

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, JA - IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 38 OF 2014

BETWEEN

ALBERT CHAUREMBO MUMBA & 7 OTHERS

*sued on their own behalf and
on behalf of the predecessors
&/or successors in title in their
capacities as*

**the REGISTERED TRUSTEES OF THE
KENYA PORTS AUTHORITY PENSION SCHEME...APPELLANTS**

AND

MAURICE M. MUNYAO & 148

OTHERS

*suing on their own behalf and
on behalf of the Plaintiffs and & other
members/beneficiaries of*

**THE KENYA PORTS AUTHORITY
PENSION SCHEME**

.....
RESPONDENTS

*(An appeal from the Judgment of the High Court
of Kenya at Mombasa (O.N. Makau, J.) delivered
on 14th February, 2014*

in

Mombasa Industrial Court Cause No. 116 of 2013)

R U L I N G

What is before the Court is a 2nd Reference application to this Court with regard to an Advocate - Client Bill of Costs by the firm of ***Kinyua Muyaa & Co. Advocate, the Advocates*** as against their client, ***Albert Chaurembo Mumba & 7 Others, the Client***. The Bill of Costs is dated 15th June 2020 and was drawn in the sum of Kshs. 150,755,817. The Bill of costs was placed for taxation before Hon.

H. Adika, Deputy Registrar, Mombasa, as Taxing Officer. By a ruling on taxation delivered on 18th December 2020, taxed the Bill of costs for Kshs.8,021,663/05.

When considering the Advocate-Client Bill of Costs between the firm of Kinyua Muyaa & Company Advocates and the Appellants, the Taxing Officer treated the appeal as one with a determinable subject matter of Kshs. 202,199,424.50 having adopted the value reflected in the Judgment for purposes of assessing instruction fees. It was found that, in accordance with the applicable scale, where a sum of Kshs. 1,000,000 was payable on any amount above Kshs. 20,000,000, together with a further

1.5% of the amount claimed above that threshold, applying that formula to the amount of Kshs. 202,199,424.50, the 1.5% component yielded Kshs. 3,032,991, which, when added to the base sum of Kshs. 1,000,000, resulted in instruction fees of Kshs.4,032,991.

The Taxing Officer further found that items 3 to 11 of the Bill were properly drawn to scale and accordingly taxed them as drawn. When those items were added to the instruction fees, the total came to Kshs. 4,691,031.

From that figure, the Taxing Officer awarded getting-up fees at the rate of 50% of the instruction fees, amounting to Kshs. 2,345,515. In making that award, the Taxing officer expressly stated that consideration had been given to the complexity of the matter, the importance of the dispute to the parties, and the amount involved, while bearing in mind that the fee payable ought not to be extravagant in the circumstances. Upon adding the getting-up fees to the instruction fees and the other allowed items, the total came to Kshs.7,036,546.50.

Finally, the Taxing Officer held that, as this was an Advocate-Client Bill of Costs, Value Added Tax at the rate of 14% was chargeable on the taxed amount. The VAT was assessed at Kshs. 985,116.51, which, when added to the taxed sum, brought the final total of the Bill of Costs to Kshs. 8,021,663.05.

Aggrieved by the ruling on taxation delivered on 18th

December 2020, both the Advocate and the Client lodged references before this Court under **Rule 112 (2)** of the **Court of Appeal Rules**. The Advocates' grievance was principally directed at the quantum, contending that the amount taxed was manifestly low

and did not reflect the complexity, importance, and value of the subject matter of the appeal. On the other hand, the Clients' grievance was anchored on jurisdiction and principle, arguing that the taxation was fundamentally flawed in light of the decision of the Supreme Court which had set aside the judgments of this Court and the lower court for want of jurisdiction, and that the work undertaken by the Advocate was limited to filing the notice and record of appeal without prosecuting the appeal.

In determining the rival references, the single Judge carefully reviewed the record, the ruling of the Taxing Officer, and the written submissions filed by both parties. The Court observed that although the Taxing Officer has jurisdiction to tax an Advocate-Client Bill of Costs and that the applicable scales are those of the High Court, the ruling on taxation was unduly terse and did not sufficiently demonstrate how the Taxing Officer exercised his discretion in relation to the contested items. In particular, the Court found that the ruling did not adequately engage with the detailed submissions of the parties on the assessment of instruction fees, the relevance and treatment of the value of the subject matter, and the justification for awarding getting-up fees

and other contested items.

It was further noted that the Taxing Officer did not clearly set out the

principles of law applied in either allowing or discounting specific items in the

Bill, nor did the ruling explain, item by item, why certain sums were awarded. Given the magnitude of the sums claimed and the complexity of the dispute between the parties, the Court held that a more reasoned and transparent analysis was required to enable the parties, and the Court on reference, to discern the basis upon which discretion had been exercised.

In the circumstances, the Court was satisfied that the taxation could not stand, because the process adopted by the Taxing Officer did not meet the threshold required for a proper exercise of discretion in taxation matters. The Court therefore set aside the ruling on taxation dated 18th December 2020 in its entirety and made the following orders:

i) The impugned ruling on taxation by Hon. H. Adika, Deputy Registrar dated 18th December 2020 be and is hereby set aside.

ii) The bill is remitted back for taxation by a Taxing Master other than Hon. H. Adika, Deputy Registrar

iii) The procedure to be followed by the incoming Taxing Master are given as follows:

- Adopt the record as it is.*
- Accept oral representation by the respective parties either in person or via Go-To-Meeting platform*
- Evaluate those submissions as respects each*

Item and give reasons either way.

- *Demonstrate sufficiently principles of law applied either in allowing or discounting any amount claimed against each item.*

iv) There will be no orders as to costs

Based on the directions issued by this Court in its ruling of 20th December 2021, the Advocate-Client Bill of Costs was placed before the Deputy Registrar at Nairobi for fresh taxation. In a ruling delivered on 14th July 2023, Hon. L. D. Ogombe, Deputy Registrar, as Taxing Officer adopted the existing record, considered the written and oral submissions of the parties, and evaluated each item in the Bill while setting out the principles of law applied.

The Taxing Officer first determined that taxation of the Bill was governed by **Rule 111(3)** of the **Court of Appeal Rules, 2010**, and that, being an Advocate- Client Bill of Costs, the applicable scale was **Schedule 6 Part B** of the **Advocates Remuneration Order, 2014**, which provides for fees as between advocate and client based on the High Court scales. She rejected the Client's contention that the minimum scale for "*other matters not provided for*" was applicable and further held that the order of this Court directing each party to bear its own costs did not bar an advocate from recovering fees from their client, as that order only affected costs as between the parties.

On the value of the subject matter, the Taxing Officer considered the Judgments of the Industrial Court, the Court of Appeal, and the Supreme Court. While acknowledging that fraud in the sum of Kshs. 6,982,340,602 had been pleaded, the Taxing Officer found that the value of the subject matter for

purposes of taxation was ascertainable from the Judgment of the trial court, which awarded Kshs. 201,981,424.50 as the Respondents' aggregate pension arrears. Guided by established authority, she held that once Judgment has been entered, the decretal amount, and not the pleaded claim, forms the basis for determining instruction fees. She further held that although the Supreme Court later set aside this Court's Judgment for want of jurisdiction and remitted the matter to the Retirement Benefits Authority, the value of the appeal remained discernible for purposes of taxing Advocate-Client costs.

Applying **Schedule 6 Part A**, the Taxing Officer computed party-and-party instruction fees on the sum of Kshs. 201,981,424.50 at Kshs. 3,234,721.36, and taxed off the balance claimed. She then considered items relating to drawings, copies, disbursements, and service, allowing some items as drawn, taxing others to scale under the Court of Appeal Rules, and disallowing amounts not justified. The subtotal of the allowed items was assessed at Kshs. 3,602,761.36.

In accordance with **Schedule 6 Part B**, the Taxing Officer allowed an additional 50% advocate-client uplift on the fees,

notwithstanding that the Advocate did not prosecute the appeal to conclusion, but on the basis that the Advocate had undertaken attendances and necessary correspondence while they had conduct of the appeal. This amounted to Kshs. 1,801,380.68, bringing the subtotal to Kshs. 5,404,142.04.

The Taxing Officer further held that Value Added Tax at 14% was chargeable on the Advocate-Client costs, since legal services are not exempt from VAT, and allowed VAT in the sum of Kshs. 757,839.88. In addition, she applied the statutory taxation fee of 5% under the Court of Appeal Rules, amounting to Kshs. 308,036.09, payable before issuance of the certificate of taxation. Consequently, the Taxing Officer taxed the Advocate-Client Bill of Costs at a grand total of Kshs. 6,468,758.01, and taxed off the balance of the amounts claimed.

Aggrieved by the ruling on taxation delivered on 14th July 2023 by the Taxing Officer, the Advocates, filed a reference to a single Judge challenging the decision in its entirety. In the reference, the Advocates contended that the Taxing Officer was in error in law and principle in her ascertainment of the value of the subject matter and in the consequent assessment of instruction fees, the Advocate-Client uplift of 50%, and VAT.

The Advocates' central grievance is that the Taxing Officer wrongly limited the value of the subject matter to Kshs. 201,981,424.50, being the decretal sum awarded to 149 named claimants, instead of the true and substantive value of the

dispute, which, according to the Advocates, was Kshs.6,982,340,602. It was contended that the decretal amount of Kshs.

201,981,424.50 did not equate to recovery of the larger sum of Kshs.

6,982,340,602, nor did it cure or nullify the fraudulent amendments to the Trust Deed and Rules and the Statutory Remedial Plan that had reduced pension benefits across the entire Kenya Ports Authority Pension Scheme involving approximately 5,100 members of the scheme.

The Advocates further contended that the Taxing Officer failed to consider material findings in the judgments of the Employment and Labour Relations Court and this Court, which addressed the alleged fraud, illegality, and unconstitutionality surrounding the failure to recover Kshs. 6,982,340,602 from the sponsor and the resultant deficit, which formed the true gravamen of the dispute and the value of the subject matter; that further, the Advocates faulted the Taxing Officer for failing to demonstrate the principles of law applied in discounting Kshs. 6,982,340,602 and in preferring Kshs. 201,981,424.50 as the value of the subject matter, as no reasons were given.

It was further contended that the Taxing Officer misdirected herself by treating the decretal amount as determinative of the value of the subject matter, contrary to the Advocates Remuneration Order, which requires the value to be ascertained

from the Judgment as a whole and not merely from part of the decree; that the appeal was not solely against a money decree, but a challenge against the findings of fraud, illegality, and collusion relating to billions of

shillings, and that the order dismissing the appeal and cross-appeal, with each

party bearing its own costs, could not lawfully be used as a basis for pegging the subject value at Kshs. 201,981,424.50. The Advocate contended that the amount taxed was manifestly low and inadequate, having been arrived at through failure to consider relevant and material factors, misapplication of the law, and disregard of the binding directions earlier issued by the single Judge in the ruling of 20th December 2021, disregarding the true value of the subject matter as pleaded and litigated.

Consequently, the Advocates prayed that this Court interferes with the taxation and determine that instruction fees ought to have been assessed on the basis of Kshs. 6,982,340,602.00 as the correct value of the subject matter, and to allow instruction fees of Kshs. 87,503,257.00, to award a 50% Advocate-Client uplift thereon amounting to Kshs. 87,871,297.00, to allow VAT at 14% of Kshs.12,301,981.58, and to tax and allow the Bill of Costs at an all-inclusive total of Kshs. 100,173,278.58, with the costs of the reference and the certificate of taxation to be borne by the Client in any event.

Equally aggrieved by the ruling on taxation delivered on 14th July 2023, the Appellant/Client lodged a second Reference dated

3rd August 2023 before this Court pursuant to **Rule 112 (2)** of the **Court of Appeal Rules**. In the Reference, the Client contends that the Taxing Officer failed to properly consider and give effect to the decision of the *Supreme Court in Petition No. 3 of 2018*, which set aside

both the Judgment of this Court and that of the lower court on the ground that the lower court lacked jurisdiction to hear the suit. According to the Client, once the Supreme Court declared that the lower court had no jurisdiction, the Judgment emanating therefrom became a nullity and was therefore incapable of forming a lawful basis for the assessment of instruction fees.

Secondly, the Client contended that the Taxing Officer was in error in proceeded to utilize the value of the subject matter indicated in this Court's Judgment for purposes of taxation, notwithstanding the Supreme Court set aside the Judgment of this Court and remitted the matter for adjudication by the Retirement Benefits Authority.

Thirdly, that the amount awarded on instructions fees is in any event manifestly excessive considering the work done by the Advocates and the subject matter in the appeal.

Fourthly, the Client challenged the award of getting-up fees, arguing that the Taxing Officer fell into error in awarding getting up fees for alleged attendances when it was correctly found that the Advocates did not prosecute the appeal.

Fifthly, the Client faulted the Taxing Officer for failing to take into account the fact that this Court had expressly ordered each party bears its own costs and lastly, and to exercise her discretion judiciously.

When the references came up for hearing on a virtual platform, learned counsel **Ms. Muyaa** and **Mr. Kinyua Kamundi** appeared for the Advocates, while Learned Counsel **Ms. Oyoo** appeared for the Client.

In their written submissions, counsel submitted that they acted for the Client in the court below having received instructions to appeal against the whole Judgment of the High Court; that they lodged and served the Notice of Appeal, Memorandum of Appeal, and Record of Appeal, after which the Client appointed new advocates to take over the conduct of the appeal, whereafter, a dispute arose on the legal fees due to them, leading to the filing of the Advocate- Client Bill of Costs dated 15th June 2020.

On the substance of their objections, counsel submitted that the principal issue in dispute was the ascertainment of the correct

value of the subject matter for purposes of calculating instruction fees; that under the Advocates Remuneration Order, the value of the subject matter was to be ascertained from the Judgment, and not from part of the decree or from the final order dismissing the appeal and cross-appeal. The Advocates faulted the Taxing Officer for

limiting the value of the subject matter to Kshs. 201,981,424.50, being the amount awarded to 149 named claimants, instead of considering the Judgment as a whole in the context of a representative suit involving all 5,100 members of the scheme.

Counsel submitted that the gravamen of the dispute, both in the suit and in the appeal, was the admitted failure to recover Kshs. 6,982,340,602, which deficit triggered the Statutory Remedial Plan and resulted in reduced pension benefits across the scheme. It was argued that the payment of Kshs. 201,981,424.50 to 149 members did not equate to recovery of the larger sum, nor did it cure the alleged fraud, illegality, and unconstitutionality surrounding the Trust Deed amendments, the Rules, and the Statutory Remedial Plan; that the Taxing Officer failed to demonstrate the principles of law applied in rejecting Kshs. 6,982,340,602 and in preferring instead to base the value of the subject matter as Kshs. 201,981,424.50.

In response to the Clients' Reference, counsel submitted that the absence of a party-and-party costs award in the appeal was irrelevant to an Advocate- Client Bill of Costs; that the Supreme Court's finding that the Employment and Labour Relations Court

and this Court lacked jurisdiction did not render the subject matter valueless for purposes of taxation, as the Advocates had

consistently challenged jurisdiction from the trial court through the appellate

courts, which culminated in the Supreme Court's decision. It was contended that, but for the appeal, the jurisdictional issue would not have reached the Supreme Court; that although they did not prosecute the appeal to hearing, instruction fees were fully earned upon lodging and serving the Notice of Appeal, Memorandum of Appeal, and Record of Appeal, and that their original Bill of Costs did not include getting-up fees. The Client's submission that the Bill should be taxed at a nominal figure such as Kshs. 50,000, was rejected as being unreasonable when compared to the scale of the dispute and the party-and-party costs paid to the 149 claimants.

Finally, counsel submitted that remitting the Bill for a third round of taxation would occasion unreasonable delay, offend the overriding objective under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** and **Article 159** of **the Constitution**, and perpetuate a dispute over fees for legal services rendered more than 11 years earlier, for which they had not been paid. They urged the Court, sitting as a single judge, to determine instruction fees on the basis of one of the four identified values of the subject matter, and in particular on Kshs. 6,982,340,602.00, which would

yield instruction fees of Kshs. 87,503,257.00, before applying the 50% advocate-client uplift and VAT, rather than uphold what they described as an erroneous and manifestly low taxation.

In their written submissions, counsel for the Client submitted in response to the Advocate's Reference dated 26th July 2023 and in support of the Client's Reference dated 3rd August 2023. Counsel submitted that the Taxing Officer was in error in principle by failing to take into account material considerations. First, it was submitted that this Court had expressly ordered that each party bears its own costs, a factor that ought to have weighed heavily against the scale on which the Advocate-Client Bill was assessed; that secondly the Supreme Court decision in **Petition No. 3 of 2016, Albert Chaurembo Mumba & 7 Others vs Maurice**

Munyao & 148 Others [2019] eKLR, had set aside the judgments of both this

Court and the lower court for reasons that the lower court lacked jurisdiction. Counsel argued that, as a consequence, the judgment of the lower court was a nullity and could not lawfully form the basis for the assessment of instruction fees.

It was further submitted that there was no pecuniary value of the subject matter capable of grounding instruction fees on a monetary scale. Counsel argued that the appeal concerned the

narrow question of whether the lower court had jurisdiction, and not the enforcement of any monetary claim. Consequently, the alleged value of Kshs. 201,981,424.50 could not properly be relied upon in taxing instruction fees. Counsel further submitted that the Advocate's work was

limited to drawing and lodging the Record of Appeal and that the Advocate did not prosecute the appeal, a fact that was conceded by the Taxing Officer.

On the specific question of instruction fees, counsel submitted that the Taxing Master was wrong to award Kshs. 3,234,721.36 as instruction fees, having incorrectly pegged the value of the subject matter to Kshs. 201,981,424.50, being the amount claimed by the Respondents before the lower court. Counsel argued that this amount did not feature as a finding in this Court's Judgment and was therefore an erroneous basis for assessment. It was submitted that, in light of the Court's order that parties bear their own costs, the Advocate-Client Bill could only properly be assessed under **Schedule VI Part B** of the **Advocates Remuneration Order**, under the category of "other matters not provided for," with a minimum instruction fee of Kshs. 8,400.

Counsel relied on the decision in in the case of **Joreth Limited vs Kigano &**

Associates [2002] EA 92, for the proposition that the value of the subject matter

for purposes of taxation must be ascertained from the pleadings,

judgment, or settlement, and that where such value is not ascertainable, the taxing officer must exercise discretion by considering factors such as the nature and importance of the cause, the interest of the parties, and the conduct of the proceedings. Applying those principles, counsel submitted that the award of

Kshs. 3,234,721.36 as instruction fees was excessive and unreasonable in the circumstances.

Counsel further submitted that the Taxing Officer was in error in awarding getting-up fees of Kshs. 1,801,380.50, notwithstanding the undisputed fact that the Advocate did not prosecute the appeal. It was argued that there was no evidence of attendances or necessary correspondence to justify such an award, and that the Taxing Officer had contradicted herself by acknowledging that the Advocate only drew the Record of Appeal, but nonetheless proceeded to allow getting-up fees. In support of this argument, counsel relied on **Samson W.**

Ndegwa t/a S. W. Ndegwa & Company Advocates vs Mukuru Munge [2019] eKLR,

where the Court held that **Schedule VI Part A** of the **Advocates Remuneration Order** applies only where the value of the subject matter is ascertainable, and that where it is not, instruction fees should be assessed under the “*other matters not provided for*” category, with a minimum of Kshs. 45,000.

On VAT, counsel submitted that the Taxing Officer was wrong to award VAT of Kshs. 756,579.88, as the same was

predicated on items that had been wrongly allowed in the Bill of Costs. Counsel further submitted that there was no evidence on record to demonstrate that VAT had been paid or was chargeable in the manner assessed.

In conclusion, counsel submitted that the taxation was erroneous in law and principle and urged the Court to allow the Client's objection. They prayed that the Bill of Costs be taxed at Kshs. 50,000.00 only, being reasonable instruction fees for the work of lodging the Record of Appeal. In the alternative, counsel prayed that, since both the Advocate and the Client had objected to the Taxing Officer's decision, the Court should remit the Bill for re-taxation before another Taxing Officer with appropriate directions.

This matter is concerned with two References, one by the Advocates and one by the Client, from a taxation by the Taxing Officer to a single Judge under **Rule 117** of this Court's rules. In particular, **Rule 117(3)** of this Court's rules provides:

"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."

In a reference such as this, the Judge will not normally

interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, fell into error in principle in assessing the costs.

In the case of **Arthur vs Nyeri Electricity Undertaking [1961] EA 497**, the

predecessor of this Court stated:

“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 or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit. See **Devshi Dhanji vs Kanji Naran Patel (No. 2), [1978] KLR 243.**

In the case of **Joreth Limited vs Kigano & Associates (supra)** and **First American Bank of Kenya vs Shah & Others [2002] EA 64,** the Court reaffirmed that in the assessment of costs, a taxing officer exercises judicial discretion. Such discretion may only be interfered with where it is demonstrated that it was exercised capriciously, in disregard of applicable legal principles, or in abuse of discretion; or where the

decision is founded on an error of principle, or where the fee awarded is so manifestly excessive or so inordinately low as to occasion an injustice to one party.

This position was further restated by this Court in the case of **Kipkorir**,

Tito & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR, an appeal

arising from a judge's determination on a reference from taxation, where the Court stated:

“The learned judge, like the taxing officer, was exercising judicial discretion when dealing with the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned judge acted on wrong principles of law.”

With the forgoing in mind, I have considered the Advocates' and the Client' References, the entire record, and the submissions of counsel, and find that the following issues arise for determination:

i) Whether the Taxing Officer was in error in principle in determining the value of the subject matter as Kshs.201,981,424.50;

ii) Whether the Supreme Court decision setting aside the lower court judgments for want of jurisdiction rendered the subject matter incapable of valuation for purposes of taxation;

iii) Whether the award of advocate-client uplift, getting-up fees, VAT and taxation fees were justified; and

iv) Whether this Court should interfere with the taxation or remit the Bill for re-taxation.

At the outset, it is observed that at the centre of this controversy is a Bill of Costs for which the Advocates' complaint is

that the taxed instruction fees were far too low. In their Bill of Costs, the Advocates based their instruction fees on the amount of Kshs. 6,982,340,602, being an alleged pension deficit affecting over 5,100 scheme members, having ascertained this to be the subject matter of the suit. The Client, on the other hand, contended that the taxed costs were far

too high as following the Supreme Court Judgment nullifying the lower court proceedings, no ascertainable pecuniary value existed.

In discerning the subject matter for the purposes of taxing the Bill for services rendered in this Court, the Taxing Officer reviewed the pleadings, the judgments of the Employment and Labour Relations Court, and this Court and concluded that, judgment having been entered by the courts in the decretal sum of Kshs.201,981,424.50, the value of the subject matter for purposes of ascertaining the instruction fees was the decretal amount awarded, as pension arrears to 149 claimants. In effect this is the crux of the reference.

The Advocates disagree that the instruction fee should have been solely based on the decretal amount of Kshs 201,981,424.50. It was contended that the Taxing officer should have considered the entire Judgment and based the subject matter on the sum of Kshs. 6,982,340,602 which arose through alleged fraud, illegality and unconstitutionality surrounding the failure to recover this amount.

So, what ought to be the subject matter on which instruction fees should be computed? To determine this, an interrogation of the construction of the **6th Schedule Part A** of the **Advocates Remuneration Order** is necessary. It specifies:

“1. Instruction fees

....The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it—

(a)...

(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and”

In the case of **Joreth Ltd vs Kigano & Associates** (Supra), this Court explained the manner of computation of the instruction fees thus;

“We would at this stage point out 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 (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

This would mean that the subject matter, for the purposes of

taxation, should be discerned from “...*the pleadings, judgment or settlement between the parties...*” In other words, the value of the subject matter if ascertainable, is to be derived from either the pleadings or the judgment or the settlement between the parties. However, where it is not ascertainable the Taxing officer is entitled to use their discretion to assess such instruction fee as they consider fair and just.

I have considered the record and the parties' submissions, and it is not in dispute that the Employment and Labour Relations Court rendered a judgment in respect of the dispute on 14th February 2014. It is also not disputed that the Advocates filed a Notice of Appeal, the Memorandum and Record of appeal, in this Court, but did not go on to prosecute and conclude the appeal. Thereafter, a judgment in respect of the appeal was rendered on 26th February 2016. Thereafter, an appeal from this Court's decision was preferred to the Supreme Court. Additionally, it is worthy of note that both counsel for the Advocates and the Client are in agreement that the basis upon which to ascertain the value of the subject matter were the Judgments of the different courts.

In brief, the Judgment of the ELRC; i) declared that, the 2002 Deed of Amendment and Rules and the subsequent remedial pension plan to be fraudulent; and ii) ordered that the Client pay the claimants Kshs.201,981,424.50. In a similar vein, the Judgment of this Court upheld the ELRC's decision. But on appeal to the Supreme Court, held that the lower courts lacked jurisdiction to determine the suit.

In the ruling on taxation, the Taxing officer applied the

liquidated and ascertained sum of Kshs.201,981,424.50 as the subject matter on which to compute instruction fees, despite having appreciated that the pleadings and Judgment in both the Employment and Labour Relations Court and this Court

had determined the issue of fraud on which the amount of Kshs. 6,982,340,602 was premised.

The taxing officer's role, in so far as computing instruction fees is concerned, was explicitly spelt out by this Court in the case of **Peter Muthoka & another vs Ochieng & 3 others** [2019] eKLR thus;

“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.”

In other words, what the Taxing officer is required to do in order to arrive at the instruction fees is firstly, to consider whether the subject matter is ascertainable or discernable from the pleadings, the judgment or settlement. If it is ascertainable, then such amount must be considered the subject matter upon which to arrive at the instruction fees. If the subject matter is not capable of being determined, then the taxing officer is permitted to use his discretion to assess

instructions fees having regard to the importance, complexity, or level of difficulty of the suit or appeal, among other factors.

Having said that, the Advocates' complaint is that the Taxing officer preferred, without reason, to rely on the decretal sum in the Judgments, as the subject matter of the suit, rather than on the amount of Kshs. 6,982,340,602 as specified in the pleadings, the findings of the Judgments on fraud and in the Bill of costs.

Having examined the Judgments, there is no question that there was reference to both amounts. The question that therefore begs is which between them was to be considered as the subject matter of the appeal for the purposes of the taxation? So as determine this question, the case of **Peter Muthoka & Another vs Ochieng & 3 Others** (supra) is instructive where it was held that:

“[56] It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse

will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.”

What is distinctly clear from the above cited authority is that, once

judgment was entered, the actual claim of the parties' dispute was discerned,

and this in turn, became the value of the subject matter of the suit, and the basis on which to compute instruction fees.

The Judgment of the trial court discloses, that judgment was entered against the Client in the sum of Kshs. 201,981,424.50. And though the question of fraud was considered and determined, it is conspicuous that judgment was not entered in the sum of Kshs. 6,982,340,602. If this was to have been the case, nothing would have been simpler than for both courts to have entered judgment for such amount, but they did not. If anything, the Judgment of to this Court filed by the Advocates had this to say:

“12. In liquidated terms, the respondents claim against the appellants is a grand total sum of Kshs.202,199,424/50 being loss and damage suffered jointly and severally by virtue of the unconstitutional, fraudulent and unlawful Trust Deed amendments that led to reduction in pensionable benefits accrued and payable to them. The respondents also claim interest at commercial rates of 20% per annum from the date due to each of them and further interest at court rates from the date of filing suit until payment in full. The respondents further claim that their monthly pension be adjusted and paid together with the applicable annual increment in respect thereof.”

So that, once judgment was entered in the sum of Kshs. 201,981,424.50, and not on the speculative amount of Kshs. 6,982,340,602, it became the true claim between the parties, and therefore, the value of the subject matter of the suit upon which the instruction fees could be based. Given these premises, the

taxation ruling shows that the Taxing officer established that judgment was entered in the liquidated and ascertained sum of Kshs. 201,981,424.50, and having so found, considered this to be the subject matter of the suit on which to compute the Advocates' instruction fees. This being the case, I am unable to fault the Taxing officer for reliance on the sum of Kshs. 201,981,424.50 on which judgment was entered, as the subject matter of the suit. I find that the correct principles were invoked, and the decretal sum rightly applied as the subject matter on which to compute instruction fees, and as a consequence I have no reason to interfere with the Taxing officer's decision.

Turning to the Client's contention on the Supreme Court's decision on jurisdiction and the effect of this on the subject matter, the Client contended that once the Supreme Court declared that the lower courts lacked jurisdiction, the Judgment became a nullity and as a result there was no subject matter on which to ground instruction fees.

I do not agree for the reason that, prior to the Supreme Court's decision, the Advocates rendered legal services by

drawing up and lodging the Notice of Appeal, the Memorandum and Record of Appeal. According to the Memorandum of Appeal, the jurisdictional issue was a substantive question in the Memorandum. The subsequent finding that the courts lacked jurisdiction

did not render the legal work undertaken as valueless for purposes of the Advocate-Client costs. It goes without saying that the Client was the sole beneficiary and indeed benefitted from of their legal services. As a consequence, it cannot be said that after the different courts in the judicial hierarchy have heard and determined the suit, that because the Supreme Court reached a finding that they lacked jurisdiction to determine the suit, all the legal services provided were rendered worthless. Indeed, it was not, and the Advocates were entitled to their fees for whatever legal services were rendered.

I now turn to the Instruction Fees and Advocate-Client Uplift. Based on **Schedule 6 Part B** of the **Advocates Remuneration Order**, the Taxing Officer computed party-and-party instruction fees and applied the statutory 50% advocate-client uplift. Although the Advocate did not prosecute the appeal to hearing, instruction fees were earned for substantive steps taken in preparation and filing of the Record of Appeal. I find no error in principle in allowing instruction fees and the advocate-client uplift.

On the next issue of the award of getting-up fees, I am

satisfied that this modest and premised on attendances and correspondence undertaken in preparation for hearing before the brief was withdrawn. The Taxing Officer gave reasons for allowing such preparatory costs, for which I am unable to find fault.

As for the VAT and the statutory taxation, since the amount was strictly drawn in accordance with the law, I equally find that the amounts cannot be faulted.

Having carefully considered the rival References of the Advocate and the Client, I am satisfied that the Taxing officer properly directed herself on the law, considered the relevant factors and complied with the directions earlier issued by this Court and came to the right conclusions, with the result that I find that there has been no error of principle demonstrated to warrant interference by this Court.

In sum, both References are dismissed with costs. Since both the reference and cross reference have failed each party to bear their own costs.

It is so ordered.

Dated and delivered at Mombasa this 25th day of March, 2026.

of the original

signed
DEPUTY REGISTRAR

*I certify that this
is the true copy*

A. K. MURGOR

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JUDGE OF APPEAL