REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.249 OF 2018

CORNEL OPIYO OSANO…….. APPELLANT

VERSUS

CFC STANBIC BANK LIMITED…….. RESPONDENT

JUDGMENT

1. The Appellant herein filed a reference dated 10th April 2025 against the ruling delivered on 30th August 2022 by the Deputy Registrar. The reference is seeking for enlargement of time to file their reference out of time. The reference is grounded on the following;

a. That there was an apparent error on the face of record.

b. The instruction fees taxed at Kshs 168,605.92 to defend an appeal suit was in excess of what was statutorily provided.

c. The instructions to defend an appeal should have been between Kshs 30,000 to Kshs 50,000.

d. ***That the Applicant came to know of the was scheduled for matter when it was scheduled for NTSC on 24th September 2024.***

e. ***The applicant was not served with the process leading to the certificate of Taxation.***

f. ***That they were given instructions after their time had lapsed under regulation 11(1) of the Advocate Regulations had lapsed.***

2. The Respondent filed their grounds of opposition dated 30th June 2025. They argued that the reference did not conform to the provisions of paragraph 11(1) of the Advocates remuneration order. They did not conform to the requirements of Section 80 of the Civil Procedure Act. That the Appellant had been served with all the relevant notices as captured in the Ruling delivered on 9th April 2025. That the averments in order 9, 10 and 11 were overtaken by events as they had been granted leave to file a reference.

3. Both parties filed their respective submissions and the court has taken them into consideration while preparing its ruling.

APPELANTS SUBMISSIONS.

4. They submitted that there was an error apparent on the face of record as the taxing master exercised their discretion unfairly. They relied on the case of **Green Hills Investment**

Ltd Vs China Complete Plant Export t/a Covec HCCC No. 572 of 2000. It was their submission that the taxing officer erred in law and principle by failing to be guided by Schedule 6 of the Remuneration order. The amount taxed as instruction fees of **Kshs 168,605** was absurd and highly exaggerated. They submitted that the instruction fees should have been taxed at **Kshs 30,000 to Kshs 50,000.** They prayed that the ruling delivered on 30th August 2022 be varied or set aside. They submitted the bill of costs dated 2nd June 2022 be retaxed or remitted back to a different taxing master.

RESPONDENTS SUBMISSIONS

5. The Respondent submitted that the reference was not merited as the cause of action emanated from a loan of **Kshs 3,430,296.** It was their submission that the taxing master exercised his discretion in accordance to Paragraph 1(b) of the Advocates Remuneration Order and the Reference ought to be dismissed. The Respondent reiterated the contents of its grounds of opposition.

ISSUES FOR DETERMINATION.

6. The Respondent herein raised the issue that the Appellant was not properly before court as per Section 11 of the Remuneration order which provides;

> ***"11. Objection to decision on taxation and appeal to Court of Appeal.***
>
> ***(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.***
>
> ***(2) <u>The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.</u>***
>
> ***(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***
>
> ***(4) The High court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2)for the taking of any step; application for such an order***

may be made by chamber summons upon giving to every other interested party not less than three clear days notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

7. The Appellant has indeed not moved the court by way of a chamber summons as provided in procedure. However, the court takes note that the Reference does raise and objection to how the Instructions fees were taxed. The substance of the objection was captured in the reference despite the procedure not being followed. The Appellant should not be denied his chance to be heard due to technicality. In stating so I am fortified by the Supreme Court in the case of ***Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016]eKLR*** where the court stated thus:

"This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a

litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, "...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts."

8. The second issue was whether the cause of action had a subject value. The Respondents cause of action from the pleadings was over a listing of an unpaid loan of **Kshs 3,430,296.** They claimed that the information had been published to the Housing Finance Limited. From a perusal of the pleadings and the documents attached by the Respondent. The court took attention of the letter dated 17th February 2014 addressed to the Advocates of the Respondent. The Appellants clearly acknowledged that they had given The Respondent a facility of Kshs 3,430,296 and the Respondent owed a balance of **Kshs 3,909.00.** The

letter further informed the Court that the Respondent raised the issue with the bank and the balance was written off and the loan delisted from the Credit Reference Bureau.

9. The Appellant submitted that the subject value of the suit could not be established from the pleadings and or documents. However, from the analysis made herein above the court has established that the cause of action was from arrears of **Kshs 3,909.00.** this amount was what was listed to the credit Reference Bureau and the Appellant felt aggrieved by it. The case of **Joreth Ltd vs Kigano & Associates [2002] 1 E.A. 92,** this Court addressed the issue 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."***

10. The well settled principle in respect to references against an award of costs by way of taxation by a Taxing Master is that the Superior Court will not interfere with the award of the Taxing Master unless it is shown that there was an error in principle.

In ***Arthur v Nyeri Electricity Undertaking*** [1961] EA 497, the Court said at page 492 paragraph I:

> ***"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 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).

11. Guided by the above principles set out in the aforementioned cases, this court has to examine whether the Deputy Registrar erred in the assessment and computation of the instruction fees as claimed by the Appellant.

12. The appropriate schedule that ought to have been used is Schedule 6, Paragraph 2 (b) of the Advocates (Remuneration) amendment Order 2014, which provides

…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 an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties……

13. Therefore, this being the case, the value of the subject matter was **Kshs 3,909.00.** The amount of **Kshs 168,605.92** ***was*** manifestly too high hence the Taxing Master applied wrong principles of law in arriving at this

figure. The Instructions fees for the value of the subject is **Kshs 75,000.** For this reason, the Ruling of the Taxing Master ought to be set aside.

14. The Appellant only objected to the Instruction fees. The court therefore finds that the Reference here-in has merit and proceed to order that:-

a. The Ruling of the Deputy Registrar delivered on 30th August 2022 taxing the bill of costs at Kshs 223,210.92 be and is hereby set aside.

b. The instruction fees is taxed at Kshs 75,000.

c. The bill of costs dated 2nd June 2022 is thus taxed at Kshs 129,605.92.

15. It is so ordered.

DATED DELIVERED VIRTUALLY, AND SIGNED ON THIS 13TH DAY OF APRIL 2026.

L. P. KASSAN

JUDGE