

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E202 OF 2023

BETWEEN

BASIL CRITICOS.....

.....PLAINTIFF

AND

TRUST BANK LIMITED(In Liquidation).....1ST

DEFENDANT

METROPOL CREDIT REFERENCE

BUREAU LIMITED.....2ND

DEFENDANT

RULING

Introduction & Background

1. By the Chamber Summons dated 17th December 2024, the Plaintiff is challenging the decision of the Deputy Registrar delivered on 5th December 2024 regarding the taxation of the 2nd Defendant's ("the Defendant") Party and Party Bill of Costs dated 29th July 2024 after the Plaintiff's suit was struck out. The Deputy Registrar taxed the Bill of Costs at Kshs. 284,039.00 and the Plaintiff is not satisfied with how Items Numbers 1, 2, 5 and 12 in the Bill of Costs on

instruction fees, getting up and service fees were taxed and seeks that the same be set aside and taxed afresh either by the court or another taxing officer.

2. The application is supported by grounds on its face and the supporting affidavit of the Plaintiff's advocate, Lawrence Ongeru sworn on 17th December 2024. It is opposed by the Defendant through his replying affidavit of its Dispute Administration Manager, Pharis Kariuki Kiama sworn on 22nd October 2025. The parties have also supplemented their arguments by way of written submissions which I have considered together with the pleadings and I will be making relevant references to the same in my analysis and determination below

Analysis and Determination

3. From the pleadings and submissions, the court is being called to determine whether the Deputy Registrar erred in the taxation of the Bill of Costs in respect of the items on instruction fees, getting up fees and service fees. As submitted by the Defendant, in a reference to the court from the taxation by the Taxing Officer, the court will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. 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 (see **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] KECA 325 (KLR)**)

4. This was reiterated in **Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others [2006] KEHC 3504 (KLR)** where Ojwang’ J., (as he was then) held as follows:

The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of

course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

5. **Schedule 6(A)** of the **Advocates Remuneration Order** (“the **Order**”) provides for Party-Party costs, that is, the manner in which costs awarded to a successful party as against another party therein should be assessed/computed/taxed. The essence of such costs is to ensure a successful litigant/party receives a fair reimbursement/recompense for the costs/expenses he/she has had to incur on account of a suit (see **Outa v Odoto & 3 others (Petition 6 of 2014) [2023] KESC 75 (KLR)**).

6. On instruction fees, **Schedule 6(A)(1)** of the **Order** provides in part as follows:

“ 1. Instruction fees

Subject as hereinafter provided, the fees for instructions shall be as follows—

...

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. To sue in any proceedings (whether commenced by
plaint, petition, originating summons or notice of motion)*

in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and -

...

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 - ..."

7. From the above, it is common ground that the subject matter of the suit in issue should be identified first, and then the value thereof determined and the said value of the subject matter can be determined from the pleading, judgment or settlement of the parties (see **Joreth Ltd v Kigano & Associates (Civil Appeal 66 of 1999) [2002] KECA 153 (KLR)**).
8. In this case, it is common ground that the suit was struck out on a Preliminary Objection raised by the 1st Defendant and that none of the Defendants filed a defence. As submitted by the Plaintiff, the

Supreme Court, in **Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR)** held as follows in respect of a matter that has been struck out at a preliminary stage:

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.

.....

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. Be that as it may, where the value of the subject matter can be determined, the Taxing Officer is required to set out the basic fees prescribed under Schedule VI Part A. Similarly, where the Taxing Officer assesses instruction fees based on the nature of a matter as stipulated in Paragraph 1, for instance like, bankruptcy proceedings or matrimonial causes she/he is required to set out the basic fees prescribed thereunder.

.....

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 Officer 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; ...”

9. In this case, the Deputy Registrar found that the value of the subject matter was ascertainable from the pleadings as Kshs. 664,528.55 and then proceeded to award Kshs. 200,000.00 as instruction fees. I find this to be an error of principle because as the Supreme Court stated above, a claim struck out at the preliminary stage does not automatically become the value of the subject matter. The Deputy Registrar treated the pleaded figure of Kshs. 664,528.55 as if it were an ascertained and determined value and proceeded as if the amount was a proven fact, which it was not. She assumed ascertainability without interrogating whether the claim could realistically be valued at that figure.

10. Furthermore, the apex court in **Kenya Airports Authority(supra)** reaffirmed the principle from **First American Bank of Kenya Ltd v Shah & 2 others (Civil Suit 2255 of 2000) [2002] KEHC 1277 (KLR)** that "*Where the value of the subject matter can be determined, the Taxing Officer is required to set out the basic fees prescribed under Schedule VI Part A. ... It is after setting out the basic fees that the Taxing Officer can exercise his/her discretion to increase or reduce the said basic fees.*" In this case, the Deputy Registrar did not set out the basic fee and jumped straight to an award of Kshs. 200,000.00 without stating what the basic fee would be under **Schedule 6(A)(1)(a)** for a value of Kshs. 664,528.55, which if she did, would be Kshs. 65,000.00 as set out therein and not Kshs. 200,000.00. She also did not explain why she was departing from that basic fee and did not provide the cogent and specific reasons required for such a departure as demanded in **Republic v. Minister for Agriculture(supra)** above.
11. The correct path to have been followed by the Deputy Registrar would have been to determine whether the value of the subject matter is ascertainable from the pleadings. Given that the suit was struck out at a preliminary stage and no defence was filed, the

pleaded sums were never proved, particularized with evidence, or determined by judgment. Therefore, the value of the subject matter for taxation purposes could not be ascertained from the pleadings and as such, under the proviso to **Schedule 6(A)(1)**, she was empowered to exercise discretion, taking into account the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances

12. The Deputy Registrar should then have recognized that the Defendant filed only a Replying Affidavit and no defence, that the suit was struck out on the 1st Defendant's Preliminary Objection, noted that the Defendant's role was limited to opposing an application, not defending the main suit, considered the appropriate fee under **Schedule 6(A)(1)(c) (viii)**, set out the basic fee therein, which is Kshs. 5,000.00 and if she felt this sum was too low, provide specific, detailed reasons why a higher figure would be justified.
13. As the Deputy Registrar misapplied the Supreme Court's holding in **Kenya Airports Authority(supra)** treating a struck-out, unproven claim as the conclusive value of the subject matter, failing to set out the basic fee as required by **First American**

Bank(supra) and affirmed by the Supreme Court and awarding Kshs. 200,000.00 without a proper foundation or cogent reasons, her decision on instruction fees cannot stand and the award is set aside.

14. On getting up fees, the applicable provision of law is set out under **Para. 2** of **Schedule 6A** of the **Order** where getting up fees is one-third of the instruction fees and chargeable once the matter has been confirmed for hearing. In this case, no defence was filed, no issues for trial were joined, the matter was determined by way of written submissions on a Preliminary Objection, there was no trial, no *viva voce* evidence and no witness preparation (see **S O Arama v Family Bank Limited [2022] KEELC 1194 (KLR)**). Consequently, the sum of Kshs. 66,667.00 awarded as getting up fees is struck off completely.
15. On service fees, I am inclined to agree with the Defendant that the **Order** does not restrict service to physical service only and that electronic service still incurs costs such as internet, electricity and time. I find no reason to interfere with this award by the Deputy Registrar.

Conclusion and Disposition

16. The upshot is that the Plaintiff's reference dated 17th December 2024 is allowed to the extent that the ruling dated 5th December 2024 is set aside and the Bill of Costs dated 29th July 2024 in respect of item number 1 on instruction fees only is remitted for re-taxation before another Deputy Registrar of the court other than Hon. Chembeni Adisa. The Plaintiff is awarded costs of the reference assessed at Kshs. 15,000.00 to be set off from the taxed Bill of Costs.

DATED SIGNED AND DELIVERED virtually at NAIROBI this

8th DAY of MAY 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. N/A for the Plaintiff
2. Ms. Achola holding brief for Mr. Nyasimi for the Defendant/Applicant
3. Amos- Court Assistant

ORIGINAL