



**Softclans Technology Limited v Nextgen Mall Management Company Limited & 2 others (Environmental and Land Originating Summons E004 of 2024) [2025] KEELC 4950 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4950 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2024**  
**TW MURIGI, J**  
**JUNE 20, 2025**

**BETWEEN**

**SOFTCLANS TECHNOLOGY LIMITED ..... APPLICANT**

**AND**

**NEXTGEN MALL MANAGEMENT COMPANY LIMITED .... 1<sup>ST</sup> RESPONDENT**

**CRESTA INVESTMENTS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**GULF AFRICAN BANK LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before this Court for determination are two applications.
2. The first application is a Chamber Summons dated 10<sup>th</sup> January 2025 brought under Articles 50 and 159(2)(d) of *the Constitution* of Kenya 2010, Rule 11(2) of the Advocates (Remuneration) Order, Sections 3 and 3A of the *Civil Procedure Act* in which the Applicant seeks the following orders:-
  - a. That leave be granted to the Applicant to appeal against the entire ruling of the Deputy Registrar delivered on 11<sup>th</sup> December 2024 taxing the 1<sup>st</sup> Respondent's bill of costs dated 5<sup>th</sup> August 2024 at Kshs. 1,202,601.67/=.
  - b. Spent.
  - c. Spent.
  - d. That this Honourable Court be pleased to set aside the entire ruling of the Deputy Registrar dated 11<sup>th</sup> December 2024 and all the consequential orders thereto.
  - e. That this Honourable Court be pleased to remit the 1<sup>st</sup> Respondent's bill of costs dated 5<sup>th</sup> August 2025 back for fresh taxation before the judge.



- f. That the costs of this application be provided for.
3. The application is premised on the grounds appearing on its face together with the supporting affidavit of Stephen Nandasaba Saisi, the Applicant's director sworn on even date.

### **The Applicant's Case**

4. The deponent averred that the Taxing Officer erred in awarding the 1<sup>st</sup> Respondent costs of Kshs. 1,202,601.67/= vide the ruling dated 5<sup>th</sup> August 2024. He further averred that the taxing officer erred by basing the instruction fees on the value of the suit property of Kshs. 45,100,000/= instead of the outstanding service charge of Kshs. 11,450,989/= which was the issue in dispute as per the judgement delivered on 18<sup>th</sup> July 2024.
5. The deponent contends that the taxing officer failed to take into consideration the fact that the suit was determined within five months when awarding the sum of Kshs. 876,500/= as instruction fees. He further contended that the Taxing Officer erred in principle in awarding getting up fees of Kshs. 292,851.62./= since the suit was canvassed by way of written submissions. The Applicant is apprehensive that it will suffer substantial loss if the ruling is not set aside.

### **The 1<sup>st</sup> Respondent's Case**

6. The 1st Respondent opposed the application through the replying affidavit of Sandra Gitia its Legal Officer. The deponent averred that the application was filed out of time with no reasonable explanation for the delay. She further averred that the outstanding service charge could not be ascertained without first determining the ownership of the suit property. She averred that parties herein exchanged pleadings in which they addressed the issue of ownership and the outstanding service charge. She maintained that the Taxing Officer exercised her discretion judiciously in assessing the instruction fees based on the value of the subject matter.
7. The deponent asserted that the Respondent was not entitled to getting up fees as denial of liability was filed in the matter. On the length of the suit the deponent noted that the Applicant should not raise a claim on its brevity as it was not agreeable to an out of Court settlement.
8. The second application is a Chamber Summons dated 10<sup>th</sup> February 2025 in which the Applicant seeks the following orders: -
  - a. That leave be granted to the Applicant to appeal against the entire ruling of the Deputy Registrar delivered on 29<sup>th</sup> January 2025 taxing the 2<sup>nd</sup> Respondent's bill of costs dated 23<sup>rd</sup> August 2024 at Kshs. 1,200,866.67.
  - b. Spent.
  - c. Spent.
  - d. That this Honourable Court be pleased to set aside the entire ruling of the Deputy Registrar dated 29<sup>th</sup> January 2025 and all the consequential orders thereto.
  - e. That this Honourable Court be pleased to remit the 2<sup>nd</sup> Respondent's bill of costs dated 23<sup>rd</sup> August 2024 back for fresh taxation before the judge.
  - f. That the costs of this application be provided for.
9. The application is premised on the grounds appearing on its face together with the supporting affidavit of Stephen Nandasaba Saisi sworn on even date.



### **The Applicant's Case**

10. The deponent averred that the costs awarded to the Respondent vide the ruling dated 23<sup>rd</sup> August 2024 are manifestly excessive in the circumstances of the case. He further averred that the taxing officer erred by basing the instruction fees on the pleadings instead of the judgement delivered on 18th July 2024 where the issue in dispute was the outstanding service charge of Kshs. 11,450,989/= and not the ownership of the suit property. The deponent further stated that the sum of Kshs. 11,450,989/= should have formed the basis of the award on the instruction fees and not the value of the suit property.
11. The deponent contends that the taxing officer failed to consider the fact that the suit was determined within five months when awarding Kshs. 876,500/= as instruction fees. He further contended that the Taxing Officer erred in awarding the sum of Kshs. 292,166.67/= as getting up fees as the suit was disposed by way of written submissions.

### **The 2<sup>nd</sup> Respondent's Case**

12. In opposing the application, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn by Ibrahim Mwalagho, the 2<sup>nd</sup> Respondent's advocate. The deponent averred that the Applicant had approached the Court seeking reliefs that touched on ownership of the suit property.
13. He further averred that the issue of the outstanding service charge was incidental to the Applicant's prayers for vacant possession, vindication of title and compensation for loss of user. He averred that the Taxing Officer awarded costs based on the value of the suit property as the judgement made reference to the issue of ownership of the suit property.
14. The deponent contends that getting up fees are awarded when a suit proceeds to full hearing including hearing by way of written submissions. He further contended that the Applicant cannot complain about Court procedures since it rejected an out of court settlement. In conclusion, the deponent averred that the application is an abuse of the court process and should be dismissed with costs.

### **The Response**

15. The Applicant filed a supplementary affidavit dated 28<sup>th</sup> February 2025 in response to the 2<sup>nd</sup> Respondent's replying affidavit. He averred that the application was filed on time as the Court was on vacation. He further averred that the entry of the judgement conclusively determined the value of the subject matter. He maintained that the Applicant was granted vacant possession of the suit property on 20<sup>th</sup> February 2024 before the matter proceeded for hearing and as such, the only issue for determination was the outstanding service charge of Kshs. 11,450,989/=.
16. In conclusion, the deponent maintained that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents frustrated the efforts to settle this matter out of court.
17. Both applications were canvassed by way of written submissions.

### **The Applicant's Submissions**

18. The Applicant filed its submissions dated 5<sup>th</sup> March 2025 and 2<sup>nd</sup> April 2025. On behalf of the Applicant, Counsel submitted that the application was filed within time as the Court was on vacation. To buttress this argument, Counsel relied on Order 50 Rule (4) of the Civil Procedure Rules, Rule 11(2) of the Advocates Remuneration Order and on the case of *Kensilver Express Limited v Mugambi* [2023] KEHC 19425 (KLR).



19. Counsel submitted that when a matter is taxed post-judgement the value of the subject matter should be based on the judgement. Counsel further submitted that the responses were filed after the issue of ownership had been determined on 20<sup>th</sup> February 2024, hence the outstanding service charge was the only issue in dispute.
20. Counsel submitted that the Taxing Officer erred in basing instruction fees on the value of the suit property rather than on the outstanding service charge. Counsel further submitted that since the award on instruction fee was erroneously arrived at, the getting up fees was also unmerited. It was noted that the matter did not proceed to full hearing as it was heard by way of affidavits and written submissions. To buttress this point, Counsel relied on Schedule 6(2) of the Advocates Remuneration Order and on the cases of Peter Muthoka & another v Ochieng & 3 others [2019] KECA 597 (KLR), Meir Mizrahi & another v Nairobi City Council & 2 othes [2014] KEHC 3409 (KLR) and Joreth Limited v Kigano & Associates [2002] KECA 153 (KLR).

### **The 1<sup>st</sup> Respondent's Submissions**

21. The 1<sup>st</sup> Respondent filed its submissions dated 2<sup>nd</sup> April 2025. On behalf of the 1<sup>st</sup> Respondent, Counsel submitted that the issue of ownership of the suit property was live up to the point of judgement. Counsel further submitted that the Applicant framed the issue of ownership of the suit property as an issue for determination. It was submitted that the taxing officer correctly based the instruction fees on the value of the suit property. To buttress this argument, Counsel relied on the case of Otieno, Ragot & Company Advocates v Kenya Airports Authority [2021] KECA 587 (KLR).
22. Counsel submitted that getting up fees accrue even when a matter is canvassed by way of written submissions. To buttress this point, Counsel relied on the case of Nguruman Limited v Kenya Civil Aviation Authority & 3 others [2014] KEHC 8077 (KLR).

### **The 2<sup>nd</sup> Respondent's Submissions**

23. The 2<sup>nd</sup> Respondent filed its submissions dated 2<sup>nd</sup> April 2025. On behalf of the 2<sup>nd</sup> Respondent, Counsel outlined the following issues for the court's determination:-
  - a. Whether the Hon. Taxing Master erred in assessing the value of the subject matter?
  - b) Whether the Hon. Taxing Master erred in awarding getting up fees?
24. On the first issue, Counsel submitted that the issue of ownership of the suit property was live up to the point of judgement and that the Applicant made submissions on it. Counsel further submitted that the taxing officer correctly based the instruction fees on the value of the suit property instead of the outstanding service charge. To buttress this argument, Counsel relied on the case of Eastland Hotel Limited v Wafula Simiyu & Co. Advocates [2014] KECA 700 (KLR).
25. Counsel relied on the case of Mwakio, Kirwa & Company Advocates v County Public Service Board Bome & Joshua Terer [2022] KEELRC 834 (KLR) to submit that getting up fees should be paid even where a matter proceeds by way of written submissions.

### **Analysis And Determination**

26. Having considered the applications, the respective affidavits and the rival submissions, the issues that arises for determination is whether the Taxing Officer erred in taxing the Bill in the manner that she did.



The Principles of taxation were aptly stated in *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and Others* (1972) EA 162 where the court held that:

- “(a) a) successful litigant ought to be fairly reimbursed for costs he has had to incur
- (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy.
- (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and
- (d) that as far as practicable there should be consistency in the awards made.
- (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances
- (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically
- (g) 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.”

In the case of *Kipkorir Titoo & Kiari Advocates vs Deposit Protection Fund Board* (2005) 1 KLR 528 the court of Appeal held that:-

“On a 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- an example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles.”

27. The Applicant averred that the taxing officer’s award on instruction fees is manifestly excessive as the same was based on the value of the suit property instead of the outstanding service charge which was the only issue in dispute. The Respondents on the other hand averred that the taxing officer arrived at the correct instruction fees as the issue of ownership was live before the Court.
28. Schedule 6 Paragraph (1) (b) and (d) of the Advocates Remuneration Order provides as follows:

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—

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 and...

To defend any other proceedings; an instruction fee calculated under subparagraph 1(b).



29. From the foregoing it is crystal clear that the value of the subject matter can be determined from the pleadings or from the judgement. In the case of Peter Muthoka & another v Ochieng & 3 others [2019] KECA 597 (KLR) the Court of Appeal 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.”

30. In the case of Joreth vs Kigano Associates (2002) EA 92 the Court of Appeal set out the various factors to be considered in determining instruction fees which include the importance of the matter, the general conduct of the case, the nature of the case, the time taken for dispatch and the impact of the case on parties.

31. At paragraph 35 of the judgement the Court stated as follows:

“I note from the affidavits of the respective parties that it is not in dispute that the Plaintiff is the registered owner of the suit property... At paragraph 36 of the judgement the Court stated as follows:-

“The Plaintiff is therefore an innocent purchaser for value and that their title over the suit land was therefore obtained procedurally and I need not belabour on the legality of title.”

32. The Court did not determine the issue of ownership of the suit property as it was already moot but determined the issue of whether the Applicant was liable to pay the outstanding service charge that was owed before it acquired the suit property before being given vacant possession. The issue of vacant possession was hinged on the outstanding service charge of Kshs. 11,450,989/=.

33. From the foregoing, this court finds and holds that the taxing officers ought to have assessed the instruction fees based on the outstanding service charge and not on the value of the suit property which was not in dispute at the point of judgement.

34. In the case of Kamunyori & Company Advocates v Development Bank Of Kenya Limited [2015] KECA 595 (KLR) the court held that:

“It is now an accepted principle that a Judge will normally remit the matter to the Taxing Officer for reconsideration where there is an error of principle. *Spry, Ag. P. held in Nanyuki Esso Service v. Touring Cars Ltd [1972] EA 500* that an error of principle can be inferred where an award is manifestly excessive unless, in the opinion of the Judge, it has not materially affected the assessment.

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 instruction fee is arrived at on the wrong principles, it will be set aside (see *Elmandry and Others v. Salim [1956] EACA 313*). As long ago as 1961,



the predecessor of this Court emphasized in *Arthur v. Nyeri Electricity* [1961] EA 492 that “where there has been an error in principle, the Court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will intervene only in exceptional cases.” That is still good law.”

35. Similarly, in the case of *Peter Muthoka & Ano v Ochieng & 3 others* (2019) eKLR the Court of Appeal 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 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.” Based on the foregoing, it follows that the taxing officer should have determined the value of the subject matter in the two bill of costs based on the judgement and not on the pleadings.

36. The import of the foregoing is that the taxing officer’s failure to ascertain the correct subject matter amounted to an error in principle.

37. On getting up fees, Paragraph 6(2) (a) of the Advocates 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 be not less than one-third of the instruction fee allowed on taxation.

38. Having found that the instruction fee was erroneously arrived at, it follows that the getting up fees which is founded on the instruction fees was also erroneously arrived at.

39. In the end, I find that both applications are merited and the same are hereby allowed as prayed. The 1<sup>st</sup> Respondent’s bill of costs dated 5<sup>th</sup> August 2024 and the 2<sup>nd</sup> Respondent’s bill of costs dated 23<sup>rd</sup> August 2024 is remitted to another taxing officer for taxation. Costs to abide with outcome of the taxation.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF JUNE 2025 .**

.....

**HON. T. MURIGI**

**JUDGE**

In The Presence Of: -

Court assistant – Ahmed

Mulaku for the 1<sup>st</sup> Respondent

Molatu for the 2<sup>nd</sup> Respondent

Ms Mutonyi for 3<sup>rd</sup> Respondent

