



**Schiering v Said & 3 others (Environment & Land Miscellaneous Case E299 of 2021) [2023] KEMC 272 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEMC 272 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
ENVIRONMENT & LAND MISCELLANEOUS CASE E299 OF 2021**

**ZK KAGENYO, DR**

**JUNE 14, 2023**

**BETWEEN**

**THOMAS SCHIERING ..... PLAINTIFF**

**AND**

**NEREAH MICHAEL SAID ..... RESPONDENT**

**AND**

**GERHARD HEIDBUK ..... 1<sup>ST</sup> DEFENDANT**

**WOLFGANG GEROG JOHANN EHGARTNER ..... 2<sup>ND</sup> DEFENDANT**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Ruling On The Party And Party Bill Of Cost Filed On 3rd September 2019**

1. The Bill of Costs subject of thi24th May 2019 and was filed by the 4<sup>th</sup> Defendant, the Applicant herein, in Court on the 3<sup>rd</sup> September 2019 against the Plaintiff, the Respondent herein.
2. The Bill of Costs was filed following the outcome of the case filed by the Plaintiff/ Respondent against the Defendants and on 23<sup>rd</sup> January 2019, Justice C.K Yano delivered a ruling which in part, at paragraph 10 and 12, struck out the Plaintiff/s/ Respondent’s suit against the 4<sup>th</sup> Defendant/Applicant with costs.
3. The Respondent was served with the Bill of Costs on 21<sup>st</sup> February 2023 pursuant to an Order by this Court but did not file any response.
4. The matter had been initiated by way of a Plaint dated 21<sup>st</sup> October 2017 and filed in court at Mombasa on 7<sup>th</sup> December 2017 and therefore the applicable Advocates Remuneration Order is the Legal Notice No. 35, the Advocates (Remuneration) (Amendment) Order, 2014 hereinafter the ARO and more



particularly under Schedule 6 for costs of proceedings in the High Court and Courts of Equal Status. The matter was contested.

5. The Applicant herein entered an appearance on 7<sup>th</sup> February 2018 by filing a Memorandum of Appearance dated 31<sup>st</sup> January 2018. Contemporaneously, the Applicant filed a Statement of Grounds of Opposition and on 19<sup>th</sup> February 2018, filed a Defence dated 15<sup>th</sup> February 2018.
6. Item 1 in the Bill of Costs (Instruction Fees) is drawn at Ksh. 1, 200, 000/= . The Applicant has not demonstrated the basis for this figure.
7. In *Joreth Limited v Kigano & Associates* [2002] eKLR, the Court of Appeal guided 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) 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.
8. The court in its capacity as the Taxing Officer endeavored to find the basis of laying the taxation of the instruction fees. In this case, the value of the subject matter could not be discerned from the pleadings by the parties, any judgment as the matter is yet to be concluded or any settlement, paragraph 7 of the Plaintiff notwithstanding more particularly as read together with the prayers sought.
9. I have considered the nature of the suit and the court record generally. I have also considered the interest of the parties evident in the pleadings and the proceedings on the court record. I note that the Plaintiff at paragraphs 9 and 12 of the Plaintiff adversely mentioned the Applicant as one in conspiracy with the other defendants and but yet again I look at the prayers as against the Applicant by the Respondent in the Plaintiff and the prayer was just one that is to say,  
  
A mandatory order, directing the 4<sup>th</sup> Defendant by itself, its against, servants, employees and/or assigns to restore and or/ reconnect electricity supply in the Plaintiff's residence at Kwale/galu Kinondo/2458 And Kwale/galu Kinondo/2459.
10. This prayer was by a private citizen seeking the Defendant to perform its statutory duties and in my opinion, it would not be in the interest of justice to private citizens seeking their civic entitlements from their government if their failed quest of such rights would come at a cost of Ksh. 1, 200,000/= ,albeit, without a basis.
11. Trickling from the foregoing, I have looked at the stakes that either parties had and the consequences of a loss of the suit to each other on either party and while doing so, I contemplated the statutory obligations of the Applicant and the alternatives to the Respondent if the Applicant would fail to perform its statutory obligations in toto.
12. Finally, I have considered that the Applicant took steps to defend its interests in the suit by among others instructing an advocate who employed his industry in executing the Applicant's brief. I am persuaded that an instruction fee of Ksh. 300,000/= is fair and reasonable in the circumstances. Item 1 (a) is taxed at Ksh. 240, 000/= and Ksh. 960, 000/= is taxed off.
13. Item 2 was on Getting up fees. The Applicant asked to be awarded the getting up fees at Ksh. 420, 000/=.
14. Schedule 6 paragraph 2 of the ARO provides that;



In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that;

- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
- ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned. (underline mine);
- iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

The above cited paragraph suffers from lack of a conjunction to inform the taxing officer on whether the 3 conditions are conjunctive or disjunctive. The court shall proceed on the assumption that they are disjunctive conditions.

15. The court interrogated the import of condition (iii) above as read with condition (ii) above in the context of the fate of a successful litigant in a matter determined before trial, but all the parties had for instance complied with Order 3 Rule 2 and Order 7 Rule 5 of the Civil Procedure Rules, but the matter had not gone through pre-trial conference due to a series of applications by the parties. I believe that the distinction between the instruction fees and the getting up fees is that instructions fees are the professional fees charged to a client when he appears before an advocate and the advocate takes up his case, advise this client on what should be done, research on the law around the circumstances and probably give the professional opinion therefrom. On the other hand, the get up fees are the professional fees that this advocate is paid to face the adversary.
16. By the time this matter was being concluded by way of the Preliminary Objection, the Applicant had filed a Defence and a Statement of Grounds of Opposition which it would appear that it was either remanded for a later or consumed in the Preliminary Objection by the 1<sup>st</sup> Defendant that the Applicant herein submitted on and parties appeared before the judge for highlighting the submissions on 17<sup>th</sup> October 2018. It is my view that the advocate was employing his skills, outside the paid instruction fees to face the adversary of his client. This was the instance of demanding the get up fees from his client.
17. Further, I note that the Applicant had filed a Defence.
18. In *Shamshudin Khosla As Chairman, Abdul Gafur Pasta as Honorary Secretary & Mohamed Bayusuf as Treasurer [On their Own Behalf and on Behalf of] The Members Of Kenya Transport Association V Kenya Revenue Authority [2011] eKLR* the Court had this to say, From the foregoing authority, I would draw the inference that “getting-up” fees, in ordinary litigation, partially overlaps with instruction fees. Whereas instruction fees represent the formal commitment of the Advocate to a new client who thereafter gives sufficient instructions, in a process of hearing-and-receiving by the Advocate, getting-up fees relate to the first step (and possibly, later, equally-significant steps) which the Advocate takes, in preparing the pleadings and other vital process-documents, for lodgment and service..... It is obvious that after counsel took instructions from the applicant/respondent, counsel moved on to the next stage of formulating, lodging and serving the cause papers; so in this regard, there was an element of getting-up fees.



19. As such, I will equally allow getting up fees at Ksh. 80, 000/= being a  $\frac{1}{3}$  of the instruction fees and tax off Ksh. 340, 000/=.
20. Items 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29,31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170 and 171 are taxed off as there were either no proof of service, drafting, receiving or receipts furnished before the Taxing Officer for consideration to satisfy himself that indeed the items were dealt with as drawn in the Bill of Costs.
21. Item 16 is drawn at Ksh. 1, 100/=. Under schedule 6 paragraph 4 (a) (i) of the ARO, it is taxed as drawn at Ksh. 1, 100/=.
22. Item 19 is drawn at Ksh. 1, 000/=. Under schedule 6 paragraph 4 (d) of the ARO, it is taxed as at Ksh. 360/= and Ksh. 640/= is taxed off.
23. Item 30 is drawn at Ksh. 2, 180/=. Under schedule 6 paragraph 4 (a) and (d) of the ARO it is assessed taxed as at drawn at Ksh. 2, 180/=.
24. Item 64 is drawn at Ksh. 700/=. Under schedule 6 paragraph 8 of the ARO, it is taxed as drawn at Ksh. 700/=.
25. Item 81 is drawn at Ksh. 50/=. Under schedule 6 paragraph 8 of the ARO, it is taxed as drawn at Ksh. 50/=.
26. Item 92 is drawn at Ksh. 50/=. Under schedule 6 paragraph 8 of the ARO, it is taxed as drawn at Ksh. 50/= but on a letter dated 4<sup>th</sup> September 2019.
27. Item 95 is drawn at Ksh. 200/=. Under schedule 6 paragraph 8 of the ARO, it is taxed as drawn at Ksh. 200/=.
28. Item 106 is drawn at Ksh. 700/=. Under schedule 6 paragraph 8 of the ARO, it is taxed as drawn at Ksh. 700/=.
29. Item 81 is drawn at Ksh. 50/=. Under schedule 6 paragraph 8 of the ARO, it is taxed as drawn at Ksh. 50/=.
30. Item 110 is drawn at Ksh. 12, 320/=. It is assessed at 14 folios for drawing and 59 folios for perusal and under schedule 6 paragraphs 4 (d) and 8 of the ARO, it is taxed as drawn at Ksh. 5, 530/= and Ksh. 6, 790/= is taxed off.
31. Items 173 is on VAT. This being a party-to-party bill of costs, the same shall not be awarded and hence the stated Ksh. 279, 620/= said to be VAT shall be taxed off.
32. In the end, the Bill of Cost dated 24<sup>th</sup> May 2019 and filed on the 3<sup>rd</sup> September 2019 is taxed at Ksh. 330, 920/=. A total of Ksh. 1, 696, 325/= is taxed off.



33. The Bill of Cost was drawn at Ksh. 2, 027, 245/= of which more than a  $\frac{1}{6}$  has been disallowed and hence the Applicant shall bear its own cost of this Bill.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS-TEAMS AT KWALE ON THIS 14<sup>TH</sup> DAY OF JUNE 2023.**

**KIONGO KAGENYO**

**DEPUTY REGISTRAR**

**ENVIRONMENT AND LAND COURT, KWALE**

In the presence of;

Mr. Archibald Kimbada- Court Assistant

Mr. Korir holding brief for Mr. Kipkorir for the Applicant

No appearance for the Respondent.

