

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E191 OF 2021

BETWEEN

DARI LIMITED.....1ST

PLAINTIFF

RAPHAEL TUJU.....2ND

PLAINTIFF

AND

EAST AFRICAN DEVELOPMENT BANK.....1ST

DEFENDANT

VIVIENNE YEDA APOPO.....2ND

DEFENDANT

DAVID OCHIENG ODONGO.....3RD

DEFENDANT

JOTHAM MUTOKA.....4TH

DEFENDANT

RULING

Introduction and Background

1. By a ruling dated 9th June 2025, the court allowed the Plaintiffs' references dated 12th October 2023 and retaxed the instruction fees at Kshs.750,000.00/= ("the Ruling"). The Ruling has

precipitated the filing of two applications dated 1st July 2025 and 16th July 2025 by the 1st Defendant and 2nd -4th Defendants respectively (“the Defendants”) seeking to correct the date written on the Ruling as its states that the court delivered it on 13th June 2025, but the typed copy states it was signed and delivered on 9th June 2025. That pursuant to **Paragraph 11(3)** of the **Advocates Remuneration Order**, the Defendants also seek leave of the Court to appeal against the Ruling and they seek a stay of execution pending the hearing and determination of the appeal.

2. The applications are supported by grounds on their face and the supporting affidavits of Carol Luwaga, the 1st Defendant’s Principal Legal Officer, sworn on 30th June 2025 and Fatuma Seif Juma, the 1st Defendant’s Senior Legal Officer sworn on 16th July 2025. The Plaintiffs oppose the 1st Defendant’s application through the replying affidavit of the 2nd Plaintiff sworn on 13th July 2025. The applications have been canvassed by way of written submissions filed by the Defendants and together with the pleadings, I will be making relevant references to them in my analysis and determination below.

Analysis and Determination

3. From the submissions and the pleadings, the main issues for determination are whether the court should grant leave to the

Defendants to appeal against the Ruling and whether a stay of execution on the same should issue. I also agree with the parties that indeed, the date of delivery of the Ruling was 13th June 2025 and not 9th June 2025 and the same is rectified and corrected accordingly.

4. I am in agreement with Defendants' submissions that an appeal to the Court of Appeal from this court on a Reference from the Taxing Master's decision is not as of right but upon application for leave under **Paragraph 11(3)** of the **Order** which provides that "*Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may with leave of the judge but not otherwise, Appeal to the Court of Appeal.*" The court's discretion to allow or deny leave is to be judiciously exercised upon facts stated by the parties so as to further substantive justice. The application too must be filed without undue delay and chances of success of the intended appeal properly demonstrated (see **J. P. Machira T/A Machira & Company Advocates v Wangethi Mwangi & another [2002] KECA 305 (KLR)** and **Majanja Luseno & Co. Advocates v Patani [2023] KEHC 17580 (KLR)**)

5. The Defendants state that the court should not have heard the Reference at all as they claim the Plaintiffs failed to file a

mandatory Notice of Objection to taxation as required by **Paragraph 11(1)** of the **Order**. They argue that this omission deprived the court of jurisdiction and they contend the court erred by curing this defect using **Article 159(2)(d)** of the **Constitution** arguing that the Court of Appeal decision in **Machira & Co. Advocates v Arthur K. Magugu & another [2012] KECA 245 (KLR)** makes this notice mandatory.

6. The Defendants further state that the court erred by interfering with the Taxing Officer's discretion as they claim the Judge wrongly exercised judicial discretion to retax the Bill and significantly reduce the Instruction Fees.
7. In **J. P. Machira T/A Machira & Company Advocates(supra)** the Court of Appeal held that one of the conditions that the applicant must meet is to demonstrate an "appeal with realistic chances of success", which it explained to mean in regard to the intended appeal as follows:

"The term realistic moves the parameter the court should consider in analysis the chances of success of the appeal from "high" and "arguable" to a higher pedestal of concreteness: that which a judge applying his/her mind to the grounds presented is convinced that they have a somewhat definitive success. By so doing, the judge is neither being called to sit on appeal over his decision nor

lay a stumbling block to or bar a party desirous of appealing from his decision”.

8. Whereas I can agree that the applications were timely filed, I doubt whether their intended appeals have realistic chances of success. The Defendants have argued that because the Plaintiffs failed to file a Notice of Objection under **Paragraph 11(1)**, the court lacked jurisdiction to hear the Reference. From the Ruling, the court’s invocation of **Article 159** to cure this defect and allow the substantive dispute to be heard is a well-established judicial practice and the court relied on decisions of the Supreme Court to uphold its decision. It is highly unlikely the Court of Appeal would find that a procedural omission by the challenging party strips the court of jurisdiction to the benefit of the responding party and it is also unlikely that the appellate court would go against the principles set out by the apex court.
9. Furthermore, the court did not merely substitute one discretionary opinion for another. The court found that the Taxing Officer committed a specific error in principle and held that the Taxing Officer wrongly treated a claim for special damages which requires proof as a liquidated claim to establish the value of the subject matter. The legal basis for the court to interfere with a taxation is

precisely when the Taxing Officer has committed an error of principle. The court identified that error and, rather than remit the bill back for yet another taxation which would waste judicial time, exercised the court's discretion to set a fee the court deemed reasonable given that the suit was struck out at a preliminary stage. This approach is supported by finding in **First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR.**

10. Whereas the reduction from just over Kshs. 50 million to Kshs.750,000.00/= is significant, it was based on a clear legal rationale. An appellate court is very unlikely to interfere with this court's proper exercise of discretion on a Reference, especially when the court correctly identified the error by the Taxing Officer.

11. It is also my finding that granting leave and staying execution would delay the finalization of costs in a matter that was struck out years ago. The Plaintiffs have already succeeded in having an erroneous taxation corrected. To allow an appeal on these grounds would delay justice and potentially subject the Plaintiffs to further costs.

12. Therefore, while I agree that the Defendants are genuinely aggrieved by the significant reduction in their costs, their grounds for appeal have no realistic chance of success and I now decline to grant leave to appeal or stay execution of the Ruling.

Conclusion and Disposition

13. In the foregoing, it is my finding is that the Defendants' applications dated 1st July 2025 and 16th July 2025 have no merit and the same are dismissed with costs assessed at Kshs.30,000.00/= . It is so ordered.

**DATED SIGNED and DELIVERED virtually at NAIROBI this 9th
OF MARCH 2026**

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF:-

1. Ms. Macharia holding brief for Mr. Nyamodi for the Plaintiff/Respondent.
2. Mr. Wakhisi holding brief for Prof. Githu SC and Mr. Wetangula for the 1st Defendant/Applicant.
3. Mr. Wasonga holding brief for Mr. Kahura for the 2nd, 3rd and 4th Defendants.
4. Amos - Court Assistant