

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: MATIVO, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAK E080 OF

2021 BETWEEN

GILANIS SUPERMARKET LIMITED.....APPLICANT

AND

STEPHEN GITAU MWANGI.....RESPONDENT

*(Being a reference to a single judge from the ruling of the
taxing officer (**Hon. L. Akoth**) dated 14th March 2024*

in

Civil Appeal (Application) No. E080 of 2021).

RULING

1. In a ruling on taxation dated 14th March 2024, Hon. Lina Akoth, the Deputy Registrar of the Court in her capacity as taxing officer taxed the respondent's party to party Bill of Costs at Kshs.315,190/=. Dissatisfied, the applicant by a letter dated 20th March 2024, applied under Rule 117 of the Court of Appeal Rules to refer the matter to a judge on grounds that:

a) Paragraph 9 of the Third Schedule to the Appellate Jurisdiction Act provides that instruction fees should have regard to "the amount involved in the appeal, its nature, importance and difficulty, the interest of the

parties "

- b) In the aforesaid Ruling, the Taxing Officer erroneously assessed instruction fees at Kshs. 300,000/=, and taxed off the same based upon that misconception, which is inordinately high and unsupported.**
- c) The subject matter of the Appeal is the decretal amount paid by the Respondent herein, which is Kshs.115,487/= through the judgment delivered on 23rd September, 2021, thus the Taxing Officer ought to have premised the instruction fees based on the said subject matter in the Appeal.**
- d) The Taxing Officer erred in principle by basing instruction fees on erroneous understanding of what was the subject matter of the appeal, thus the instruction fees awarded is manifestly high and unsupported.**
- e) The Taxing Officer did not give reasons of each of the items allowed in the Applicant's Bill of Costs, and in particular that the bill arose from the costs awarded for the hearing of the application to withdraw the appeal.**
- f) There was an error in principle on the part of the learned Taxing Officer in items 3 to 16 in its entirety.**
2. The applicant has filed submissions dated 2nd December 2025 in support of its application. The respondent filed submissions dated 29th April 2024 in opposition to the reference.
3. The applicant's counsel submitted the learned taxing officer erred in law and fact in assessing instruction fees at a sum of Kshs.300,000/= which figure was not only excessive but also unsupported by law since under the second schedule

part 3

(a) and the Third Schedule on taxation and scale of costs of

this Court Rules, 2022 the set instruction fees chargeable for receiving instructions on appeal and application before this Court for a subject matter not exceeding Kshs.210,000/= is Kshs.2000/= and not Kshs.300,000/=. Counsel reiterated that the amount intended to be appealed against in the Notice of appeal dated 1st October 2021 was Kshs.198,000/=the said decretal amount was paid by the respondent and the matter marked as settled. Therefore, the correct figure was Kshs. 2000/=.

4. To buttress his submission, counsel cited the case of **Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92** in submitting that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement but if the same is not ascertainable then the taxing officer is entitled to use his discretion to assess such instructions fee as he considers just taking into account among other matters, the nature and importance of the cause, interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. Further, paragraph 9 of the Third

Schedule to

the Appellate Jurisdiction Act provides that instruction fee should have regard to the amount involved in the appeal, its nature, importance and difficulty, and the interest of the parties.

5. Regarding whether there is an error in principle on the part of the learned taxing officer in item 3 to 16 of the party & party costs, counsel maintained that item 3, 6, 8, 11 & 13 of the bill ought to have been taxed off for want of proof in the form of receipts since the same is special claim item.
6. Regarding item 4 and 5 of the Bill, counsel submitted that the Third Schedule part 4 on the Scale of Costs provided for Kshs. 100/= per folio for drawing affidavits and therefore the applicable fee ought to have been taxed at Kshs.400/= and the excess fees taxed off. Item 5 should be taxed off for want of proof.
7. For item 9 counsel maintained that the applicable fee should have been Kshs.500/= and thus the rest should be taxed off.
8. On item 10 and 11 of the Bill of Costs, counsel maintained that the bill of costs consisted of 3 folios and not 5 as alleged

and thus the Applicable fees ought to be Kshs.300/= and not Kshs.500/= as alleged.

9. Regarding item 14 of the Bill, counsel submitted that the taxation of the bill did not exceed a period of 30 minutes and thus the applicable fee should have been Kshs.300/= and thus he excess should be taxed off.
10. For item 15 and 16 of the Bill, it was submitted that the certificate of costs cited by the applicant had not been proved and thus the fees thereof should have been taxed off.
11. Regarding 16% VAT item, counsel contended that the same was not applicable in the Bill given the fact that the tax is not chargeable on third party who is not a client and no service was rendered.
12. On disbursement, counsel maintained that the fee provided under the second schedule at part 5 (1) is Kshs.750/= and not Kshs.1400/= cited therein in the absence of any prove in form of a receipt to support the same.
13. The respondent in opposing the reference maintained that the contention that instruction fee must be pegged to the

underlying decretal amount of Kshs.198,000/= is

fundamentally erroneous and constitutes a clear misclassification of the subject matter since the value was unascertainable, the Deputy Registrar correctly invoked paragraph 9 (2) of the Third Schedule of the Court of Appeal Rules which mandates the taxing officer to assess a reasonable sum having regard to the nature, importance and difficulty of the cause.

14. Mr. Magata also submitted that the awarded figure was proportionate and reasonable for contested interlocutory application in appellate courts and the proposal that Kshs. 2000/= or Kshs.2750/= should be sufficient is flippant and violates the core policy of fair remuneration articulated in

Premchand Raichand Limited & Another vs. Quarry Service of East Africa Limited & Another [1972] EA 162.

15. Regarding the objection to items 3 to 16, Mr. Magata maintained that the objections are premised on a misunderstanding of the requirement for scale fees versus disbursement and that the fees are fixed scale fees under the Third schedule and the taxing officer's role is to assess the necessity of the activity, not to demand external

receipts for every folio or copy made internally.

16. On the dispute over folios counts counsel maintained that such disputes are technical, factual assessment of volume that fall squarely within the competence and discretion of the Deputy Registrar. Therefore, her factual finding that the claimed folio and the necessary five copies were correct is not an error of principle for a reviewing judge to overturn.
17. On the objection that attendance fees should be reduced to the minimum scale because the actual time spent before the bench was minimal, Mr. Magata maintained that the argument was restrictive and unreasonable.
18. On the defence of 16% VAT, counsel maintained that it is trite that legal professional services are taxable supplies in Kenya, generally attracting 16% VAT. The applicant incurred the tax liability to their advocate and allowing its recovery ensures the applicant is fully indemnified for the necessary expenses incurred in the successful conduct of the application.
19. I have considered the reference and the submissions. The main issue is basically whether there is any basis for this Court to interfere with the impugned decision. Basically, determining the said issue entails answering two

questions,

namely, whether the Taxing Master erred in principle by basing instruction fees on erroneous understanding of what was the subject matter of the appeal, thus the instruction fees awarded was manifestly high and unsupported; and, whether there was an error in principle on the part of the learned Taxing Officer in items 3 to 16 in its entirety.

20. On the first issue, the learned Taxing Master awarded Kshs.

300,000/= as instruction fees. However, the applicant finds the amount awarded to be either manifestly excessive and maintained that the subject matter of the appeal being Kshs.198,000/=, then the correct figure would have been Kshs.2000/= as instruction fees.

21. To answer the question of what was the appropriate instruction fees, I will fall back to on the principles of taxation elucidate under Paragraph 9 (2) of the Third Schedule of the Court of Appeal Rules, 2010. It provides that:

“The fees to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interests of the parties, the other costs to be allowed, the general

conduct of the proceedings, the fund or person to be the costs and all other relevant circumstances.”

22. In Premchand Raichand Ltd vs. Quarry Services of East

Africa Ltd. (No.3) [1972] EA 162, the predecessor of this Court identified some of the principles of taxation of costs to include:

- i. that costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy;***
- ii. that a successful litigant ought to be fairly reimbursed for the costs that he or she has had to incur;***
- iii. that the general level of remuneration of advocates must be such as to attract recruits to the profession; and***
- iv. that so far as practicable, there should be consistency in the awards made.***

23. On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In **Arthur vs. Nyeri**

Electricity Undertaking [1961] EA 497, the predecessor of this Court at page 492 paragraph I rendered itself as follows:

“where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly

fitted to deal and the court will interfere only in exceptional cases". An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles - see Arthur v Nyeri Electricity Undertaking (supra) or where the

taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji v Kanji Naran Patel (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - D'Souza v Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji v Kanji Naran Patel (No. 2) (supra)."

24. In Nairobi Bottlers Limited vs. Mark Ndumia Ndungu &

Another, SC Petition (Application) No. E024 of 2023,

the Supreme Court reiterated that the decision of a taxing officer may be interfered with if there is an error of principle committed by the taxing officer; or if the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy, or is manifestly deficient as to amount to an injustice to one party. It is therefore trite that a party applying for a reference to bring themselves within the ambit of

interference by demonstrating the error of law or principle
or that the award of costs made by the taxing officer

is manifestly excessive or manifestly inadequate. Did the applicant discharge that burden in this case?

25. The gravamen of the applicant's case is that the taxing officer failed to appreciate or consider that the value of the subject matter, which according to the applicant was Kshs.198,000/= the said decretal amount. The applicant proposed a sum of Kshs.2000/-. On the other hand, the respondent contended that pegging the instruction fees on the decretal amount of Kshs.198,000/= was fundamentally erroneous and constituted a misclassification of the subject matter. According to the respondent the value of the procedural finality was intangible and unascertainable from the original pleadings or judgment and the costs were awarded for a successful procedural notice of motion that secured the finality in litigation.

26. In awarding Kshs.300,000/= as instruction fees, the taxing officer stated as follows:

***“4. While taxing this Bill, I am mandated to consider the amount involved in the appeal/application, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstance.*”**

5. The costs arose out of the hearing and determination of an application to withdraw the notice of appeal dated 23/09/2021. Guided by the provisions of the schedule and the principles of taxation of costs set out in the case of Premchad & Another vs. Quarry Services of East Africa Limited & Others (1972) EA, I find that the items are drawn to scale and are therefore taxed as drawn save for item (VAT).

27. Paragraph 9 (2), obligates the taxing officer in determining what is reasonable, to take into account a number of tabulated factors, namely, the amount involved in the appeal, its nature, importance, difficulty, the interest of the parties, other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances. See **Kenya Revenue Authority vs. Universal Corporation Ltd [2024] KECA 1103 (KLR)**.

28. In **Peter Muthoka & Another vs. Ochieng & 3 Others [2019] KECA 597 (KLR)** this Court held:

***“It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing.*”**

He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily

provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.”

29. Regarding whether there was an error in principle on the part of the Taxing Master in items 3 to 16 in its entirety, I reiterate this Court’s holding in Kipkorir Titoo & Kiara Advocates vs.

Deposit Protection Fund Board [2005] eKLR that:

“We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA, (1) that would be an error in principle. And if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer. (See - D’Sonza Vs Ferrao (1960) EA 602. (See Devshi Dhanji Naran Patel (No.2) [1978] KLR 243.” (Our emphasis)

30. It is accepted that the Taxing Master is required to consider the time taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The

definitive question is whether the Taxing Master struck
this equitable

balance correctly in the light of all the circumstances of this case. This requires this Court to be satisfied that the Taxing Master was clearly wrong before interfering with the decision. The quantum of such costs is to be what was reasonable fees and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles. However, the Taxing Master's discretion will not be interfered with unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law or gave a ruling which no reasonable man would have given. In principle, costs are awarded, having regard to such factors as: - *(a) the difficulty and complexity of the issues; (b) the length of the trial; (c) value of the subject matter and (d) other factors which may affect the*

fairness of an award of costs. The law obligates the Taxing Master to take into account these principles.

31. The Taxing Master must exercise this discretion judicially, reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case. Where the discretion is not so exercised, the decision will be subject to review. The issue at hand narrows to whether the Taxing Master applied the formula for assessing cost specified under the third schedule. Determining this entails examining the reasons provided by the Taxing Master in support of her findings. This will ascertain whether the discretion was properly exercised. This is because giving of reasons is a normal incident of the judicial process. The obligation to explain how and why a particular decision has been reached stems from the common law. However, modern jurisprudence is in agreement that this duty has a constitutional dimension as well. Reasons enable a reviewing court to be satisfied that the decision-maker took into account all matters that he or she was required to consider and did not have regard to extraneous material. Reasons also enable the reviewing court

to determine whether any other form of jurisdictional error has been demonstrated.

32. The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan pointed out, the main object of a reasoned judgment *“is not only to do but to seem to do justice”*: (See *The Writing of Judgments* (1948) 26 Can Bar Rev at 491). Thus, the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Secondly, the giving of reasons furthers judicial accountability. As Professor Shapiro said (*In Defence of Judicial Candor* (1987) 100 Harv L Rev 731 at 737):

“... A requirement that judges give reasons for their decisions —grounds of decision that can be debated, attacked, and defended — serves a vital function in constraining the judiciary's exercise of power.”

33. Thirdly, under the common law system of adjudication, courts not only resolve disputes— they formulate rules for application in future cases: Hence the giving of reasons enables practitioners, legislators and members of the public to

ascertain the basis upon which like cases will probably be decided in the future. What are adequate or sufficient reasons is always a matter of degree. As long as the reasons deal with the principal issues upon which the decision turns, they will normally pass muster.

34. I have considered the definitive paragraph reproduced earlier which communicates the ultimate finding. It is unclear which considerations guided the Taxing Master in arriving at her final decision. Nevertheless, I am persuaded that the I am of the view that the taxing master failed to apply the correct principles and take into account the correct factors in taxing the bill of costs. In the premises, I allow the applicant's reference, set aside the Taxing Master's ruling dated 14th March 2024, and remit this matter back for re-taxation by different taxing officer. Each party will bear its own costs of the reference.

Dated and delivered at Nakuru this 16th day of December, 2025.

J. MATIVO

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**J. JUDGE OF
APPEAL**

*I certify that this is
a true copy of the
original.*

Signed.

DEPUTY REGISTRAR.