

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MILIMANI
ELCLC NO. E039 OF 2024

**ALY ENTERPRISES
LIMITED.....PLAINTIFF/APPLICANT**

-VERSUS-

**ABSA BANK KENYA PLC.....1ST
DEFENDANT**

**ABIB ZAMZAM ABDI T/A
ABIB & ASSOCIATES ADVOCATES.....2ND
DEFENDANT**

**STARK EAST AFRICA LIMITED.....3RD
DEFENDANT**

**GULF AFRICA BANK LIMITED.....4TH
DEFENDANT/RESPONDENT**

**REGISTRAR OF COMPANIES5TH
DEFENDANT**

AND

**MAFUTA PRODUCTS LIMITED.....1ST INTERESTED
PARTY**

**HALAL MEAT PRODUCTS LIMITED.....2ND INTERESTED
PARTY**

RULING

1. Before this court for determination is the chamber summons dated 18th December, 2024 filed by the plaintiff/applicant and it is expressed to be brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Rule 11(2)** of the **Advocates Remuneration Orders** seeking the following orders:

a. That the ruling of the taxing officer, Hon. Judith

Omollo, delivered on 04/12/2024 on the 4th defendant's bill of costs dated 26/09/2024 be set aside and taxed afresh by a different taxing officer.

b. That the costs of the application be provided for.

2. The application is premised on the grounds on its face. It is further supported by the affidavit of Yusuf Motha, the director of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that the taxing officer failed to consider its written submissions dated 25th November, 2024 opposing the 4th defendant's bill of costs which had been filed and served prior. It was deposed that there was grave miscarriage of justice as the value of the subject matter was erroneously found to be Kshs.150,000,000/=, while the plaintiff/applicant simply sought for declaratory orders in the amended plaint dated 29th May. 2024 and not the aforesaid sum.
3. According to the plaintiff/applicant, the taxing officer erred in law and fact by taxing the 4th defendant's bill of costs at Kshs.1,866,123/-, despite the 4th defendant not filing a defence to its claim and the finding that the 4th defendant is entitled to instruction fees in the sum of Kshs.1,866,123/- is therefore unreasonable in the circumstances. For this reason, it was

averred that it is only fair and just that the ruling by the taxing officer dated 4th December, 2024 be set aside and taxed afresh by a different taxing officer.

4. The application was canvassed through written submissions. The plaintiff/applicant filed its submissions dated 19th March, 2026. The 4th defendant/respondent did not file its response to the application and neither did it file any submissions. Be that as it may, I have considered the application, and the written submissions filed by the plaintiff/applicant. In my view, the issue for determination is *whether the taxing officer erred in taxing the bill of costs as alleged by the plaintiff/applicant.*
5. The genesis of this dispute is that the plaintiff/applicant filed this suit and the 4th defendant filed a preliminary objection to the suit, disputing the jurisdiction of this court to hear this matter. Subsequently, the plaintiff/applicant filed the notice of withdrawal of the suit dated 12th July, 2024 and the court awarded costs to the 4th defendant/respondent. The plaintiff/applicant submitted that the 4th defendant's bill of costs on instruction fees based on the alleged value of the suit property is manifestly high and punitive in the circumstances, is without basis in law and is unjust. Reliance was placed in the case of

Joreth vs Kigano & Associates [2002] eKLR where it was held:-

“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 importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

6. In the amended plaint dated 29th May, 2024 the plaintiff/applicant had sought for a declaration that the sale of the suit property by private treaty to the 3rd defendant was null and void, an order directed to the registrar to cancel the 3rd defendant’s title, an order directed at the 4th defendant to discharge the charge over the suit property and a permanent injunction order restraining the 1st, 3rd and 4th Defendants from interfering with the suit property.
7. The taxing officer relied on the sale agreement where the suit property was to be sold by private treaty for a sum of Kshs.150,000,000/=, which the plaintiff/applicant alleges was an

illegal agreement. One of the authorities relied on is the case of **Kenya Airports Authority v Otieno Ragot and Company**

Advocates (Petition E011 of 2023) [2024] KESC 44 (KLR)

where it was held that:-

“We are of a considered opinion that a claim in a suit which is struck out at the preliminary stage does not ipso facto render that claim or amount pleaded therein without more the value of the subject matter. The position still remains that the amount therein has not been ascertained or determined, and as such, it cannot be applied as the value of a subject matter in a disputed taxation. The application of such a claim or amount as the value of the subject matter would go against the rationale that the fees/costs paid to an advocate and a successful party should be reasonable. Consequently, we are not persuaded by the respondent’s contention that even where the amount claimed in a pleading which is struck out by a court, as in the instant appeal, the said amount would still act as the value of the subject matter when it comes to taxation of instruction fees.”

8. Since the matter was concluded at the preliminary stage by withdrawal of the suit, the sum of Kshs.150,000,000/- cannot be said to be the value of the subject matter, since that was not established by way of hearing and determination by the court.

The suit was concluded in a summary manner, thus the costs that apply need to be assessed in an alternative manner, considering such factors as the work done, noting that the 4th defendant did not defend the suit save for prosecuting their preliminary objection. Thus, the taxing officer must exercise discretion in assessing instruction fees. The Court of Appeal in the case of **Moronge & Company Advocates v Kenya Airports Authority [2014] KECA 816 (KLR)** established the following principles:-

“In our view, there is no way the value of the subject matter of the suit could be determined from the pleading in paragraph..... The figure given therein was, in our view, plucked from the air. Like the learned Judge, we find and hold that the figure had absolutely no basis. It could not therefore be the value of the subject matter of the suit. The suit was dismissed on a preliminary objection. The value of the subject matter of the suit could not also be ascertained from the judgment or settlement as there was none. As the value of the subject matter could not be determined from the pleadings, judgment or settlement, the taxing officer should have used his discretion to determine such instructions fees as he considered just, taking into account, amongst other matters, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances (See Joreth Limited -vs- Kigano &

***Associates [Court of Appeal, Civil Appeal No. 66
of 1999 Nairobi] (UR). (emphasis mine)***

9. I disagree that the value of the suit property could be ascertained from the pleadings as the same was not proved through hearing. In that case, there is need to disturb the findings made by the taxing officer. Arising from the above, I find merit in the chamber summons dated 18th December, 2024, and I grant the following orders:

- i. The ruling of the taxing officer, Hon. Judith Omollo, delivered on 04th December, 2024 on the 4th defendant's bill of costs dated 26th September, 2024 is set aside and remitted for taxation afresh by a different taxing officer.***
- ii. I make no orders as to costs.***

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 23RD DAY OF APRIL, 2026.**

**HON. MBOGO C.G.
JUDGE
23/04/2026.**

In the presence of:

Ms. Benson Agunga - Court assistant

Ms. Tarus holding brief for Mr. Odoyo for the Plaintiff/Applicant

Mr. Muhizi holding brief for Mr. Ongegu for the 4th

Defendant/Respondent

ORIGINAL