IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, JA – IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 63 OF 2019

BETWEEN

ATTORNEY GENERAL.....1ST APPLICANT

DIRECTOR OF CRIMINAL INVESTIGATIONS .....2ND APPLICANT

AND

PHOENIX GLOBAL KENYA LIMITED.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

ANTI-COUNTERFEIT AGENCY.....3RD RESPONDENT

FINANCIAL REPORTING CENTRE.....4TH RESPONDENT

KENYA BUREAU OF STANDARDS.....5TH RESPONDENT

MITCHELL COTTS (K) LIMITED.....6TH RESPONDENT

MITCHEL COTTS FREIGHT (K) LIMITED.....7TH RESPONDENT

(A reference application arising from a party and party Bill of Costs dated 15th November, 2024 emanating from a Judgment of this Court delivered on 19th December, 2019 in Civil Appeal No. 63 of 2019)

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R U L I N G

Before this Court is a Reference Application arising from a Party and Party Bill of Costs drawn and filed by ***the 5th Respondent, the Kenya Bureau of Standards*** against ***the 1st Respondent, Phoenix Global Kenya Limited.*** The Bill of Costs dated 15th November 2024 that was drawn in the sum of Kshs.3,212,210, and emanated from the Judgment of this Court delivered on 19th December 2019 in *Civil Appeal No. 63 of 2019, Attorney General & Another vs Phoenix Global Kenya Limited & 6 Others (2019) eKLR.* In the Judgment, this Court found both the appeal and the cross-appeal to be meritorious, allowed the appeal, set aside the Judgment of the High Court at *Mombasa in Constitutional Petition No. 205 of 201*8 delivered on 24th January 2019, and substituted it with an order dismissing the Petition with no orders as to costs. The Court further ordered that the 1st Respondent bear the costs of the appeal and the cross-appeal.

The Bill of Costs was placed for taxation before the Deputy Registrar of this Court at Mombasa (Hon. E.M. Mwamuye,) and by a Ruling on Taxation delivered on 20th March 2025, the Taxing Officer considered the Bill, which was unopposed, and

assessed the costs at Kshs. 534,100.

In determining the Bill, the Taxing Officer held that ***Schedule 3*** of the

Court of Appeal Rules, 2022 was applicable and proceeded to assess whether the items claimed were reasonably charged. On instruction fees, the Taxing

Officer observed that the Bill covered both the appeal and the cross-appeal and, in exercising her discretion under ***paragraph 9 of Schedule 3***, the Taxing officer awarded Kshs. 500,000 in respect of Item 1, with the balance thereof being taxed off.

The Taxing officer further held that instruction fees under ***paragraph 9***

(3) Schedule 3 include all work necessary and properly done in connection with the appeal, including attendances, correspondence, perusals, and consultations. Consequently, several items claimed under perusals were taxed off.

With regard to drawings and copies, the Taxing Officer applied ***paragraph 10*** of ***Schedule 3***, and capped drawings at Kshs. 100 per folio, and scaled down several items. Attendances at the registry were capped at Kshs. 200, while service costs were assessed under ***Schedule 6*** of the ***Advocates Remuneration Order, 2014***, and scaled down where no receipts were attached, and since "...*the notices were served via email as the Court of Appeal provides...*"

Ultimately, the Taxing Officer taxed and allowed the Party and Party Bill of Costs at a total sum of Kshs. 534,100.00, comprising Kshs. 500,000 for instruction fees and Kshs. 34,100 for other legal fees, thereby taxing off Kshs. 2,678,110 from the

amount claimed. The 1st Respondent was further directed to pay 5% of the taxed amount for the Certificate of Costs.

Aggrieved by the decision, the 5th Respondent, through its Advocates, Wekesa & Simiyu Advocates, lodged a letter dated 25th March 2025 pursuant to ***Rule 117(1), (3)*** and ***(4)*** of the ***Court of Appeal Rules, 2022*** seeking to formally apply for the Ruling on Taxation of the Party and Party Bill of Costs to be referred to a single Judge of this Court for determination on the ground that the amounts taxed and allowed were manifestly low and inadequate.

The 5th Respondent filed written submissions, but there were no submissions filed by the other parties. When the reference came up for hearing learned counsel ***Ms. Nthenya*** appeared for the 5th Respondent, while learned counsel ***Mr. Ondego*** appeared for the 1st Respondent. There was no appearance by the other parties though served.

Counsel for the 5th Respondent submitted that there was an error in principle on the instruction fee as the Taxing officer having failed to appreciate the value and award of instruction fees, and by so doing, awarded an amount that was far too low. It was also contended that no basis or rationale was laid by the Taxing officer for how the award of Kshs. 500,000 instead of Kshs 1.5 million was arrived at. Counsel also submitted that,

notwithstanding the complexity and level of difficulty of the appeal, that this was not referred to or taken into account by the Taxing Officer.

Counsel also pointed out that the Taxing officer did not consider other items raised in the Bill, for instance, there was no determination of items 5,

16, 32 and 45 of the Bill of Costs. Furthermore, on items 17 to 19, 23, 24, 25, 28, 33 to 35, and 38, of the Bill of Costs, the Taxing Officer made an improper determination by assuming that service to the Respondents was via email, yet service at the time was physically effected on the Respondent's offices, and therefore the amounts indicated were properly charged under the Advocates Remuneration order.

For his part, save for informing the Court that he had no instructions as the 1st Respondent was in liquidation, of which no evidence was provided, counsel for the 1st Respondent did not proffer any submissions.

I have read and considered the reference, the ruling of the Taxing officer, the 5th Respondent's submissions and the authorities cited in support. I note that whereas counsel for the 5th Respondent has relied on the previous rules of this Court there is no dispute that the ***Rule 117*** is applicable to a reference to this Court in respect of a taxation of costs. More particularly ***Rule 117 (3)*** provides that:

> ***"A person who contends that a bill of costs as taxed is, in all circumstances, manifestly excessive or manifestly inadequate, may require the bill to be referred to a judge, and the judge shall have power to make such deduction or***

addition as will render the bill reasonable and except as provided in this sub-rule, there shall be no reference on a question of quantum only."

So that where a person is dissatisfied with a decision of the Registrar in his or her capacity as Taxing officer, they may require any matter of law or

principle to be referred to a judge for determination, and the judge shall determine the matter as the justice of the case may require.

Furthermore, it is settled law that regarding a reference, this Court will not interfere with the decision of the Rregistrar in a taxation save for exceptional cases where it appears that the sum allowed is manifestly excessive or low, having regard to the nature of the suit or proceedings, so as to lead the Court to the conclusion that the Taxing officer must have acted on a wrong principle in assessing the costs.

In this regard, the predecessor of this Court in the case of ***Arthur vs***

Nyeri Electricity Undertaking [1961] EA 497, emphasized that:

> ***"…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".***

In ***Kipkorir,Titoo & Kiara Advocates v Deposit Protection Fund Board***

[2005] KECA 325 (KLR) this court held that

> ***"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 supreme Court in ***Non-Governmental Organization Board V EG & 5 Others (Petition (Application) 16 of 2019) [2023] KESC 102(KLR) (CIV),*** held

that:

"A certificate of taxation will be set aside, and a single Judge can only interfere with the taxing officer's decision on taxation if;

a. there is an error of principle committed by the taxing officer;

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

c. the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, 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); and

d. the award proposed is so far as practicable, consistent with previous awards in similar cases. To these general principles, I may add that;

i. There is 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,

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

iii. The single Judge will normally not interfere

with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes."

In this case, the 5th Respondent is aggrieved by the ruling of the Taxing Officer for the reasons that, firstly, a) the amount involved in the appeal, b) the nature, importance and difficulty of the appeal and the cross appeal, c)

the number of parties involved; and the manner of conduct of the proceedings were not factored into the instruction fees.

A consideration of the Bill of Costs shows that the Advocate based the instruction fees on the award of general damages of Kshs. 15,000,000 awarded by the High Court to the 5th Respondent. Relying on guidance from the Schedule 6 of the Advocates Remuneration order, the 5th Respondent's counsel calculated the instruction fees at Kshs. 1,500,000.

In addressing the instruction fees, the Taxing officer stated:

> ***"In my discretion, I do hereby award in my discretion Kshs. 500,000 for Item 1. The balance is taxed off".***

An analysis of the Ruling does not provide any reason as to why the Taxing officer disallowed the amount of Ksh. 1.5 million and nor was any basis provided as to how the Taxing officer arrived at the instruction fee of Ksh. 500,000. Clearly, there is nothing in the Ruling that discloses how this amount was arrived at. All that the Taxing officer stated was that she exercised her discretion to allow the sum of Ksh.500,000. Considering that the instruction fee was central to the Bill of costs, it would have been prudent for the taxing officer to indicate why the amount of Kshs. 1.5 million was disallowed

and what principle she relied upon to arrive at an instruction fee of Kshs. 500,000.

Further, and more importantly, in arriving at the instruction fee, the Taxing officer did not take into account the nature of the appeal. Nothing in the Ruling was said of its importance, or complexity or level of difficulty.

At paragraph 9(2) Schedule 3 it is specified that:

> ***"The fees to be allowed for instructions to appeal or to oppose an appeal shall be such some 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 bear the costs and all other relevant circumstances".***

The Record and grounds of appeal, the cross appeal, the number of parties involved as well as the subject matter all disclose that there were significant factors which cannot be downplayed or disregarded, and of which the Taxing officer ought to have taken into account in arriving at the instruction fee. A review of the Ruling discloses that no mention or reference was made to the facts and circumstances or the pertinent issues surrounding the appeal, or the amount involved, its complexity and importance, or the level of difficulty. In my view, ***paragraph 9 (2) Schedule 3,*** makes it

a requirement for a taxing officer to take cognizance of the integral factors forming the crux of the appeal so as to arrive at a just and fair instruction fee. I find, that such factors were distinctly absent from the Ruling.

The next complaint was that on items 17 to 19, 23, 24, 25, 28, 33 to 35, and 38, of the Bill of Costs, the Taxing Officer made an improper determination by assuming that service to the Respondents was via email.

In this regard the Taxing officer stated *inter alia* that, *"...it is assumed that the said notices were served via email as the Court of Appeal provides..."* What is of importance to consider is the period when service was said to have taken place. I take judicial notice that the period in question was before the onset of the Covid 19 pandemic, and prior to the virtual hearings by this Court, when service on parties, and court hearings were conducted physically. In my view, these are matters that the Taxing officer ought to have taken into account before disallowing or taxing off the sums for service from the Bill of costs.

Another complaint was that the Taxing officer failed to consider items 5, 16, 32 and 45 in the Bill of costs or at all.

I think I have said enough to demonstrate that in view of the above assessment and reasoning, the ends of justice would be better served if the matter were to be remitted for re-taxation before another taxing officer other than Hon. E.

Mwamuye, Deputy Registrar. And I make the following orders.

i) The impugned Ruling on taxation by Hon. E. Mwamuye, Deputy Registrar dated 20th March 2025 B and is hereby set aside;

ii) The Bill is remitted back for taxation by a taxing officer other than by Hon.
E. Mwamuye, Deputy Registrar;

iii) The incoming Taxing officer should:

a) Establish the basis upon which the instruction fees are founded given the circumstances of the case;

b) Apply the established principles pertaining to instruction fees to the facts surrounding the case; and

c) Specify the applicable principles of law, in allowing or discounting any amount claimed in each item of the Bill.

iv) There will be no orders as to costs.

It is so ordered.

Dated and delivered at Mombasa this 13th day of March, 2026.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed
DEPUTY REGISTRAR