



REPUBLIC OF KENYA



KENYA LAW
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**Wiseborne Industries (K) Ltd. & another v Fortune Sacco Society Limited & another
(Reference E002 of 2022) [2025] KEHC 13517 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
REFERENCE E002 OF 2022
EM MURIITHI, J
SEPTEMBER 25, 2025**

BETWEEN

WISEBORNE INDUSTRIES (K) LTD. 1ST APPLICANT

CEAASER NJAGI KUNGURU 2ND APPLICANT

AND

FORTUNE SACCO SOCIETY LIMITED 1ST RESPONDENT

LINET WAMBUI KIBUE T/A RESTORERS CONSULT

AUCTIONEERS 2ND RESPONDENT

RULING

Background

1. The applicants have filed a reference from taxation by Chamber Summons under Rule 11 of the Advocates' Remuneration Order dated 13/1/2022 following a ruling on taxation by the Taxing Officer of the subordinate court delivered on 9/6/2021 upon a successful Preliminary Objection to an application before that Court which was dismissed with costs, as follows:

“Republic Of Kenya

In The Principal Magistrate Court At Gichugu

Misc Application No. 4 Of 2020

Fortune Sacco Society Limited1st Applicant

Linet Wambui Kibue Tia

Restores Consult Auctioneers2nd Applicant

Versus



Wiseborn Industries(k) Limited-1st Respondent

Cesar Njagi Kuguru..... 2nd Respondent

Ruling

The applicant filed a notice of motion application dated 9th October 2020 seeking the following orders;

- a) That the application be certified as urgent and be disposed of *ex parte* in the first instance.
- b) That this Honourable court be pleased to order police assistance to the 2nd applicant to access the properties known as LR Baragwe/Raimu/2366, Baragwe/Raimu/3282 (In the name of Caesar Njagi and Baragwe/Raimu/2389 (in the name of Wiseborne Industries Limited).
- c) That the officer commanding Kianyaga police station or any other officers under them not below the ranks of assistant inspectors do supervise the exercise of the -2nd applicant conducting a public auction in exercise of the 1st applicant's statutory power of sale and provide security for the purpose of maintaining law and order.

The affidavit of Linnet Wambui Kibui supported the applicant's application. She deponed that the 1st applicant advanced the 1st respondent a credit facility that was secured by a legal charge over the aforementioned parcels of land. It was averred that the 1st respondent made sporadic and nominal payments, as a result of which the loan facility fell into arrears. The 2nd applicant was therefore instructed to sell the aforesaid parcels of land. The 2nd applicant further deponed that she has been unable to access the aforesaid parcels of land for valuation purposes as they are always met with hooligans who chase them away. Therefore, the 2nd applicant prayed that the court does issue an order directing the area OCS to provide security so that they can conduct their auction peacefully.

The 2nd respondent opposed the application through a replying affidavit filed on 9th October 2020. He deponed that the value of the properties in question was 87,000,000, and the magistrate court has no jurisdiction to adjudicate over the said properties. The 2nd respondent stated that the applicant has not demonstrated why and when the police assistance is necessary since it has not been demonstrated when the next sale by auction would be conducted.

Therefore, the 2nd applicant contended that the applicant's application was an abuse of the court process, and the same should be dismissed with costs. The parties herein agreed to file written submissions in support of their arguments. The 2nd respondent, through the firm of Wambugu Kariuki & associates, submitted that this court lacks the pecuniary jurisdiction to adjudicate over the applicant's application. It was submitted that the subject matter's value was 87,000,000, and as such, even the Chief Magistrate court lacks the pecuniary jurisdiction to entertain the applicant's application. The 2nd respondent relied on section 7(1) of the Magistrates Act and the case of Owners of the motor vessel Lilian S vs. Caltex Oil Ltd.

The applicants filed their submissions on 4th November 2020, where they submitted that they had approached the court under rule 9 of the Auctioneers Rules 1997. Their prayer was for the provision of police escort or assistance and not for any other reason. The applicant



submitted the court is not sitting as an ELC Court or Commercial court; hence this court has the jurisdiction to entertain their application.

From the foregoing, the issue for determination is whether this court has the jurisdiction to hear and determine the applicant's application.

The applicant contended that the court is only supposed to determine the issue of police assistance and that the court was not sitting as a commercial court or an environment and lands court. The applicant quoted rule 9 of The Auctioneers Rules, 1997. The rules provide that Police assistance (1) Where an auctioneer has reasonable cause to believe that-

- (a) he may have to break the door of any premises where goods may be seized or repossessed; or
- (b) he may be subject to resistance or intimidation by the debtor or other person; or
- (c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.

The rules refer to the seizure or repossession of a property where a police escort may be required for the auctioneer to carry out his duties. The property being referred to, often has a value. In this case, the respondent has specified the value of the property to Ksh.87,000,000. This fact is supported by the valuation reports marked CNK 1&2.

Section 7(1) of the Magistrate Act gives the pecuniary jurisdiction of each court. This court being a resident magistrate's court, has a pecuniary jurisdiction of Ksh.5,000,000; therefore, it lacks the jurisdiction to adjudicate on this matter or any other issue affecting the disposition of the said property as the subject value of the land to be auctioned by the 2nd applicant is 87,000,000.

Even if this court had the jurisdiction to adjudicate this matter, the applicant was expected to demonstrate that there is reasonable cause that makes the applicant believe that he would need police escort and break in orders. He only stated that hooligans have often chased them away, but there is no material supporting such averments.

Considering the foregoing, the court does find that it lacks the pecuniary jurisdiction to adjudicate this matter. The application is dismissed with costs to the 2nd respondent.

Dated, Signed, And Delivered At Gichugu This 20th Day Of November 2020.

G.k Odhiambo

Resident Magistrate.”

Ruling on taxation of Bill of Costs

2. The Ruling on Taxation dated 20/11/2020, which is the subject of this reference is set out in full below:

“Ruling

This ruling is in relation to the respondent's party and party bill of costs dated 8th December 2020. The applicable schedule for taxing the said bill of costs is schedule 7 of the Advocates Remuneration Order.



Instruction fees.

The respondent instructed the firm of Wambugu Kariuki and associates to oppose an application dated 9/10/2020 where the subject matter was valued at Kshs 87,000,000. The amount charged as instruction fees by the respondent's advocate is Kshs 2,215,000.

What was being adjudicated before this Court was a miscellaneous application dated 9/10/2020 and not a suit. Therefore instruction fees should be charged as per Schedule VII paragraph - 5 of the Advocates Remuneration Order, which provides:-

"On any application, Notice of Motion, Chamber Summons or execution proceedings, to include taking instructions to proceed or oppose, drawing application, engrossing and filing, Ksh.3000/-."

In support of this proposition, the Court is guided by the decision of Philip Muchiri Mugo v Mugo Kithakwa & another [2017] eKLR where it was held that;

"The matter which was the subject of the taxation before the Deputy Registrar was a Miscellaneous Application No. 80 of 2015. From the proceedings attached by the Applicant, it was a burial dispute. In her ruling the honourable magistrate stated that:

"By a notice of motion dated 26th September, 2015 said to have been brought under Section 7A, 3A Civil Procedure Act and Order 57 Civil Procedure rules, the applicant sought the following order;-

This shows that what was before the trial court was an application and not a suit.

The Deputy Registrar when taxing the bill of costs noted that the matter was an application in respect of Land Parcel No. Inoi/kerugoya/69 and based the taxation on Schedule 7(2) of the Remuneration Order. The rule provides: "In any

suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the judgment (other than proceedings falling under paragraph 3 below) such costs as the Court in its discretion but not less than Ksh.20, 000/- if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to

exceed Ksh.50,000/-

The provision relates to a suit or appeal but not an application. The Honourable magistrate erred by basing the taxation on a suit when what was before her was an application which was dismissed on a preliminary point. There was no justification for such award Considering that what was before Court as pointed out above was an application instructions fees claimed on Item -1- which applicant objected, to defend an application should have been under Schedule VII paragraph -5."

Instruction fees to oppose the Miscellaneous application dated 9/10/2020 is therefore taxed at Kshs 3,000. There is no sound justification to award Kshs2,215,000 as instruction fees for the said application as proposed by the respondent.

Drawings, perusals and making copies.

These are not provided for under schedule 7 of the Advocates Remuneration Order. Claim for Item 2,3,6,7,8,9,11,12,14,15,18 and 19 is not allowed and the same is taxed off.

Attendances.



Attendance to the court registry. The same is not provided for under schedule 7 of the Advocates Remuneration Order. The Court is further guided by the decision of Philip Muchiri Mugo v Mugo Kithakwa & another [2017] eKLR as to this aspect where it was held that;

The applicant also objected to Item No. 5. The respondent was claiming traveling to Court on 23rd September 2015 to file pleadings. Ksh.1400/- was awarded. This award was in error.

Schedule VII Paragraph -6- the amount is paid when attendance is before a magistrate. It is provided:- "On any necessary application to or attendance on Magistrate in court or in Chambers. Ksh.1400. "The amount ought not to have been awarded for attendance at the registry to file pleadings. This is covered under Note -1- of Schedule VII.

Attendance to the registry as indicated in items 4 and 13 is not allowed. The same is taxed off.

Attendance for items 5,10, and 20 is allowed as drawn.

Disbursements.

Items 16 and 17 are allowed as drawn.

The respondent's party and party bill of costs is therefore taxed at Kshs 11,120.

Dated. Signed, And Delivered At Gichucju This 9th Day Of June 2021.

G.k. Odhiambo

Resident Magistrate”

The Reference

3. The taxation reference to the High Court dated 13/1/2022 seeks the specific orders as follows:

“chamber Summons

(Under Part 1- General Matters, Rule 11 of the *Advocates Act*)

Let All The Parties Concerned attend the Hon. Judge in chambers or open Court on the day of 2022 at 9.00 O'clock in the forenoon or soon thereafter as the court may order/ direct when the counsel for the applicants may be heard on application for orders:-

1. That. this Hon. Court be pleased to set aside the Ruling and/or his finding on Ksh.11,120/= as taxed costs by the taxing officer and /or the Resident Magistrate Gichugu dated 9th June 2021 in Gichugu Misc. Application No. 4 of 2020.
2. That, this Hon Court be pleased to TAX the applicant's Bill of Costs dated & filed on 8th December 2020 in Gichugu Misc. Application No.4 of 2020 in respect to item No. 1 and/or order the taxation to be done afresh by a different taxation officer/magistrate.
3. That. the costs of this application be provided for.

4. The grounds of the reference were set out in the application as follows:

- “(a) Section 2 of the *Civil Procedure Act* defines what a suit is as follows; "suit means all civil proceedings in any manner prescribed”.



- (b) Vide the Ruling dated 20th November 2020, the taxing officer / Resident magistrate in the same Gichugu Misc. Appl. No 4 of 2020 dismissed the respondents application related & filed before that court on 9th October 2020 for lack of pecuniary Jurisdiction after having determined the value of the proceedings and/or suit that was before him was in excess of Ksh.7,000,000/= . To date that Ruling has never been appealed against by the respondents.
- (c) Vide Ruling dated 9th June 2021, the same taxing officer I resident magistrate could not legally go around his Ruling dated 20th November 2020 by stating that what was before him when considering costs payable to have been just an application and not a suit after having previously determined the value of the proceedings vide Ruling dated 20th November 2020 to have been in excess of ksh.87,000,000/= and went further to determine that the court lacked Jurisdiction to entertain the proceedings.
- (d) The only re - course to the respondents after the ruling dated 20th November 2020 to get over the applicants claim on cost~ as in item number one of the applicants Bill of Costs related & filed on 8th December 2020 would have been a successful appeal against the Ruling dated 20/11/2020 because there was nothing that stopped the respondent to have filed their application dated 9th October 2020 before the High Court of Kerugoya where pecuniary Jurisdiction would not have been an issue.
- (e) What was before the Court as Gichugu Misc. Appl. No. 4 of 2020 was a suit not just an application, in fact it was not at all an application within a suit.”

5. The facts of the application are not in dispute. It is the interpretation to be put to the facts that are in dispute. The genesis of this taxation dispute is the Respondent’s application before the subordinate Court dated 9/10/2020 seeking principal reliefs that-

“Notice Of Motion

(Under Provisions of Section 1A & B, 3A of the Civil Procedure Act and Rule 9 of the Auctioneers Act, Order 51 Rule 1 the Civil Procedure Rules and all other enabling provisions of the Law.)

Take notice that the Honorable Court shall be moved on the day of the 2020 at 9:00 am or soon thereafter as Counsel for the Applicant shall be heard on application for Orders:

1. That the Application be certified as urgent and be disposed of ex-parte in the first instance.
 - ii. That this Honourable Court be pleased to order police assistance to the 2nd Applicant namely Linet Wambui Kibue trading as Restorers Consult Auctioneers to access the properties known as LR.NO.Baragwf/Raimuj2366, LR.NO.Baragwf/Raimu/3282 (in the name of Caesar Njagi Kuguru) & LR.NO.Baragwi/Raimuj2389 (in the name of Wiseborne Industries Limited).
 - iii. That the Officer Commanding (OCS) Kianyaga Police Station or any other officers under them not below the ranks of Assistant



Inspectors do supervise the exercise of the 2nd Applicant conducting a public auction in exercise of the 1st Applicant's statutory power of sale and provide security for the purpose of maintaining law and order.

iv. That the costs of the Application be borne by the Respondent.

6. It was based on grounds set out in the application as follows:

1. That the 1st Applicant advanced loan facilities to the 1st and 2nd Respondents in which the properties hereinbefore mentioned were charged in favour of the 1st Applicant having been used as security for the advancement of the loan facilities aforesaid.
2. That the 1st and 2nd Respondents have since defaulted in repayment of the loan facilities granted and the 1st Applicant is desirous of exercising its statutory power of sale.
3. That the 1st Applicant instructed the 2nd Applicant in order that the 2nd Applicant does conduct a public auction to dispose off the aforesaid properties to recover the amounts owed to the 1st Applicant by the Respondents.
4. That the 2nd Applicant has been unable to conduct the aforesaid auction as the 2nd Respondent who is also a Director of the 1st Respondent has been hostile and has continued to threaten, intimidate and restrict access by anyone who dares access the aforesaid properties making it impossible for the 2nd Applicant to conduct a public auction.
5. That the recovery of the outstanding loan facility will also be defeated if the police will not assist, supervise and / or oversee the sale by public auction of all that piece of properties known as LR.NO.Baragwf/Raimu/2366, LR.NO.Baragwf/Raimu/2389 & LR.NO.Baragwf/Raimuj3282 situated in Kianyaga area.”

7. The application was supported by the Supporting Affidavit of Linet Wambui Kibue sworn on 9/10/2020 as follows:

“Supporting Affidavit

I, Linet Wambui Kibue of Post Office Box 1375-00232 Ruiru within the Republic of Kenya do hereby conscientiously declare solemn oath and state as follows: -

1. That I am an Auctioneer duly licensed in accordance with provisions the *Auctioneers Act* No. 5 of 1996, a copy of the current license attached herewith marked exhibit "LWK1".
2. That I swear this affidavit in support of the Application herein.
3. That sometime in 2016 the 1st Applicant advanced the 1st Respondent a credit facility secured by a legal charge over all that property known as LR.NO.Baragwf/Raimuj2366, LR.NO.Baragwf/Raimuj2389 & LR.NO.Baragwf/Raimuj3282 to secure the payment of the advanced amount.
4. That thereafter the 1st Respondent only made sporadic and nominal payments as a result of which the loan facility fell into arrears.



5. That the 1st Applicant instructed me to proceed and sell the aforesaid parcels of land vide instruction dated 15th February 2017 annexed herewith and marked exhibit "LWK2"
6. That on 7th March 2017 I proceeded to the subject properties of the Respondents at Kianyaga town and found a worker Miss. Eunice Njuguna who I served with 45 days redemption notice and sale form 4 as required by law. On the same day I proceeded to Mr. Caesar Njagi Kuguru's Residence and found his wife Miss. Beatrice Njagi who I also served with a copy of the same. A copy of the 45 days redemption notice and sale form 4 attached herewith and marked exhibit "LWK3"
7. That upon the expiry of the 45 days' notice the Respondents instituted several cases at the Co-operatives Tribunal & the High Court with a view to stopping the 1st Respondent from exercising its statutory power of sale.
8. That however the Co-operatives Tribunal in a ruling dated 11th April 2018, granted the Respondent conditional injunctions requiring the Respondent deposit a sum of Kenya Shillings Fifteen Million Five Hundred Thousand (Kshs.15,500,000/=) only with the Applicant on or before 11th June 2018 pending the hearing and determination of its Application.
9. That on 30th May 2018, the Respondent being dissatisfied with the order of the Co-operatives Tribunal filed an Appeal at the High Court at Nairobi. The High Court on 13th November 2018 vide High Court Civil Appeal No,229 of 2018, granted the Respondent Conditional injunctions restricting the Applicant from attaching the said properties and requiring the respondent to deposit Kenya Shillings Five Hundred Thousand (Kshs.500,000/=) Only on the 5th day of every month pending the hearing and determination of the Appeal failure to which the conditional injunctions against the Applicant shall automatically vacate. (Annexed and marked "LWK4" is a copy of the ruling/ order of the High Court Civil Appeal No. 229 of 2018 delivered on 13th November 2018.)
10. That the Respondents have never deposited the amounts as ordered by the Honourable Courts and therefore the injunctions granted as against the 1st Respondent lapsed.
11. That the relevant notices having been issued, we instructed the 2nd applicant to proceed with the sale by way of public auction of the properties known as LR.NO.Baragwf/Raimu/2366, LR.NO.Baragwf/Raimu/2389 & LR.NO.Baragwf/Raimu/3282.
12. That the 2nd Applicant has been unable to access the property together with a valuer for the purposes of obtaining a current valuation of the property to enable her dispose off the said properties as they are always met with hooligans who chase them away.
13. That the 2nd Applicant advertised the property for sale with the Auction due to happen on 27th July 2020. Attached herewith and marked as LWK- 5 is a copy of the advertisement.



14. That however after the advertisement appeared, the 2nd Respondent began threatening the 2nd Applicant together with anyone who wanted to attend the aforesaid auction.
 15. That we have interested buyers who are however being put off by the inaccessibility of the premises as a result of the 2nd Respondents threats.
 16. That in the circumstances I pray that this court do issue an order to me directing the Area oes (Officer Commanding Station) to provide security while I conduct the auction peacefully for the purposes of making arrangement to auction and recover the outstanding amount so advanced to the respondents plus my costs.
 17. That it is in the interest of justice and fairness that this Application be heard forthwith and the orders sought granted.”
8. Upon a Preliminary Objection by the Respondents (applicants herein) through a Replying Affidavit of 19/10/2020 (para 6 and 7 as to the value of the properties before advancement of the loan by the 1st applicant), this application was dismissed on the ground of the pecuniary jurisdiction of the Magistrate’s Court as aforesaid by a Ruling of 20/11/2020 set out above.
 9. The Costs of the application as taxed by the Taxing Officer by the Ruling of 9/6/2021 are the subject of the present Reference.

Submissions

10. The Counsel for the parties filed their respective submissions on the reference on several occasions urging their respective contentions.
11. The applicants’ Submissions dated 19/5/2022 detailed the reference application before the Court tracing it from the filing by the Respondents in the Magistrates’ Court of a proceeding in the nature of a Miscellaneous Application (dismissed for want of pecuniary jurisdiction), which the applicants consider to be a suit within the meaning of the Civil Procedure Rules and, therefore, attracting instruction fees as a suit under the relevant provisions of the Advocates’ Remuneration Order, as follows:

“Applicants Bill Of Costs

After the Striking out of the Respondents’ application dated 9/10/2020 with Costs, the applicants filed the Bill of Costs dated 8112/2020 (see pages 64-67). The respondents filed a p/objection against the Bill of costs dated 2311/2021 (see pages 68-69).

The court ordered for Canvassing of the p/objection by way of written Submissions (see also pages 110-111). The respondents filed their written Submissions to their p/objection dated 1/3/2021 (see pages 70-72). The applicants herein filed their written Submissions to the respondents p/objection (see pages 73-96). The Court vide Ruling dated 9/4/2021 delivered itself that it had jurisdiction to tax the applicants Bill of Costs dated 811212020(see pages 97- 100).

On 9/4/2021 after the dismissal of the respondents p/objection against the taxation of the applicants Bill of Costs dated 8112/2020, what remained was only the Assessment and/ or taxation of the Bill of Costs. On 1614/2021 the Applicants said Bill of Costs dated 811212020 was fixed for taxation on 28/4/2020 when the Court after hearing Both parties



indicated that it was to consider the Bill and deliver a Ruling on 9th June 2021 (see pages 113-114). On 9th June 2021 the Court delivered its Ruling (see pages 101-103) thereby taxing the applicants Bill of Costs dated 8/12/2020 at Ksh.11,120/=.

Your Lordship,

It is the Ruling dated 9/6/2021 Vide which the trial Court andlor taxing officer taxed and/or Assessed the respondents Bill of Costs at Ksh.11,120/=which is the subject of this reference and the three orders being sought by the applicants. At page 101 it is clear that the taxing officer taxed item No 1 of the Bill of Costs at Ksh.3000/= and not ksh.2,215,000/- proposed in the Bill after the taxing officer pronounced himself over that item as follows:--

"what was being adjudicated before this Court was a miscellaneous application dated 9/10/2020 and not a Suit. Therefore instruction fees should be charged as 'per schedule Vii paragraph 5 of the Advocates Remuneration order which Provides:

instructions fees to oppose the miscellaneous application dated 9/10/2020 is therefore taxed at ksh.3000.

There is no sound- Justification to Award Ksh. 2,215, 001=as instructions fees for the said application as proposed by the respondent"

Your Lordships,

It is our very humble submission that the trial Court and/or taxing officer misdirected himself in relying on the cited case of Muchiri Mugo-vs- Mugo Kithakwa & Another [2017] Klu Because It Was Clear In That Case That The Value Of L.r.title No Inoi/Kerugoya/769 which was the subject of those proceedings had not been pleaded or stated and therefore there was no specific Sum Sued for claimed for or awarded in the judgement. Infact the Bill that was before the taxing officer in the matter was only for a Notice of Motion that had been determined at the interlocutory Stage in the Burial dispute and the main suit was yet to be heard. For the taxing officer to rely on that Case was therefore a clear misapprehension of the facts and the law because:

- (a) What was before the Court for taxation was an interlocutory Notice of Motion that had been determined and the main Suit was yet to be heard Unlike in our instance application dated 9/10/2020 which was filed to commence civil proceedings afresh before the Gichugu Court and it was not an interlocutory application in a pending Suit/ matter. In fact the moment the Misc Appl. dated 9/10/2020 was struck out that was the end of those commenced civil proceedings.
- (b) To better appreciate the position that the respondents application dated 9/10/2020 was an independent suit and that the moment it was struck out with Costs Vide Ruling dated 20/11/2020 there was nothing left pending to be later determined before the Gichugu Court.
- (c) The taxing officer vide Ruling dated 20/11/2020 was deal" that the Court lacked the pecuniary Jurisdiction to entertain the respondents application dated 9/10/2021 because the Subject matter of L.R. Title Nos. Baragwi/Raimu/2366, 2389 & 3282 were in excess of Ksh.87,000,000/= (see replying affidavit at page 24).



- (d) It is our very humble Submissions that the taxing officer could not down his tools for lack of jurisdiction Vide Ruling dated 20/11/2020 and the Same taxing officer Vide Ruling dated 9/6/2021 Rule that what was before him was only an application like any other at an interlocutory Stage proceedings within a pending main suit which was the position in the MUCHIRI MUGO- VS- MUGO KITHAKWA Case -
- (e) The Ruling of the trial Court and/or taxing officer dated 20/11/2020 that it had no jurisdiction to date stands. The respondent did not appeal against the Ruling. The respondent had filed a further affidavit emphasizing that the Court had Jurisdiction (see pages 32-33) which is the same position the respondent stands on in this reference vide their R/Affidavit as we are soon going to demonstrate.

"The rules refer to the Seizure or repossession of a property where a police escort may be required for the Auctioneers to carry out his duties."

- (f) The *Civil procedure Act* at section 2 defines a suit as follows:-

"suit means all Civil proceedings commenced in any manner prescribed"

The same Section 2 of the *Civil procedure Act* defines 'prescribed' means prescribed by rules"

With the definite definition of the *Civil Procedure Act*, as quoted even if one visits the Gichugu Civil registry any day Miscellaneous Application No 4 of 2020 as commenced, registered and filed as an independent and distinct suit and/or Civil proceedings and not an interlocutory application within another main Suit.

- (g) The learned taxing officer did not consider the said section 2 of the *Civil Procedure Act* when Coming to the conclusion that - what was before him was a miscellaneous application dated 9/1/2020 and not a Suit because clearly the Miscellaneous application was the prescribed means by the Rules to commence the civil proceedings in the miscellaneous application and that is why as earlier indicated in the Ruling dated 20/11/2022 he upheld the applicants' objection that he did not have the pecuniary jurisdiction to entertain the matter which was a commenced civil proceedings by way of the miscellaneous application as prescribed by the Rules and/or the law.

Respondents Replying Affidavit

The respondent has filed a R/ affidavit by Counsel on record Sworn on 6/5/2022 by Eric Kanuri Kibue Advocate and filed before court on 11/5/2022. The R/affidavit has 14 paragraphs. We have no doubt that this Hon. Court shall have all the time to go through the affidavit. On our part, we want to make Submissions on regarding its paragraphs 6,7,8,9,10,11,12,13&14:-

- (i) To start with in the entire replying affidavit the respondent does not talk about the objection that the applicants had raised to their Miscellaneous application that culminated in the Ruling dated 20/11/2020 indicating the court did not have pecuniary jurisdiction to entertain the matter because of the value of L.R.Title. Nos Baragwi/Raimu/2366, 2389 & 3282 which parcels of land were at the time in excess of over KSh.87,000,000/=(see page 24 and the Ruling at pages 60-63 dated 20/11/2020). The respondents are silent on this.



- (ii) As regards the disposition of the R/affidavit paragraphs 6,7,8,9,10,11&12, the concern of the respondents is what the Auctioneers Rules provides (which is true) but our answer was well captured by the Ruling of the taxing officer dated 20/11/2020(see page 62 of the ruling where the taxing officer delivered himself as follows;

“The rules refer to the Seizure or repossession of a property where a police escort may be required for the Auctioneers to carry out his duties. The property being referred to often has a value. In this Case the respondent has specified the value of the property to Ksh.87,000,000/=. This fact is supported by the valuation report marked CNK 1&2 ... SECTION 7(1) of the Magistrates Act gives the pecuniary jurisdiction of each court. This Court being a resident Magistrate court has pecuniary jurisdiction of Ksh.5,000,000/=:, therefore it lacks the jurisdiction to adjudicate on this matter or any other issues affecting the disposition of the said property as the Subject value of the land to be auctioned by the 2nd applicant is 87,000,000/=

Even if this Court had the Jurisdiction to adjudicate this matter the applicant was expected to demonstrate that there is reasonable Cause that makes the applicant believe that he would need police escort and break in orders ... ”

- (iii) The respondent has not indicated why they did not file their miscellaneous application before the High Court of Kenya at Kerugoya which was the court with the jurisdiction when they had all the materials facts and evidence even in their application dated 9/10/2020 particularly regarding the parcels of land in question and their value well within the record of their application too.
- (iv) The respondent refers to order 3 Rule 1 (see their R/Affidavit paragraph 11) to assert that what they filed was not a suit or plaint With a lot of respect, even order 3 Rule 1(l) cannot aid the respondents because, it provides as follows;-

“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed”

The respondent is deliberately ignoring the 2nd part of the provision that a suit is also instituted. ” in such other manner as may be prescribed” order 3 Rule 1 (l) in our very humble Submission is therefore the same as section 2 of the Civil procedure Act which as

earlier indicated provides that (“Suit means all Civil proceedings commenced in any manner prescribed. The best we can call therefore GICHUGU MISC. APPLICATION NO 4 of2020 that was struck out with costs on 20/11/2022 is that the respondent commenced civil proceedings which to say the least was a suit.

- (v) Paragraph 14 of the R/affidavit. We want to very humbly Submit that, what was before the taxing officer vide the Bill of costs dated & filed on 8112/2020 (see pages 64-67). The Bill of costs is “Party & Party Bill Of Costs” And Not An Advocate Against Client Bill Of Costs. The matter being a party & party Bill of Costs, whatever amount is ordered to be payable or Say the ksh.11,1201= ordered vide the impugned Ruling dated 9/6/2021 (see pages 101-103) the money will end up in the applicants pockets as the client but not in our pockets as the applicants Counsel on record. It was therefore very undesirable for Counsel to depone that we are using a backdoor to enrich ourselves unjustly!



Conclusion

From the foregoing, we have no doubt in our mind as we hereby humbly submit that the respondent Commenced Civil proceedings whose value was and remains undisputed at Ksh.87,000,000/=. The instructions fees ought to be based on that value in accordance with the law. We therefore pray that your Lordship does grant the application as prayed. We rely on the Court of Appeal decision of Joreth Ltd- Vs-kigano & Associates, Civil Appeal No 66 OF 1999 (copy attached) at pages 24, 25 & 26 as Highlighted where the Court stated as follows-

"On the face of it this is a Completely wrong method of Assessing the Instruction fees and we are unable to agree with the learned Judge. We will have more to say about a judge assessing instructions fees later on in this Judgement. We would at this stage point out that the value of the subject matter of a suit (or the purposes of taxation of a Bill of Costs ought to be determined (rom the pleadings. Judgement 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 instructions fee as he Considers just, taking into account amongst other matters, the nature and importance of the cause or matter, the interests of the parties, the general Conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances ... It is not really in the province of a judge to re-tax the bill. If the Judge comes to the concision that the taxing master has erred in principle he should refer the bill back for taxation by the same or another "taxing officer with appropriate directions on how it should be done. It was stated by the predecessor of this Court in the case of Steel Construction & Petroleum Engineering (E.A) Ltd -vs- Uganda Sugar Factory Ltd D9701E.A.141 spry J.A. at page 143:

"Counsel for the appellant Submitted, relying on D'sousa v Ferao [1960] E.A 602 and Arthur-vs- Nyeri Electricity undertaking [1961] E.A.492 that although a judge undoubtedly has Jurisdiction to re-tax a bill himself he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re-assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement, that it is a matter of Juridical discretion".

12. Despite filing twice the Submissions (differently dated 20/4/2023 and 5/12/2024) by Respondents repeated the same points on the nature of the application filed in the Magistrates' Court, the Counsel for the Respondents urging that the proceedings filed by the Respondents in the subordinate court were merely for police assistance in the respondents attempt to release the security in exercise of a power of sale as follows:

"The main question for determination being the taxable amount as per the Applicants bill of Costs. The Applicants do claim that the value of the property in issue is Kshs.87,000,000.00 and they further allege that the bill of costs should be taxed in reference to the value of the property. If that's to be the case, we ought to find out how the proceedings were initiated.

Order 3 Rule 1 of the Civil Procedure Rules, on the Frame and Institution of Suits provides that; every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed. The said rule opens room for other forms and ways of instituting proceedings provided that they do not contravene the law.

Being guided by Rule 9 of the Auctioneers Rules 1997 postulates that:

Where an auctioneer has reasonable cause to believe that:



- (b) He may be subject to resistance or intimidation by the debtor or other person;
or
- (c) A breach of peace is likely to result as a result of seizure or repossession or attempted seizure or repossession of the property, the auctioneer shall request for police escort from the nearest station in order to carry out his duties.

Further, Rule 9 of the Auctioneers Rules sub rule (2) provides that, an Application under this rule shall be by motion by way of a Miscellaneous Application supported by an Affidavit.

In reference of the above the proceedings herein were first initiated by the Respondents herein at Gichugu Law Courts by way of miscellaneous application and an affidavit sworn by the Respondents Advocate. This approach by the Respondents was in line with the provisions of the law. Referring back to the equitable maxim of Equity follows which is also expressed as "aequitas sequitur legem ", which means that equity will not allow a remedy that is contrary to the law. This maxim lays down that equity supplements law and does not supersede it. The discretion of the court is governed by law and equity which are subservient to one another. Wherever the law can be followed, it must be followed.

Onto the issue of the taxable amount as per the bill of costs; it is our humble submission that the Advocates Remuneration Order Schedule 7 on costs of proceedings in subordinate courts paragraph 5 which provides that:

'On any application, notice of motion, chamber summons or execution proceedings, to include taking instructions to proceed or oppose, drawing application, engrossing and filing, is taxed at Kshs.3000.'

In the case of Philip Muchiri Mugo v Mugo Kithakwa & another [2017]eKLR the honourable court was of the opinion that considering that what was before Court as pointed out above was an application instructions fees claimed, which applicant objected, to defend an application should have been under Schedule VII paragraph -5- which provides-

"On any application, Notice of Motion, Chamber Summons or execution proceedings, to include taking instructions to proceed or oppose, drawing application, engrossing and filing, Ksh.3000/-."

The Respondents through their Advocate filed a Miscellaneous Application at the Chief Magistrate's Court, Gichugu under Certificate of Urgency dated on an even date. Among the orders sought by the Respondent, were that the Honourable Court do issue an Order of Police Assistance to the 1st Respondent trading as Restorers Consult Auctioneers to access the properties known as

LR.NO.Baragwe/Raimu/2366, LR.NO.Baragwe/Raimu /3282 (registered in the name of Caesar Njagi Kuguru) & LR.NO.Baragwe/Raimu /2389 (registered in the name of Wiseborne Industries Limited).

The Respondent subsequently sought that an Order be issued that the Officer Commanding (OCS) Kianyaga Police Station or any other officers under them not below the ranks of Assistant Inspectors do supervise the exercise of the 2nd Respondent conducting a Public Auction in exercise of the 3rd Respondent's Statutory power of sale.

In a nutshell, the purpose of the Application filed by the Respondents was to allow the Respondents have access of the properties and/ securities owned by the.



Applicants herein, which were used to secure a loan from the 2nd Respondent.

Conclusion

The main subject for determination in this matter is the issue of costs. It is without doubt that the Respondents filed a miscellaneous application seeking police assistance which fact is unopposed. It is therefore our humble submission that the Honourable Court while determining the costs, it should be considerate on the mode in which the matter was brought in. this Application by the Applicants is in whole defective and improperly founded. The Applicant's Advocates additionally intend to unjustly enrich themselves by filling erroneous costs whilst aiming at misleading the Court. It is therefore our humble prayer that this Honourable Court does uphold the decision of Gichugu Law Courts and further dismiss this Application with costs.”

13. The Counsel for the Applicant filed Submissions in reply dated 6/5/2024 citing the ruling of the Supreme Court (Ouko, SCJ.) in Frederick Otieno Auta v. Jared Otieno Odoto & 3 Others Pet. NO. 6 of 2014 of 22/9/2023 on the principles for the setting aside of a taxing officer's decision and the factors to be considered in assessing the instruction fees, and emphasizing at paragraph 7 thereof the value of the subject matter of the suit as follows:

“7. Now, we all are in agreement that the value of the pleadings that was before the trial magistrate who also doubled as the taxing officer was Ksh.87,000,000= and that is why he upheld the Applicants P/Objection that he had no Jurisdiction. It is our very humble submissions that the taxing officer exercised his discretion improperly and/or not Judiciary because of going beyond the value of the pleadings before him and started referring to the pleadings as only a Notice of Motion and/or application that could be awarded Ksh.3,000= instructions fees when he was aware that what was before him was a miscellaneous Application which is one of the legal ways of filing initial pleadings and/or initiating a suit before our courts and being well aware which is the position to date that his Ruling upholding the P/Objection actually closed that court file and there was nothing remaining and as such that was a suit....”

14. The Counsel for the parties also highlighted their submissions orally before the court, and ruling was reserved.

Issue before the Court

15. From the submissions of the parties, the issue for determination before the court is whether the Court will interfere with the taxation decision of the taxing officer with respect to the finding on the instruction fees based on the nature of the subject matter and value of the subject matter. The twin question is what is the subject matter of application and the value of the subject matter for purposes of taxation of the instruction fees.



Determination

Interference with discretion

16. The discretion of the taxing officer under Rule 16 of the Advocates (Remuneration) Order is for purposes of allowing certain costs in terms as follows:

“ 16. Discretion of taxing officer

Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through overcaution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.”

The principles for interference with the discretion of the taxing officer are restated in *Frederick Otieno Auta v. Jared Otieno Odoto & 3 Others Pet. NO. 6 of 2014 of 22/9/2023*, supra, citing *First American Bank v Shah & Others (2002) EA64* and *Joreth Ltd. V Kigano & Associates [2002] 1 EA 92* relied on the Applicant.

17. It is not disputed that the applicable Schedule for the taxation in the proceedings subject of this reference which were filed in the Magistrate’s Court is Schedule 7 of the Advocates (Remuneration) Order, as provided in Rule 51 of the Order, as follows:

51. Costs in subordinate courts according to Schedule 7

Subject to paragraph 22, the scale of costs applicable to proceedings in subordinate courts (other than Kadhi’s Courts) is that set out in Schedule 7.”

Schedule of the Advocates Remuneration Order is for “Costs Of Proceedings In Subordinate Courts”, as shown on the header. Rule 22 referred to in Rule 51 above operates “as between advocate and client” and it is not applicable in this case of party and party Bill of Costs.

18. On the question of assessment of instruction fees, which is the only dispute in this matter, the Supreme Court in its leading decision *Kenya Airports Authority v Otieno Ragot and Company Advocates (Petition E011 of 2023) [2024] KESC 44 (KLR) (2 August 2024) (Judgment)* has guided the courts as follows:

“ 55. It is common ground that the subject matter of the suit in issue should be identified first, and then the value thereof determined. How is the value of the subject matter to be determined? Paragraph 1 of Schedule VIA is clear on this issue, and in point of fact stipulates that, “... where the value of the subject matter can be determined from the pleading, judgment or settlement of the parties”. This means that the value of the subject matter can be determined



from the pleadings or judgment or settlement of the parties. In that regard, the Court of Appeal in the case of Joreth Ltd v Kigano & Associates [2002] 1 EA 92 expressed that-

“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) ...”

56. Equally, the Court of Appeal in considering the issue of how the value of a subject matter can be determined in Peter Muthoka & another v Ochieng & 3 others, Civil Appeal No 328 of 2017; [2019] eKLR, stated 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.

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.”

We concur and approve of the foregoing findings by the Court of Appeal on the factors to take into consideration when determining the value of the subject matter.

57. Whilst the determination of the value of subject matter from a judgment and settlement of the parties is quite straight forward, the determination from pleadings is not. The determination of the value of the subject matter, may be difficult, for instance, where the pleadings/suit is struck out at a preliminary stage, such as in this case, and the value can only be determined/ascertained upon the conclusion of a trial. In considering this pertinent issue, we make reference to D Njogu and Co Advocates v Kenya National Capital Authority, HC Misc Application No 21 of 2003; [2005] eKLR, wherein the advocate therein acted for the respondent (who was the plaintiff) in a suit whose claim was for Kshs82,706,408.60, together with interest at 30% per annum from October 18, 2000. On whether the value of the subject matter could be determined from the pleadings, Ochieng, J, as he then was, held that-

“So, whilst I accept that the advocate may have been instructed to sue for not only the principal sum, but also for interest thereon, at a specific rate, that fact alone cannot mean that the claim would be successful. In other words, the court could dismiss the whole claim, or grant part of the principal sum. Alternatively, the court could grant judgement for the whole principal sum, but without interest, or even with interest at rates other than those claimed. Effectively, therefore the value of the subject matter of the suit would remain indeterminate until the court passed its verdict on the case.” [Emphasis added]



58. The facts of the instant appeal were not so dissimilar with the above case as the value of the subject matter was disputed by the appellant and the issue was not determinable from the pleadings which were struck out. It is evident that the original plaintiff did not provide any particulars or the value of the parcels that were allegedly compulsorily acquired by the appellant. This information in our view was necessary as a guide to the Taxing Officer in the assessment of reasonable costs. The original plaintiffs simply pleaded or claimed a sum of Kshs.13,932,000,000 as special damages and indicated that the particulars thereto would be availed during the hearing. Therefore, the value of the subject matter could only be determined upon the conclusion of the trial which never happened.
59. 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."

At paragraphs the Supreme Court conclude that –

- "76. We believe we have said enough to demonstrate that there were no justifiable reason (s) to warrant the majority decision of the Court of Appeal to interfere with the taxation of the instruction fees by the Taxing Officer. The Taxing Officer as well as the High Court Judge did not in any way err in law or principle, in the assessment of Advocate-Client instruction fees. Moreover, an increase of the instruction fees from Kshs 5,000,000 to Kshs196,044.750,50 amounted to an impediment to access to justice. As emphasized in the many authorities and submissions made to us, instruction fees ought to take into account the amount of work done by an advocate, the prevailing economic times and should be reasonable to a level where the charges should not impede access to justice. Odunga, J, (as he then was) in *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd*, HC Misc No 843 of 2013; [2014] eKLR expressed as follows:

" ... 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.”

Equally, the finding by Ojwang, J (as he then was) in *Republic v Ministry of Agriculture & 2 others ex parte Muchiri W’njuguna & 6 others*, HC Misc 621 of 2000 [2006] eKLR, resonates with the matter at hand. He stated as follows:

“Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the Taxing Officer is to provide only for reasonable compensation for work done; the should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious;...”

77. Accordingly, we find this appeal has merit and hereby set aside the impugned majority judgment of the Court of Appeal and uphold, the High Court’s ruling dated February 20, 2017.”

19. From the statement of the Supreme Court that “the subject matter of the suit in issue should be identified first, and then the value thereof determined”, it appears to this court that the answer to the question as to the value of the subject matter for purposes of instruction fees, appears to be in the consideration that the subject matter of a suit is to be reckoned with reference to the nature of the suit or the cause of action in the acceptance of the term defined by Lord Pearson in *Drummond - Jackson v British Medical Association* (1970) 2 WLR 688 at p 696 (cited in *DT Dobie & Company (Kenya) Ltd v Muchina* [1980] KLR 1) that -

“ A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.”

20. If any nexus were sought between a suit and the cause of action it is to be found in section 8 of the [Civil procedure Act](#) which provides that -

“

“8. Bar to further suit

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.”

21. Instructions fees on a suit for recovery of a property may properly be costed on the basis of the value of the suit property sought to be recovered but a suit whether by application, petition, summons, motion etc. for the access to a property for purposes of taking possession by an auctioneers who is instructed to sell the property in exercise of the chargee’s power of sale, which is distinguished from a suit for recovery of title or possession, or for foreclosure, is not a suit for recovery of the property. There is no suit for determination of the applicant’s right to take possession or to sell in exercise of power of sale, etc. It was simply an application under the Auctioneers’ Rules for access to the premises. It must be distinguishable from a suit seeking to injunct the Chargee from exercising the power of sale or for foreclosure by the Chargee, where the subject matter is the property and the value of the subject matter is, consequently, the value of the property recovered or sought to be recovered in the process.



22. An application for access to the property by an auctioneer merely results in the access and the Chargor could well have sued for injunction to restrain the Chargee and its agent the Auctioneer from selling the property in a suit to enforce the equity of redemption. There was, with respect, no suit for purposes of recovery of the suit property valued at 87,000,000/- which could attract a finding that the value of the subject matter for purpose of taxation of costs was the said sum. In this case, the subject matter was the access obtained by the order of the court, which not being ascertained in terms of Paragraph 1 of Schedule 7 fell to be assessed on the basis of the other guidelines in the Advocates Remuneration Order, whether the proceedings were considered a suit or an application. The Court finds that the application subject of these proceedings is a suit within the meaning of the *Civil Procedure Act* but the value of the subject matter is not to be ascertained by reference to the value of the suit property whose recovery, or of the value whereof, was not the cause of action in the application.

23. I respectfully agree with the observations of the Court in *Joreth Ltd- Vs-kigano & Associates*, Civil Appeal No 66 OF 1999, supra,

“We would at this stage point out that the value of the subject matter of a suit (or the purposes of taxation of a Bill of Costs ought to be determined from the pleadings, Judgement 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 instructions fee as he considers just, taking into account amongst other matters, the nature and importance of the cause or matter, the interests of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances.”

24. Under Schedule 7 of Advocates (Remuneration) Order is applicable to the proceedings before the Magistrates’ Court, the instructions fees costs are provided for the various nature of suits/proceedings, as follows:

“

“1. Where the sum found due (in the case of a wholly or partially successful plaintiff) or the sum sued for (in the case of a wholly successful defendant).

Subject as provided in this Schedule, the fees for instructions shall be as follows—

(a) To sue in an ordinary suit in which no appearances is entered under Order IXA of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a).

(b) 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).

(c) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule.”

25. Where no specific sum is ascertained by the claim, judgment or settlement, Schedule 7 Paragraph 2 of the Advocates Remuneration Order provides for assessment of instruction fees as follows:

“2. In any suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the judgment (other than proceedings falling under paragraph 3 below); such costs as the court in its discretion but not less than



Kshs.20,000 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Kshs.50,000.”

Rules 3, 4, 5, 6 of the Schedule 7 provide for costs in other nature of proceedings, respectively, Election petition, Dissolution of Marriage, Applications, Necessary applications, among other court process.

26. Because the application before the Court was not a suit for recovery of a sum of money or compensation for any loss or damage, there was no sum found due (in the case of a wholly or partially successful plaintiff) or the sum sued for in terms of paragraph 1 of schedule 7. Accordingly, the provisions of Rule 1 do not apply and there is no question of percentages does not arise even though the suit was determined upon a preliminary objection in a summary manner as contemplated in paragraph 1 (b).

The dismissal of the suit on the grounds of lack of jurisdiction in view of the value of the properties subject of the intended sale having been valued at Ksh.87,000,000/- is, with respect, not material to the present application. The finding of the trial court on the preliminary objection was not appealed from and the correctness of the trial court’s decision is not before me. As the Supreme Court in the Kenya Airports case, supra, ‘was not persuaded by the respondent’s contention that even where the amount claimed in a pleading which is struck out by a court, the said amount would still act as the value of the subject matter when it comes to taxation of instruction fees’ this court does not accept that the value of the properties the access to which is sought by an application which is struck out for want of pecuniary jurisdiction, ipso facto, becomes the value of the subject matter for purposes of the taxation of instruction fees.

27. However, what before the trial Court was a suit for police assistance in accessing the properties. The Subject-matter of the suit was the prayer for police escort specifically for two principal orders that –
1. That this Honourable Court be pleased to order police assistance to the 2nd Applicant namely Linet Wambui Kibue trading as Restorers Consult Auctioneers to access the properties known as LR.NO.Baragwf/Raimuj2366, LR.NO.Baragwf/Raimu/3282 (in the name of Caesar Njagi Kuguru) & LR.NO.BARAGWI/Raimuj2389 (in the name of Wiseborne Industries Limited).
 2. That the Officer Commanding (OCS) Kianyaga Police Station or any other officers under them not below the ranks of Assistant Inspectors do supervise the exercise of the 2nd Applicant conducting a public auction in exercise of the 1st Applicant’s statutory power of sale and provide security for the purpose of maintaining law and order.

The suit in the Application subject of the Bill of Costs was for a claim ‘the nature of which no specific sum is sued for, claimed for, or awarded in the judgment’ and its costs were in the discretion of the Court ‘but not less than Kshs.20,000 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Kshs.50,000.” As this case was defended, the applicable ceiling of costs was Ksh.50,000/-

28. The trial court was wrong in treating the application before it as an inter locutory application. In relying on Philip Muchiri Mugo case, supra, the trial court took the view that the Respondent’s application was an application filed within a suit before the Court for which costs are provided for under Rule 5 of the Schedule 7. The Court did not consider that a suit is defined in section of the Civil Procedure Act as “suit” means all civil proceedings commenced in any manner prescribed.” The



application originating the proceedings the subject of the Bill of Costs was made un the Auctioneers Rules 1997 Rule 9, which provides as follows:

“9. Police assistance

- (1) Where an auctioneer has reasonable cause to believe that—
 - (a) he may have to break the door of any premises where goods may be seized or repossessed; or(b) he may be subject to resistance or intimidation by the debtor or other person; or(c)a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.
- (2) An application under this rule shall be by motion by way of a miscellaneous application support by an affidavit and may be heard ex parte.

[L.N. 144/2009, r. 3.]”

In this court’s respectful view, the application filed by the Respondent was clearly was an originating Notice of Motion under the Auctioneer’s Rules 1997 which amounted to a suit within the meaning of section 2 of the Civil Procedure Act being a civil proceedings commenced in any manner prescribed.

29. As accepted by the Supreme Court in the Kenya Airports case ‘instruction fees ought to take into account the amount of work done by an advocate, the prevailing economic times and should be reasonable to a level where the charges should not impede access to justice’. In this case, as the only question was the instruction fees on the application, which the Court has now decided, there is no need to escalate costs in money and time by referring the Bil of Costs for taxation before another taxing Officer, and the Court will take the exceptional course of taxing the Bill itself on the reference. Considering the nature of the application before the Court and the amount work done in the suit which was struck before full hearing and the need to afford opportunity to access to justice, the Court will interfere with the discretion of the trial court and set aside the award of Ksh.11,120/= as costs of the application and substitute therefor an award of Ksh.50,000/- bearing in mind the importance of the matter to the parties being an application to give effect to the exercise of the applicant’s power of sale of the charged properties. The Court will further award costs for the successful reference to this court assessed at ksh.30,000/=.

30. The costs taxed and allowed in this case shall attract interest in accordance with section 27 (2) of the Civil Procedure Act which provides as follows:

- “(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

Orders

31. Accordingly, for the reasons set out above, the Court finds merit in the reference on taxation herein makes the following orders:



1. The Ruling and/or his finding on Ksh.11,120/= as taxed costs by the taxing officer/Resident Magistrate Gichugu dated 9th June 2021 in Gichugu Misc. Application No. 4 of 2020 is set aside.
 2. The applicant's Bill of Costs dated and filed on 8th December 2020 in Gichugu Misc. Application No.4 of 2020 in respect to item No.1 is taxed and allowed in the sum of Ksh.50,000/- . The other awards by the trial court remain unaffected.
 3. The Court awards to the Applicant the costs of the reference to this court assessed at Ksh.30,000/- to be paid by the Respondent.
 4. In terms of section 27 (2) of the *Civil Procedure Act*, the costs shall attract interest at 14 per cent per annum until payment in full.
32. On account of the public importance of the question of ascertainment of the subject matter and the value of the subject matter for purposes of assessment of instruction fees in the Advocates (Remuneration) Order raised in this reference, the Court grants any party aggrieved leave to appeal to the Court of Appeal in terms of Rule 11 (3) of the Advocates (Remuneration) Order that -
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.”

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Wambugu Kariuki instructed by M/S Wambugu Kariuki & Associates, Advocates for the Applicants.

Mr. Kibue instructed by M/S Kibue Mugiira & Mbagara Advocates for the Respondents.

