REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT

KAKAMEGA

MISC. APPLICATION NO.E007 OF 2025

HARVANTSINGH MANGALSINGH VAGHELA ..... APPLICANT

VS

COUNTY GOVERNMENT OF KAKAMEGA.....RESPONDENT

Being a reference from the decision of the taxing officer Hon. V.O. Amboko DR ELC delivered on 8/1/2025 in Kakamega ELC Case No. E034 of 2022)

R U L I N G

Introduction

1. Before court is an appeal against the decision of the taxing officer made on 8th January 2025, in Kakamega ELC Case No. E034 of 2022, presented by way of a chamber summons dated 21st February 2025 filed by the applicant against the respondent seeking the following orders;

a) **That the decision of the Deputy Registrar dated 8/1/2025 in respect to item 1 (instruction fees), item 2 (Getting up fees), Items 24 and 25 (attendances) be set aside and items taxed afresh by this honourable court.**

b) **That costs of this application be provided for.**

2. The application is premised on the grounds on its face and the supporting affidavit sworn by Mr. Cleveland M. Mwebi, Advocate for the applicant. The applicant's case is that the respondent filed Kakamega ELC Case No. 034 of 2022 against the applicant and the matter was set down for hearing on 9th May 2023. That instead of the matter proceeding, it was withdrawn by the respondent who declined to offer costs. That on 4th September 2024 in its ruling this court awarded costs to the applicant and another. That the applicant filled his bill of costs dated 11th May 2024 which the taxing officer taxed at Kshs. 343, 450/= on 8/1/2025.

3. That aggrieved with the decision, the applicant filed objection and the taxing officers gave reasons for taxation in her letter of 10/2/2025. The applicant argued that the taxing officer failed to give reasons for awarding Kshs. 300, 000/= in a matter filed in the High Court whose jurisdiction is beyond Kshs. 20 Million. That the taxing officer erred in principle in failing to award getting up fees and that she failed in awarding Kshs. 1, 900/= in respect of items 24 and 25 without considering the time taken before the judge in court. That the taxing officer disregarded the applicant's submissions. He attached the bill of costs dated 15/05/2024, parties' submissions, valuation report, objection notice and the taxing officer's letter dated 10/2/1025.

4. The reference was opposed. Justus Wabuko, the respondent's legal officer filed replying affidavit dated 13th March 2025. He stated that this court will not interfere with the taxing officer's exercise of discretion unless it is shown that the decision was based on error of principle. That the taxing officer's exercise of discretion was not whimsical or arbitrary. That the respondent

intended to exercise its right of forfeiture hence on 13th May 2022 it sued the applicant for failure to develop the suit property. That on the date the matter was withdrawn, the same was not ready for hearing as the applicant had just served the respondent with a further list of documents dated 6th December 2022

5. Further, that the taxing officer was right in concluding that getting up fees were not awardable as the matter did not proceed to full hearing and that the reasons for the taxation were contained in the taxation ruling. That it is the ELC with the mandate to determine the question of forfeiture, the value of the property notwithstanding.

6. Regarding the value of the property, he argued that the applicant presented the value of the suit property from the bar, which is untenable as the value can only be determined from pleadings, judgment or settlement, which was not the case in the suit between the parties herein. That the applicant has misapprehended facts and the law and the application is an abuse of the court process.

7. The reference was disposed by way of written submissions. On record are submissions filed by the applicant dated 24th April 2023 and the respondent's submissions dated 27th June 2025.

Applicant's submissions

8. Counsel for the applicant argued that the reference was filed pursuant to "section 89 of CPR" (sic) and paragraphs 7 and 11 of the Advocates Remuneration Order. Counsel submitted that the taxing officer did not give reasons or basis for her awards on the contested items. That in awarding Kshs. 300, 000/= under item 1, the taxing officer did not give any reason or basis for arriving at that amount and that the same was too low in the circumstances of this case. Counsel further argued that the subject matter was plot No Kakamega Town BlockII/III, a plot within Kakamega Town and this court should not "close its ears to that fact". Counsel faulted the taxing officer's position and argued that the latter ignored the valuation report which showed that the subject matter was valued at Kshs. 65 Million, when the jurisdiction of this court is over 20 million shillings and

that if the taxing officer would go by that, then the minimum award on instruction fees should be Kshs. 500, 000/=. Counsel argued that there was nothing filed to dispute the valuation. And that the Environment and Land Court Act vests jurisdiction to determine matters of forfeiture in the ELC alone. Counsel argued that the taxing officer should have awarded Kshs. 800, 000/= in regard to instruction fees.

9. Regarding getting up fees for item 2, counsel submitted that Schedule 7 provides that getting up fees is awarded when the suit is confirmed for hearing. Counsel argued that the suit was confirmed for hearing on 22/02/2023 to be heard on 9th May 2023 but that it was withdrawn on the hearing date. Counsel argued that because the hearing had been slated for 9/5/2023, it meant that preparation for hearing had been done. Counsel submitted that the taxing officer was wrong in finding that getting up fees is awarded when the case is heard.

10. On items 24 and 25, counsel submitted that the attendance of the same lasted for more than one hour and

so the applicant ought to have been awarded Kshs. 3, 000/=.

Respondent's submissions

11. On whether the applicant had demonstrated an error of principle by the taxing officer to warrant this court's interreference with the discretion exercised, counsel relied on the case of **Outa v Odoto & 3 Others KESC 75 (KLR)** and argued that an interference with the taxing officer's decision can only happen where the taxing officer erred in principle, as taxation of costs is a matter of discretion.

12. On whether taxation of items 1, 2, 24 and 25 was manifestly low, counsel submitted that the taxing officer gave detailed reasoning in her ruling in paragraphs 2 and 3 of the ruling arguing that the pleadings did not support the alleged valuation for purposes of taxation. Counsel argued that a valuation report filed at the point of taxation amounts to evidence of the value of the property adduced at the bar and is not admissible. That the applicant's bill of costs referred to a value of "over 40

Million” on item 1 and not a definite figure as what should guide the taxing officer, while the valuation report specified a figure of Kshs. 65 Million.

13. Reliance was placed on the case of **Manyonge Wanyama & Associates v County Government of Kirinyaga [2019] KEELC 2973 (KLR)** for the proposition that the values should be what is stated in the pleadings or judgment and not one “plucked from the air”. The court was further referred to the cases of **S.G. Mbaabu & Co. Advocates v Joseph Muoki Kakenyi & Others [2018] KEELC 1356 (KLR)** and **Joreth v Kigano & Associates (2002) e KLR** for the proposition that even where there are valuation reports the value of the subject matter should be derived from pleadings, judgment or settlement.

14. Counsel maintained that it was fallacious for the applicant to argue that by filing a case before the Environment and Land Court, the value was over Kshs. 20 Million. Counsel referred to sections 31 (1) (b) and 2 of the Land Act and submitted that a claim for recovery of land by a county or national government ought to be filed

in the ELC. Further, counsel submitted that by dint of section 4 of the Environment and Land Court Act, the ELC is a superior court.

15. Regarding getting up fees, counsel relied on the case of **Ngati & 3 Others v Embakasi Village Craft Curios & Jua Kali Association & 7 Others [2023] KEELC 21068 (KLR)** for the proposition that an award of getting up fees can only be made where a suit has been confirmed for hearing and indeed proceeded for hearing.

16. On items 24 and 25, counsel submitted that the two dates for those items being 24/11/2022 and 22/02/ 2023, the matter came up for mention and hence the taxing officer was correct in awarding the same at half hour or less which is reasonable for a routine mention.

Analysis and determination

17. The court has carefully considered the reference, the replying affidavit and the submissions filed by the parties. The issue for determination is whether there is sufficient material presented by the applicant to justify this court's interference with the decision of the taxing officer.

18. It is trite that taxation of bills of costs is an exercise of discretionary power by the taxing officer and that discretion must be exercised judiciously and not whimsically or arbitrarily. Therefore this court will not ordinarily interfere with the taxing officer's exercise of discretion merely on the basis that the award is low or high, unless it is demonstrated clearly that the decision on taxation was clearly wrong due to a misdirection by failure to take into consideration relevant matters or taking into consideration irrelevant matters or that the awarded sum is manifestly excessive or too low to justify a conclusion that it was based on an error of principle.

19. In the case of **First American Bank of Kenya v Shah & Others (2002) 1 EA 64,** the court held as follows;

> **"The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course, it would be an error of principle to take into**

account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. …….if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment…A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved."

20. Similarly, in the case of **DK Law Advocates v Zhong Gang Building Material Co. Ltd & Another [2021] e KLR** it was held that a judge will interfere with the taxing officer's discretion where the latter's decision is premised on an error of principle among such errors being failure to take into account relevant matters or taking into account irrelevant matters.

21. On instruction fees, the taxing officer ought to consider the value of the subject matter. The value of the subject matter is to be discerned from the pleadings, judgment and settlement.

22. In the case of **Joreth Limited v Kigano & Associates [2002] 1 E.A 92** it was held that the value of the subject matter is ascertained from the pleadings, judgment or settlement.

23. I have had the opportunity to peruse Kakamega ELC Case no. E034 of 2022. That suit was commenced by plaint dated 9th May 2022 and filed on 13th May 2022 seeking orders that the lease in respect of parcel No. Kakamega /Municipality/ Block I/655 be forfeited on account of non-development. The defendant opposed the suit by defence dated 21st June 2022 wherein he denied non-compliance with the terms of the lease, insisting that he had developed the property and sought the dismissal of the suit. It is clear that the value of the subject matter was not disclosed in the parties' pleadings.

24. Proceedings in Kakamega ELC E034 OF 2022 show that on 22nd February 2023, the matter was fixed for hearing on 9th May 2023, on which date the plaintiff's counsel's application to withdraw the suit was allowed while the question of costs on withdrawal of suit was determined vide the court's ruling of 14th March 2024 when the defendant in that suit (applicant herein) was awarded costs of the suit.

25. On 16th May 2024, the applicant herein filed his bill of costs dated 15th May 2024. In the bill of costs, in item No. 1 in respect of instruction fees, the applicant herein indicated that the value of the subject matter was over Kshs. 40 Million. Thereafter, the applicant herein placed a valuation report dated 4th September 2024 on the court file wherein the value of the suit property was stated as Kshs. 65, 000, 000/=.

26. Regarding the valuation report, the respondent herein faulted the manner and procedure in which the same was presented in court arguing that it came from the bar and was inadmissible.

27. Regarding the valuation report, the taxing officer referred to the cases of **S.G. Mbaabu & Co. Advocates v Joseph Muoki Kakenyi & Other** and **Joreth** (supra) to the effect that the filing of valuation reports for purposes of guiding the taxing officer ought to be discouraged for the reason that such a value was never the basis of the suit in the first place and that if the value of the suit property is so important to a litigant, then it should form the basis of his claim and should be specifically pleaded.

28. In her ruling, the taxing officer stated that the value of the subject matter should be ascertained from pleadings or judgment and that in the instant case the value is not ascertainable. The taxing officer relied on the decision in **Joreth** (supra), applied her discretion and made an award of Kshs. 300, 000/= in respect of instruction fees.

29. On instruction fees, this court will not reinvent the wheel. It is trite that the value of the subject matter is ascertained from pleadings or judgement or settlement, and where the value is not ascertainable from the three elements, the taxing officer should exercise discretion in

arriving at the instruction fees. The value of the subject matter in this case was not stated in the pleadings and neither was it disclosed at the point of withdrawal of suit. If the disclosure of the value of the subject matter was not important throughout the proceedings, in my view, it is too late in the day for the applicant to purport to disclose it at the point of taxation by filing a valuation report. I say so because, a valuation report is evidence and not a pleading yet the value of the subject matter is not ascertained from evidence but from pleadings, judgement or settlement.

30. In this case, the applicant did not mention the value of the subject matter until after filing his bill of costs that is when he prepared the valuation report. The valuation report was only for purposes of taxation. I agree with the decision in **S.G. Mbaabu & Co. Advocates** (supra) that a valuation report filed only at the taxation stage and which did not form the basis of the parties' claim should not be applied in taxation, because the pleadings or judgment or settlement did not refer to it. In short, unless in the taxing officer's wisdom in the circumstances of the case,

filing of a valuation report is necessary and is ordered by the taxing officer, a valuation report coming from one of the parties at the tail end, after litigation and only in respect of taxation is nothing but stealing a march on the opposing party, which is frowned upon by the law.

31. For those reasons, the taxing officer was right in following the guidance in **Joreth,** not considering the valuation report and arriving at the conclusion that the value of the subject matter could not be ascertained in the case.

32. In the instant case, the taxing officer awarded Kshs. 300, 000/=. The claim in the suit was for forfeiture of the lease on the basis of noncompliance with the terms thereof. The defence was that the applicant had complied. No value of the subject matter was stated in the pleadings or at the withdrawal of the suit. The applicant argues that 300, 000/- is too low. There was no complexity in the matter and none has been pleaded by the applicant. The applicant has not demonstrated in what manner Kshs. 300, 000/= is too low. The award under this head was an exercise of discretion and I do not

find anything in that award that demonstrate that the taxing officer erred in principle. In the premises, I find no justification to interfere with the exercise of discretion by the taxing officer in that regard.

33. On item 2 of the applicant's bill of costs, Schedule 6 paragraph 2 (ii) of the Advocates Remuneration order provides for getting up fees, as follows;

> **"2. Fees for getting up or preparing for trial**
>
> **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;

(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."

34. Therefore, getting up fees is chargeable in circumstances where the case has been confirmed for hearing. Whether or not a confirmed hearing proceeds or is adjourned, this fee is awardable. However, before awarding fees for getting up, the taxing officer must be satisfied that the case was prepared for trial. Essentially, confirmation for hearing of a suit is only one element in regard to awarding getting up fees. The other element is preparation for trial. Confirmation for hearing does not equate to preparation for trial, because many times cases may be confirmed for hearing but from the record, parties have not prepared for trial because, for instance, they

have not filed compliance documents or had opportunity to consider documents filed by the opposing party.

35. In Kakamega ELC 34 of 2022, when the matter came up on 22nd February 2023, even though a hearing date of 9/5/2023 was fixed, the applicant herein had not served his list of documents and the respondent had not filed compliance documents and therefore the hearing date was fixed subject to compliance. On 9th May 2023, parties did not inform court whether both or any of them had complied with the orders of 22/2/2023. On that date, the respondent's counsel sought and was allowed to withdraw the suit. Thus, whether or not preparation for trial had been made was not disclosed by parties. Before a taxing officer makes an award for getting up fees, he or she must first be satisfied that preparation for trial has been made. On the issue of getting up fees, the taxing officer did not award the same on the basis that the case did not proceed to full hearing. In my view, the taxing officer misdirected herself on that issue as what she needed to be satisfied with was that the case was confirmed for hearing and that the case had been

prepared for trial. The preparation in this case was the confirmation that the compliance documents had been filed and served and all pretrial preliminaries concluded. As the parties herein did not demonstrate that the case had fully been prepared for trial, the getting up fees was not awardable.

36. Regarding items 24 and 25 which refer to attendances on 24/11/2022 and 22/2/2023, the record in ELC E034 of 2022 shows that on those dates, the matter came up for mention. As for 24/11/2022, the matter came up for mention for directions, when the applicant herein sought time to file compliance documents, a request which was not opposed by the respondent and which the court allowed. Looking at the proceedings, that exercise could not have taken more than ten minutes. Therefore, the taxing officer was right in awarding Kshs. 1, 900/= for the same, which is the amount provided for, in regard to attendance before the judge for half hour or less; under paragraph 7 (d) of Schedule 6 of the Advocates Remuneration Order. Regarding item 25 which is in respect to attendance on 22/2/2023, the issue that came

up was still that of filing and service of compliance documents, which the court again granted the parties timelines for compliance and fixed a hearing date. Again, looking at the proceeding, the same could not have taken more than 10 minutes and hence the award of Kshs. 1, 900/= was proper and justified.

37. In the premises, I find no merit in the reference which I hereby dismiss with costs to the respondent.

38. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 19TH DAY OF NOVEMBER 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI
JUDGE

In the presence of:

Mr. Mwebi for the applicant

Mr. Wabuko for the respondent

Court Assistant; Delphine