

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**HCCOMM NO. E242 OF 2023**

MUMO MWENDWA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT

MUVOSUNZA INVESTMENT LIMITED.....2<sup>ND</sup> PLAINTIFF/RESPONDENT

-VERSUS-

SAMMY MUVELAH.....1<sup>ST</sup> DEFENDANT/3<sup>RD</sup> RESPONDENT

SUKI MWENDWA.....2<sup>ND</sup> DEFENDANT/APPLICANT

SAMMY NGANGI.....3<sup>RD</sup> DEFENDANT/4<sup>TH</sup> RESPONDENT

MURI JAMES NJUGUNA.....4<sup>TH</sup> DEFENDANT/5<sup>TH</sup> RESPONDENT

*(A Reference from the Ruling delivered on 5<sup>th</sup> August 2024 by Hon. S. Githogori Bett, sitting as a Taxing Master).*

**RULING**

1. The 2<sup>nd</sup> defendant/applicant filed a Chamber Summons application dated 16<sup>th</sup> August 2024 pursuant to the provisions of Paragraph 11(2) of the Advocates (Remuneration) Order seeking an order for this Court to review, vary and/or set aside the Deputy Registrar's Ruling delivered on 5<sup>th</sup> August 2024 on the 2<sup>nd</sup> defendant's Party and Party bill of costs dated 3<sup>rd</sup> November 2023, and to have the costs taxed afresh on merits. In the alternative, the 2<sup>nd</sup> defendant prays for an order that the said bill of costs be remitted for taxation before a different Taxing Master.
2. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Mr. Suki Mwendwa, the 2<sup>nd</sup> defendant herein. He averred that the plaintiffs filed this suit alongside an application seeking interim orders, and they engaged W.G. Wambugu & Co. Advocates who later filed an application to strike out the suit. He stated that the

plaintiffs withdrew the suit on 23<sup>rd</sup> August 2023 and the Court confirmed the withdrawal, with costs on 12<sup>th</sup> October 2023. That thereafter, his Advocates filed a Party and Party bill of costs dated 3<sup>rd</sup> November 2023, claiming Kshs.40,081,990/=. He however contended that in a Ruling delivered on 5<sup>th</sup> August 2024, the Taxing Master reduced this sum to Kshs.278,190.00.

3. Mr. Mwendwa stated that the Taxing Master erred in finding the subject matter's value indeterminable as the same could be ascertained from the pleadings, specifically from an affidavit showing the 2<sup>nd</sup> plaintiff's 100% shareholding valued at over Kshs.4,100,000,000/=. He further stated that instruction fees should have been based on this value rather than under "*other matters*" in Schedule 6. The 2<sup>nd</sup> defendant urged this Court to set aside the Taxing Master's Ruling of 5<sup>th</sup> August 2024 and for his bill of costs to be taxed afresh either by this Court or a different Taxing Master.
4. In opposition to the application, the plaintiffs filed a replying affidavit sworn on 12<sup>th</sup> September 2024 by Mr. Mumo Mwendwa, the 1<sup>st</sup> plaintiff herein and a Director of the 2<sup>nd</sup> plaintiff. Mr. Mumo averred that this suit was a derivative action, filed to protect the 2<sup>nd</sup> plaintiff company from actions by the 1<sup>st</sup> & 2<sup>nd</sup> defendants. He further averred that the said suit sought injunctive and declaratory orders relating to Director appointments, not monetary relief. He stated that no defence was filed to this suit and it was withdrawn on 23<sup>rd</sup> August 2024, before it was set down for hearing. Mr. Mumo contended that there was no evidence in the pleadings of the subject matter's monetary value. He contended that the 2<sup>nd</sup> defendant's claim that the 2<sup>nd</sup> plaintiff company's value formed the subject matter of this suit is erroneous, unproven, and unsupported by any formal valuation. He asserted that taxation of the 2<sup>nd</sup> defendant's Party and Party bill of costs dated 3<sup>rd</sup> November 2023 at Kshs.278,190.00 was fair and in line with correct principles.

5. In a rejoinder, the 2<sup>nd</sup> defendant filed a further affidavit sworn on 13<sup>th</sup> December 2024 by Mr. William Mwangi Mugu, an Advocate of the High Court of Kenya and learned Counsel for the 2<sup>nd</sup> defendant. He reiterated that the Taxing Master assessed the Party and Party bill of costs on 24<sup>th</sup> July 2024, with reasons delivered on 5<sup>th</sup> August 2024. He emphasized that the value of the 2<sup>nd</sup> plaintiff's shareholding can be ascertained from the 1<sup>st</sup> plaintiff's own annexure in a prior application, specifically from an affidavit in probate proceedings showing the company's value.
6. The plaintiffs also filed a further replying affidavit sworn on 14<sup>th</sup> January 2025 sworn by Mr. Mumo Mwendwa, the 1<sup>st</sup> plaintiff herein and a Director of the 2<sup>nd</sup> plaintiff. He averred that the affidavit relied on by the 2<sup>nd</sup> defendant drawn from a pending succession cause, does not prove the value of the 2<sup>nd</sup> plaintiff company, as the figures are unsupported by evidence or formal valuation and may have been inflated. He maintained that this suit's subject matter was the appointment of the 3<sup>rd</sup> & 4<sup>th</sup> defendants as Directors, and not the 2<sup>nd</sup> plaintiff company's value. He supported the Taxing Master's finding that the value of this suit's subject must be derived from pleadings, which contain no monetary valuation.
7. The application herein was canvassed by way of written submissions. The 2<sup>nd</sup> defendant's submissions were filed by the law firm of W. G. Wambugu & Company Advocates on 13<sup>th</sup> December 2024, while the plaintiffs' submissions were filed on 15<sup>th</sup> January 2025 by the law firm of Khaminwa & Khaminwa Advocates. On 18<sup>th</sup> February 2025, Mr. Waweru, learned Counsel for the 1<sup>st</sup> & 3<sup>rd</sup> defendants indicated that the 1<sup>st</sup> & 3<sup>rd</sup> defendants were not participating in this application.
8. Mr. Mugo, learned Counsel for the 2<sup>nd</sup> defendant cited the case of **First American Bank of Kenya Ltd v Gulab P. Shah & 2 others** [2002] KEHC

1277 (KLR) and submitted that this Court may only interfere with a Taxing Master's decision where it is shown that the assessment was based on an error of principle or the amount awarded was manifestly excessive or too low. He contended that the Taxing Master erred in principle by finding that the value of the subject matter could not be determined from the pleadings. Relying on paragraph 1(a) of Schedule VI of the Advocates Remuneration (Amendment) Order, 2014, and the Court of Appeal's holding in the case of **Joreth Limited v Kigano & Associates** [2002] KECA 153, (KLR), Mr. Mugo argued that where the value of the subject matter can be determined from the pleadings, judgment, or settlement, it should form the basis of instruction fees.

9. Mr. Mugo maintained that the subject matter of this suit comprised the assets of the 2<sup>nd</sup> plaintiff company, as reflected in the prayers in the plaint, where it can be seen that the plaintiffs sought an order seeking to restrain dealings with those assets. He referred to an affidavit filed in support of a probate petition annexed to the plaintiffs' application dated 31<sup>st</sup> May 2023, showing 51% shareholding in the 2<sup>nd</sup> plaintiff company valued at Kshs.2,100,000,000/=, placing the 2<sup>nd</sup> plaintiff's total value at Kshs.4,117,647,058.82. Counsel referred to the case of **Lucy Waithira & 2 others v Edwin Njagi T/A E. K Njagi & Company Advocates** [2017] KECA 272 (KLR), and asserted that the Taxing Master misapprehended the law and failed to consider material evidence on record that established the value of the subject matter.
10. Dr. Khaminwa, learned Counsel for the plaintiffs also relied on the case of **Joreth Limited v Kigano & Associates** (supra), and submitted that the Taxing Master correctly assessed the costs due to the 2<sup>nd</sup> defendant. He contended that the plaintiff's assertion that the subject matter of this suit exceeded Kshs.2,100,000,000/= is misleading, as the plaintiffs' plaint only sought injunctive and declaratory reliefs in respect to the appointment of the 3<sup>rd</sup> & 4<sup>th</sup>

defendants as Directors of the 2<sup>nd</sup> plaintiff company, not ownership of the company or its assets. He asserted that no defence or counterclaim was filed and the pleadings filed did not indicate any monetary value. Dr. Khaminwa submitted that under Schedule 6(A)1(b) of the Advocates (Remuneration) (Amendment) Order 2014, the value of the subject matter is determined from the pleadings, not external evidence, and in this case, the subject matter fell under the “*other matters*” category.

11. Dr. Khaminwa submitted that the Taxing Master acted within her discretion and applied the correct Schedule. He cited the case of **First American Bank of Kenya Ltd v Gulab P. Shah & 2 others** (supra), and maintained that full instruction fees to defend a suit are only earned once a defence is filed, which is not the case herein. Dr. Khaminwa stated that this suit was withdrawn before trial, and as such, under Schedule 6(A)1(c), only 85% of the applicable value applies. He relied on the case of **Kenya Agricultural & Livestock Research Organisation (Formerly Kenya Agricultural Research Institute v Njama Limited** [2017] KEHC 9873 (KLR), and asserted that “*getting up*” fees are not payable as no *viva voce* evidence or trial preparation took place.

#### **ANALYSIS AND DETERMINATION.**

12. I have considered the application filed herein, the grounds on the face of it, and the affidavits filed in support thereof. I have also considered the replying affidavits filed by the plaintiffs and the written submissions by Counsel for the parties. The issue that arises for determination is whether the Taxing Officer’s Ruling delivered on 5<sup>th</sup> August 2024 should be set aside and the 2<sup>nd</sup> defendant’s Party and Party bill of costs dated 3<sup>rd</sup> November 2023 be referred to another Taxing Master for taxation, or of this Court should tax the said bill afresh.
13. The High Court will only interfere with a Taxing Master’s decision where there has been an error in principle and not solely on questions of quantum, as the

Taxing Master is better suited and more experienced in determining such matters. The Court of Appeal in the case of **Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board** [2005] eKLR, held as hereunder in this respect –

*On 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.*

14. The 2<sup>nd</sup> defendant challenges the Taxing Master's Ruling delivered on 5<sup>th</sup> August 2024 in respect to instruction fees. He contended that the Taxing Master erred in finding that the value of this suit's subject matter cannot be ascertained from the pleadings. He maintained that the said value was ascertainable from the pleadings, specifically from an affidavit showing the 2<sup>nd</sup> plaintiff's 100% shareholding valued at over Kshs.4,100,000,000/=. The 2<sup>nd</sup> defendant contended that the instruction fees in this case should have been assessed based on the said value rather than under the "other matters" category under Schedule 6.
15. The plaintiffs on the other hand averred that the reliefs sought in the suit were injunctive and declaratory in nature, in respect to Director appointments, and not monetary claims. They asserted that the pleadings filed in the suit contained no evidence of the subject matter's monetary value, therefore the 2<sup>nd</sup> defendant's assertion that the value of the 2<sup>nd</sup> plaintiff company constituted the subject matter of the suit was incorrect, unsubstantiated, and unsupported by any formal valuation.
16. The Court of Appeal in the oft cited case of **Joreth Ltd v Kigano & Associates** (supra), set out the guidelines for determining the value of a suit's subject matter as follows-

*We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.*

17. The suit amongst the parties herein was withdrawn before it was set down for hearing, therefore, the subject matter of the suit could only be determined from the pleadings filed. A review of the plaint filed reveals that a derivative suit was instituted by the 1<sup>st</sup> plaintiff on behalf of the 2<sup>nd</sup> plaintiff against the defendants. The plaintiffs challenged the appointment of the 3<sup>rd</sup> & 4<sup>th</sup> defendants as Directors of the 2<sup>nd</sup> plaintiff company pursuant to a resolution passed by the 1<sup>st</sup> & 2<sup>nd</sup> defendants, on grounds that the appointment was irregular and in breach of the Shareholders Agreement. The plaint further shows that the plaintiffs do not seek any monetary relief, but rather injunctive and declaratory orders. Further, on perusal of the application filed alongside the plaint, it is evident that the plaintiffs sought leave for the 1<sup>st</sup> plaintiff to proceed with the suit as a derivative claim on behalf of the 2<sup>nd</sup> plaintiff, as well as an interlocutory injunction.
18. In view of the foregoing, I agree with the Taxing Master's conclusion that the value of the subject matter in this suit is indeterminable. Accordingly, I find no error in the Taxing Master's application of Schedule 6 of the Advocates (Remuneration) Order under the category of "*other matters*" to assess the 2<sup>nd</sup> defendant's entitlement under instruction fees.

19. In the circumstances, I am not persuaded that the 2<sup>nd</sup> defendant has established a case to warrant setting aside of the Taxing Master's Ruling delivered on 5<sup>th</sup> August 2024 and referral of the 2<sup>nd</sup> defendant's Party and Party bill of costs dated 3<sup>rd</sup> November 2023 to another Taxing Master for taxation, or for me to tax the same afresh.
20. In the end, this Court finds that the Chamber Summons dated 16<sup>th</sup> August 2024 is bereft of merits. It is hereby dismissed with costs to the plaintiffs.

It is so ordered.

**DELIVERED DATED and SIGNED at NAIROBI on this 24<sup>th</sup> day of October 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms Wekesa holding brief for Dr. Khaminwa for the plaintiffs/respondents

Mr. Lundi for the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants

Mr. Ken Murgor holding brief for Mr. George Ouma for the 2<sup>nd</sup> defendant/applicant

Ms B. Wokabi – Court Assistant.