

**IN THE COURT OF  
APPEAL AT  
MOMBASA**

**(CORAM: MURGOR, LAIBUTA & NGENYE,  
JJ.A.) CIVIL APPEAL (APPLICATION) NO. 24  
OF 2020**

**BETWEEN**

**DAVID KANDIE.....APPLICANT**

**AND**

**ALI HAMISI CHANDE.....1<sup>st</sup> RESPONDENT**

**NASRA SHARIFF MOHAMED..... 2<sup>nd</sup>**

**RESPONDENT LAND REGISTRAR, KWALE.....3<sup>rd</sup>**

**RESPONDENT**

**KHADI'S COURT, KWALE..... 4<sup>th</sup>**

**RESPONDENT**

**RUTUNE LTD ..... 5<sup>th</sup>**

**RESPONDENT**

*(Being a Reference against the Ruling and Orders of the  
Court of Appeal at Mombasa (L. Achode, JA.) dated 11<sup>th</sup> April  
2025)*

\*\*\*\*\*

**RULING OF THE**

**COURT**

1. From the scanty record as put to us, we gather that, by a

Judgment dated 31<sup>st</sup> March 2023, this Court (Kairu, Nyamweya & Odunga, JJ.A.) determined three consolidated appeal Nos. E017, 24 and 74 of 2020 challenging the Judgment and decree of the ELC (A. Omollo, J.) dated 12th May 2020 in Petition No. 11 of 2019 filed in

the ELC at Mombasa by the applicant, David Kandie, over and concerning four properties in Diani Settlement Scheme, which were the subject of civil proceedings in Succession Cause No. 155 of 2018 in the Kadhi's Court at Kwale.

2. In determination of the consolidated appeals in which the applicant herein was the "common respondent", this Court allowed the consolidated appeals having held that the ELC had no jurisdiction to entertain matters arising from succession proceedings. Consequently, the Court set aside the Judgment and decree of the ELC with costs to the respondents herein.

3. In a bid to have their costs taxed (Ali Khamis Chande and Nasra Shariff Mohamed), the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, filed a bill of costs dated 22<sup>nd</sup> June 2023, including the contested sum of Kshs. 1,200,000 claimed on account of instructions fees. It is noteworthy that the remaining items in the 1<sup>st</sup> and 2<sup>nd</sup> respondents' bill of costs were not in issue.

4. In his ruling dated 29<sup>th</sup> November 2023, the Taxing Officer (H. Adika, DR.) assessed and taxed the instructions fees in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as claimed in the sum of Kshs. 1,200,000.

5. Dissatisfied with the Taxing Officer's decision, the applicant, David Kandie, moved to this Court in a Reference dated 4th December 2023 seeking orders to set aside the ruling of the Taxing Officer, and to have the Bill remitted for re-taxation of the instruction fees awarded to the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the grounds, *inter alia*:

"a. ... ..

d. That Item No. 1 on the instructions fees the Taxing Master allowed the figure of Kshs 1,200,000/- proposed by the Appellant without giving any reasons on how he arrived as such an amount of money when there is [a] valuation report on the record showing the value of the suit property as Kshs. 1,000,000/-"

... ..

h. [that] The Taxing Master taxed the bill of costs on the basis of the Court of Appeal Rules, 2022 instead of the Court of Appeal Rules, 2010 since the appeal was filed in the year 2020.”

6. The applicant’s case in the Reference was that the petition involved 4 properties belonging to 4 different parties; that the parties filed separate appeals; that the value that ought to have been considered in computation of the appropriate instruction fees ought to have been the value of Kwale/Diani SS/2845; that the Mswambweni Land Control Board Consent Form on record clearly indicated the property’s value as Kshs. 1 million; and that the Taxing Master erred by assessing the instructions fees based on the value of all of the 4 properties, being Kshs. 40 million.

7. The applicant further contended that the Taxing Officer ignored his submissions, failed to provide reasons for the amount taxed, and wrongly applied the 2022 Court of Appeal Rules in place of the 2010 Rules.

8. In her ruling dated 11<sup>th</sup> April 2025, the learned Judge (L. Achode, JA.) found that the Taxing Officer had indeed considered the relevant submissions and applied the correct principles, including the value of the subject matter as determined by a recent valuation report as well as the complexity of the consolidated appeals. The learned Judge held that the applicant had not demonstrated any error of principle or manifest excess in the award and, accordingly, dismissed the application with costs.

9. By a letter dated 11<sup>th</sup> April 2025, learned counsel for the applicant, M/s. Ondabu & Company, made an application for a reference to a full bench from the learned Judge's decision dated 11<sup>th</sup> April 2025 to "persuade them to vary the Ruling."

10. Counsel relied on their submissions dated 30<sup>th</sup> September 2024 contending that the subject matter from which the three appeals arose was a constitutional petition involving four properties which belonged to four different parties; that, aggrieved by the decision of the ELC, the parties filed separate appeals with each memorandum

of appeal seeking to address and defend the rights to their individual properties; that the subject matter of Civil Appeal No. 24 of 2020 filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein was Kwale/Diani SS/2845; that it is in respect of that appeal and suit property that the applicant became accountable to the respondents for the costs awarded albeit in error in the computation of the instructions fees; and that the instructions fees payable to the 1<sup>st</sup> and 2<sup>nd</sup> respondents by the applicant ought to have been computed on the basis of the value of the specific property aforesaid, *to wit*, Kshs. 1,000,000 instead of the aggregate value of the four properties, namely Kshs. 40,000,000.

**11.** Counsel cited the cases of **Joreth Limited v Kigano & Associates** [2002] eKLR where this Court observed 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; and **First American Bank Ltd v Shah & Another** [2002] 1 EA 64, highlighting the basis on which this Court can interfere with the Taxing Officer's decision on taxation. They urged

us to set aside the learned Judge's decision and remit the 1<sup>st</sup> and 2<sup>nd</sup> respondents' bill of costs dated 22<sup>nd</sup> June 2023 for re-taxation.

12. In rebuttal, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, M/s. Mungai Kamau & Company, filed written submissions, a list and bundle of authorities dated 8<sup>th</sup> November 2024. Counsel cited the cases of **Joreth Limited v Kigano & Associates** (supra); and

**Peter Muthoka & Another v Ochieng Onyango, Kibet & Ohaga** [2019] eKLR, highlighting the manner in which the value of a subject matter should be computed for the purposes of taxation; and **NGO**

**Board v EG & 5 Others** [2023] KESC 102 (KLR) where the Supreme Court laid down the grounds to be considered in setting aside a certificate of taxation. Counsel urged us to dismiss the Reference with costs.

13. When the Reference came up for hearing on the Court's virtual platform for oral highlights, Mr. Ondabu appeared for the applicant while Mr. Mungai appeared for the 1<sup>st</sup> and 2<sup>nd</sup>

Respondents. However, the Attorney General did not appear for the 3rd and 4th

Respondents despite having been duly served. On the other hand, Mr. Kinyanjui appeared for the 5th Respondent and associated himself with Mr. Mungai's submissions.

14. We take to mind the rival submissions of learned counsel and the afore-cited authorities, among others. It is clear that the Hon. Deputy Registrar computed the instructions fees in the 1<sup>st</sup> and 2<sup>nd</sup> respondents' bill of costs on the basis of the value of the four properties the subject of the consolidated appeals (valued at Kshs. 40,000,000) notwithstanding the fact that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' Civil Appeal No. 24 of 2020 was solely concerned with Kwale/Diani SS/2845, whose value was estimated at Kshs. 1,000,000, and in respect of which the applicant was obligated to pay costs of the appeal.

15. In view of the foregoing, we find that the Taxing Officer acted in error of principle by computing instructions fees recoverable by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the basis of the value of four properties of which three were not subject to the specific appeal (Civil Appeal No.

24 of 2020) in respect of which the 1<sup>st</sup> and 2<sup>nd</sup> respondents were entitled to costs as against the applicant. In effect, the instructions fees awarded were manifestly excessive.

**16.** We take to mind the Supreme Court's decision in **NGO Board v EG & 5 Others** (supra); and **Premchand Raichand Limited & Another v Quarry Services of East Africa Limited & Another** [1972] EA 162 where the predecessor of this Court set out the guiding principles on which the Court may set aside a certificate of taxation, namely: where the Taxing Master acts in error of principle; where the fee awarded is manifestly excessive; that the successful litigant ought to be fairly reimbursed for the costs incurred; and, so far as is practicable, there should be consistency in the award.

**17.** In **NGO Board v EG & 5 Others** (supra), the Supreme Court thus laid down more succinctly the basis on which a certificate of taxation may be set aside:

***“7. A certificate of taxation would be set aside, and a single judge could only interfere with the taxing officer’s decision on taxation if:***

***a. There was an error of principle committed by the taxing officer.***

***b. The fee awarded was shown to be manifestly excessive or was so high as to confine access to the court to the wealthy; (and conversely, if the award was so manifestly deficient as to amount to an injustice to one party).***

***c. The court was satisfied that the successful litigant was entitled to fair reimbursement for the costs he had incurred, (and the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party).***

***d. The award proposed was so far as practicable, consistent with previous awards in similar cases.***

***e. There was no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances.***

***f. Although the taxing officer exercised unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically.***

***g. The single judge would normally not interfere with the decision of the taxing officer merely because the judge believed he would have awarded a different figure had he been in the taxing officer's shoes."***

18. In view of the foregoing, and on the afore-cited authorities, we find that the applicant's Reference dated 11<sup>th</sup> April 2021 succeeds and is hereby allowed as prayed and, consequently:

(a) the ruling of the Hon. Single Judge (L. Achode, JA.) dated 11<sup>th</sup> April 2025 is hereby set aside;

(b) the applicant's bill of costs dated 22<sup>nd</sup> June 2023 be and is hereby remitted for re-taxation by a Taxing Officer other than Hon.

Adika, and

(c) The parties shall bear their own costs of the Reference.

It is so ordered.

***Dated and delivered at Mombasa this 30<sup>th</sup> day of January 2026.***

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

.....  
**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....  
**JUDGE OF APPEAL**

***I certify that this is a  
True copy of the  
original***

***Signed***

**DEPUTY REGISTRAR**