions were not considered, and not rightfully so, this would not in itself defeat a taxation as the law allows a Taxing Master to tax a bill ex-parte, in the absence of either or both parties

46. In light of the foregoing, and given that the applicable charging schedule is not in dispute, and further, that no specific objection has been raised regarding any other item as taxed, the sole question for determination by this court is whether the subject matter of the suit was ascertainable for the purpose of assessing instruction fees, and consequently, whether the Taxing Officer properly exercised her discretion in that regard.

47. It is trite law that instruction fees are determined based on the value of the subject matter of the suit, which is typically ascertained from the pleadings, judgment, or settlement. Where such value is not ascertainable, the Taxing Officer has discretion to determine a reasonable figure based on various considerations. This position was explained by the Court of Appeal in Joreth Ltd vs Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR 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."

48. Similarly, the Court of Appeal in the case of Peter Muthoka & another vs Ochieng & 3 Others [2019] eKLR noted:

> "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."

49. By way of brief background, the Respondents/Plaintiffs instituted this suit seeking inter-alia, declarations that the 1st Respondent was the legitimate owner of L.R No 12062/915 Kariobangi, permanent injunctive orders restraining interference with the property and an order directing the nullification of the title I.R 122352.

50. It was the Respondents' case that the 1st Respondent was the legitimate proprietor of the aforesaid property having been allotted the same by the Nairobi City Council and issued with a further allotment by the Nairobi City Commission. It was stated that further, he applied for and was issued with a lease and been duly paying rates and rent over the property.

51. On its part, the Applicant/1st Defendant asserted that it was the legitimate owner of parcel L.R 26719 which it purchased from one Dennis K Mwangi who had acquired the same through a sale by public auction pursuant to which it was registered as the proprietor of the suit property.

52. It sought vide a Counterclaim, a declaration that it is the duly registered owner of L.R No 26719, I.R Number 122352 measuring 0.2073Ha, an order directed at the Chief Lands Registrar to cancel the title to L.R No 12062/915, and a permanent injunction restraining the Respondents from taking over possession, occupation, trespassing, interfering and selling or dealing with the suit property.

53. The matter proceeded for hearing after which the court found the Respondents claim to be partly merited and declared it the owner of L.R No 12062/915. The court similarly issued injunctive orders restraining the Defendants from interfering with the property aforesaid. The Applicants Counterclaim was dismissed. On matters costs, the Respondents were awarded costs of the suit. Similarly, the Applicants' Counterclaim was dismissed with costs.

54. Pursuant to the award of costs, the Respondents filed a Party-Party Bill of Costs and under instruction fees, they sought the sum of Kshs 70, 805,000/= being:

> "Advocates fees for receiving instructions to conduct the matter for recovery of L.R 12062/915 situated in Kariobangi South Nairobi measuring approximately 0.75Ha or thereabout to recover land estimated at the value of USD 14,000,000/= converted to Kshs 2,023,000,000/=."

55. In her taxation of the bill, the Taxing Master noted:

> "The Plaintiff has indicated that the value of the subject property is about Kshs 2, 023,000,000/=, however the same is not contained in the pleadings or in the judgment. My finding is that the value of the subject matter is not ascertainable from both the pleadings and the judgment."

56. In determining whether the Taxing Master committed an error in principle, the starting point is whether or not she correctly identified the subject matter. As previously noted, the Bill of Costs under consideration arose from the Respondents' suit. A perusal of the Plaint and counter-claim reveals that the Respondents and Applicant were laying claim to two parcels of land, namely, L.R. No. 12062/915 and L.R. No. 26719 – I.R. 122352 respectively. These two parcels therefore constituted the subject matter of the Respondents' suit.

57. However, upon examination of the Taxing Master's ruling, it becomes apparent that she considered the Plaintiffs suit in assessing the Bill of Costs, and not the counter-claim. Moving next to the value of the subject matter, it was the Taxing Masters position that the same could not be ascertained from either the judgment or the pleadings.

58. Vide the impugned bill, the Respondents asserted that the value of L.R. No. 12062/915 was USD 14,000,000/=. This was erroneous because a look at the pleadings shows that no value was pleaded with respect to this property. However, a look at the Defence and Counterclaim shows that two values were attributed to L.R 26719- I.R 122352, also the subject of the Respondents' suit being the purchase price and the amount which the parcel secured as collateral.

59. In the circumstances, the court finds that the Taxing Officer committed errors in principle in two significant respects. First, the Taxing Officer failed to properly identify and consider the full subject

matter of the suit by limiting the assessment to only one parcel of land, namely L.R. No. 12062/915, and not considering L.R. No. 26719 – I.R. 122352, which was also the subject of the suit.

60. Secondly, the Taxing Officer erred in finding that the value of the subject matter could not be ascertained from the pleadings or judgment. While it is true that no specific value was pleaded in relation to L.R. No. 12062/915, the Defence and Counterclaim clearly referenced the value of L.R. No. 26719 – I.R. 122352, both in terms of its purchase price and the amount it secured as collateral under a loan facility.

61. As the only contested item in the bill of costs relates to instruction fees, the court will accordingly refer the Bill back to another Taxing Master for taxation.

62. For those reasons, the application dated 8th November, 2024 is allowed as follows;

    i. The ruling dated the 3rd July, 2024 of the Taxing Officer in so far as it relates to the taxation of the Bill dated 12th March, 2024 be and is hereby set aside.

    ii. The Party-Party Bill of Costs dated 12th March, 2024 to be taxed by any other Taxing Master other than Hon. Omollo.

    iii. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JUNE, 2025.

O. A. ANGOTE

JUDGE

IN THE PResence of;

Mr. Mwiruri for Respondent

No appearance for Applicant

Court Assistant: Tracy