REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC APPLICATION NO. E337 OF 2022

KENCOM CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LTD.....1st APPLICANT

RAFFIK CONSULT LIMITED.....2nd APPLICANT

VERSUS

PROF. MUSILI WAMBUA

& CO. ADVOCATES.....RESPONDENT

RULING

1. This Ruling arises out of a Reference filed by the Applicants against the Advocate/Respondent.
2. It is in respect of an application by way of a Chamber summons dated 8/7/2024. In it the Applicants seek the following orders;
    a) *The Ruling of **Hon. S. Githogori Bett (DR)** as Taxing Officer delivered on 5th April 2024, be set aside and/or vacated in respect of Item No. 1 on instruction fees.*
    b) *The court do assess and award the Applicant the proper Instruction fees due in accordance with the Advocates Remuneration Order.*

c) In the alternative, the court do remit the applicant's bill of costs for re-taxation before another Taxing Officer.

d) The costs of this application be provided for.

Background Facts

3. The Respondent **Prof. Musili Wambua & Co. Advocates** filed a Bill of Costs dated 27/4/2022 against the Applicants. It sought taxation of costs against the Applicants. The Bill of Costs was drawn for a sum of Kshs.380,608,880.10
4. The Bill of costs was opposed by the Applicants on the basis that there was a written retainer agreement. That the Advocate could only proceed to enforce the agreement for fees, but not tax a Bill of Costs.
5. The Taxing Officer in a Ruling dated 7/7/2023 agreed that the Bill of Costs could not be lie on the fact of a written retainer agreement. It was struck off with costs.
6. Having been awarded the costs of the struck Bill of Costs dated 27/4/2022, the Applicants herein pounced upon the Advocate. They filed a Bill of Costs which was amended on 28/9/2023. They sought costs of Kshs.8,324,083.93 against the Advocate.
7. The Taxing Officer rendered a Ruling on 5/4/2024. She held that as the Bill of Costs dated 27/4/2022 having been struck off, the value of the subject matter could not be ascertained. It proceeded to tax the instruction fees at kshs.75,000/-. The entire Bill of Costs was taxed at Kshs.100,000/=. A sum of kshs.8,224,083/- was taxed off.

8. Dissatisfied with the Ruling by **Honourable S. Githogori Bett** dated 5/4/2024, the Applicants have filed this Reference to this Court.
9. The Reference is opposed by the Respondent who filed a Replying Affidavit. Parties were directed to file written submissions and also given an opportunity to highlight the same.

Issues for Determination

10. The Court has considered the Reference filed, the Response, the submissions and the oral highlights by Counsel for the parties. The Court frames three (3) issues for determination as follows;
    (i) Whether the Reference was validly filed before the Court.
    (ii) Whether the Taxing Officer erred by finding that the subject matter was unascertainable.
    (iii) Whether the Bill of Costs is a pleading.

Analysis

11. This Reference is filed under the provisions of **Rule 11 of the Advocates Remuneration Order**, which states as follows;

> **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) 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.

(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) far 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.

12. The leading decisions on References is **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board [2005] KECA 325({KLR)**. The Court of Appeal stated as follows;

> *"On a reference to a Judge from the taxation by the Taxing Officer, the Judge will only interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing costs. In Arthur vs. Njeri Electricity undertaking (196) E 497, the predecessor of this Court said at page 492 paragraph 1J:*
>
> > *"Where there has been an error in principle the court will interfere; but questions solely of quantum are recorded as matters with which the Taxing Officer are particularly fitted to deal and the Court will interfere only in exceptional cases."*

i) <u>*Whether the Reference was validly filed before the Court.*</u>

13. The Ruling by the Taxing Master the subject of the reference was delivered on 5/4/2024. By a letter dated 11/4/2024 the Applicants wrote to the Taxing Officer seeking for reasons for the Ruling. The Taxing Officer responded vide a letter dated 3/7/2024. The Reference was filed on 5/7/2024, barely five days later.

14. The Respondent does not object to the time frame for filing the objection. Rather, it objects on the ground that the Notice of

Objection does not identify or specify the items under contest. That the failure to specify the particular item objected to led to vagueness. This, it is argued makes the entire notice of objection invalid. That the subsequent filing of a Reference stating that the objected item is the instruction fees, does not cure the defect.

15. The Court was referred to the decision of the Court of Appeal in **Machira & Co. Advocates v Arthur K. Magugu & another [2012] KECA 245 (KLR)**. The Court of Appeal stated as follows"

> *"Sub-rule (1) requires the party objecting to give notice in writing within 14 days "of the items of taxation to which he objects." As the trial judge correctly found, the Respondents notice of 1st August 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.*
>
> *As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference*

based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.

Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master's decision was received is immaterial and does not avail the Respondents. Under sub-rule (2), time stops running from the date a proper notice is filed, which of course must be within 14 days of taxation, until receipt of the taxing master's reasons for his decision."

16. The Court follows the decision of the Court of Appeal and notes that the Notice of Objection dated 11/4/2024 stated as follows.

"We refer to the Ruling on Taxation delivered on 5/4/2024 in the above matter. We have instructions to request you to kindly furnish us with the reasons for arriving at the decision for purpose of filing a Reference."

17. The Notice contemplated under **Rule 11 (1)** should be clear and specific as to which items of taxation are objected to. The Court of Appeal has emphasised that in the case of **Machira & Co. vs. Arthur Magugu (supra)**.

(ii) **Whether the Taxing Officer erred by finding that the subject matter was unsustainable.**

18. This Court notes that the initial Bill of Costs dated 27/4/2022 which was struck off was drawn for a sum of Kshs.308,608,880.10. The instruction fee was said to relate to;

> *"Receiving instructions from **KenCom Cooperative Savings and Credit Society Limited** to act on their behalf in the provision of legal services with regard to implementation of a low-cost housing project within the 47 counties in the Republic of Kenya with an estimated costs of Kenya shillings 362,223,303,501.09 (equivalent of US$3,622,233,035)."*

19. The Taxing Officer held that this Bill of Costs dated 27/4/2022 having been struck off, the value could not be ascertained. She proceeded to Tax the Bill under Schedule 6 under *"other matters."*

20. The Applicant submits that this was an error in principle that she ought to have considered the value as that of the Kshs.380,608,880.10 set out in the Bill of Costs dated 27/4/2022. This figure was clearly indicated, discernible and ascertainable. The Court was referred to **Limpompo Developers (K) Ltd v Wilfred & Ngugi Associates Advocates [2023] KEELC 16170 (KLR); CM Advocates LLP v Cole (Sued as the administrator of the Estate of Josephine Eleanor Muikobu) [2024] KEELC 537 (KLR); Peter Muthoka & another v Ochieng & 3 others [2019] KECA 597 (KLR); Masore Nyang'au & Co Advocates v Kensalt Ltd [2019] KEELC 2712 (KLR) and Kamunyori & Company Advocates v Development Bank Of Kenya Limited**

[2015] KECA 595 (KLR). That once the Taxing Officer could ascertain the value of the subject matter from the pleadings, that value was to be applied to the Taxation.

21. The Respondent maintains that no such value could be discerned from the pleadings as the Bill of Costs was struck out. It relied on **Joreth Ltd v Kigano & Associates [2002] KECA 153 (KLR).**

22. The Applicants urged the Court to distinguish and not apply the decision of the Supreme Court in **Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR).**

23. The Court is persuaded by the position taken by the Taxing Officer. The Bill of Costs dated 27/4/2022 was struck off. The Taxing Officer could not rely on the values set out in that Bill for purposes of ascertaining the values of the subject matter. That Bill of Costs was never taxed.

24. The Supreme Court in **Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR)** stated as follows;

"Whilst the determination of the value of subject matter from a

judgment and settlement of the parties is quite straight forward, the

determination from pleadings is not. The determination of the value of

the subject matter, may be difficult, for instance, where the

pleadings/suit is struck out at a preliminary stage, such as in this case,

and the value can only be determined/ascertained upon the conclusion

of a trial. In considering this pertinent issue, we make reference to D

Njogu and Co Advocates v Kenya National Capital Authority, HC Misc

Applic No 21 of 2003; [2005] eKLR, wherein the advocate therein acted

for the respondent (who was the plaintiff) in a suit whose claim was for

Kshs 82,706,408.60, together with interest at 30% per annum from

October 18, 2000. On whether the value of the subject matter could be

determined from the pleadings, Ochieng, J, as he then was, held that-

> *"So, whilst I accept that the advocate may have been instructed to sue for not only the principal sum, but also for interest thereon, at a specific rate, that fact alone cannot mean that the claim would be successful. In other words, the court could dismiss the whole claim, or grant part of the principal sum. Alternatively, the court could grant judgement for the whole principal sum, but without interest, or even with interest at rates other than those claimed. Effectively, therefore the value of the subject matter of the suit would remain*

indeterminate until the court passed its verdict on the case." [Emphasis added]

The facts of the instant appeal were not so dissimilar with the above case as the value of the subject matter was disputed by the appellant and the issue was not determinable from the pleadings which were struck out. It is evident that the original plaintiffs did not provide any particulars or the value of the parcels that were allegedly compulsorily acquired by the appellant. This information in our view was necessary as a guide to the Taxing Officer in the assessment of reasonable costs. The original plaintiffs simply pleaded or claimed a sum of Kshs.13,932,000,000 as special damages and indicated that the particulars thereto would be availed during the hearing. Therefore, the value of the subject matter could only be determined upon the conclusion of the trial which never happened.

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."

25. The Supreme Court decision supports the position taken by the Taxing Officer, thus;

"In the event that value of the subject matter of a suit can not be determined from either the pleadings, judgment or settlement by the parties, and the nature of the said suit is not provided for in Paragraph 1 of Schedule VIA, proviso (i) thereunder empowers a Taxing Ofifcer to exercise his/her discretion in assessing instruction fees for such a suit. The proviso in question reads as follows:

> *"... the Taxing Officer may take into consideration other fees and allowances due to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances; ..."*

See Joreth Ltd v Kigano & Associates (supra).

The Court of Appeal in the Peter Muthoka Case found and rightly so, when the aforementioned discretion comes into play as follows:

"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 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." ***[Emphasis added]****"*

(iii) <u>Whether the Bill of costs is a pleading</u>.

26. The Applicants maintained that the Bill of Costs was a pleading for that reason, the taxing master was bound to look at it to ascertain the value of the subject matter. On the other hand, the Respondent maintained that pursuant to the provisions of **Section 2 of the Civil Procedure Act**, a Bill of cost was not a pleading.

27. The short answer to this is that though a Bill of Cost is a pleading used to assess, the Taxing Officer is not bound to refer to it as a pleading for purposes of ascertaining the value of the subject matter. Ideally the value of the subject matter would be discerned from pleadings such as a Plaint, Defence a Counter-Claim, Reply to Defence and Defence to Counter-claim etc. It could also be discerned from other documents filed in the suit such as a valuation report, Affidavits and Witness Statements. The Supreme Court in the **Jude Ragot Case** has made very clear distinctions as to which documents and when such documents are to be relied upon, in ascertain the subject matter value.
28. The upshot is that the Court is not persuaded that there was an error in principle in the manner in which the taxing officer exercised her discretion. It follows that the Court is not convinced that it should interfere with the quantum assessed on the instruction fees at kshs.75,000/-. The appeal is therefore lost.
29. As to costs, the same lie at the discretion of the Court and ordinarily follow the event. The same are awarded to the Respondent.
30. The Reference by of an application by way of a Chamber Summons dated 18/7/2024 is hereby dismissed for lack of merits.
31. The costs of the Reference are awarded to the Respondent.
32. It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI this 22nd day of APRIL, 2026.**

NJOROGE BENJAMIN. K

JUDGE

In the presence of: -

Mr. Wanjohi for the Applicants.

N/A for Miss Matata for the Respondents.

Mr. John Paul - Court Assistant.