



Chesang (Personal Representative of the Estate of Nathan Chesang Moson) v Grand Creek LLC & another (Civil Application 397 of 2018) [2025] KECA 208 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KECA 208 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 397 OF 2018**

**M NGUGI, JA
FEBRUARY 7, 2025**

BETWEEN

JOSEPHINE CHELANGAT CHESANG (PERSONAL REPRESENTATIVE OF THE ESTATE OF NATHAN CHESANG MOSON) APPLICANT

AND

GRAND CREEK LLC 1ST RESPONDENT

JOHN KRISTLER COORS 2ND RESPONDENT

(Being a reference against the ruling and order of the Deputy Registrar, Hon. L.D. Ogombe delivered on 28th May 2024 in respect of the respondents' party and party bill of costs dated 26th October, 2023)

RULING

1. By the application dated 4th June 2024, the applicant asks this Court to set aside or review downwards the award by the Deputy Registrar of this Court, in the ruling dated 28th May, 2024, of Kshs 1,000,000 to the respondents on item 1 of the respondents' Bill of Costs dated 26th October 2023; and to tax item 1 of the said Bill of Costs.
2. The application has been brought under Article 159 of the Constitution of Kenya 2010; section 3, 3A, and 3B of the Appellate Jurisdiction Act; rules 116 and 117 of the Court of Appeal Rules, 2022; and rules 11(1) and (2) of the Advocates Remuneration Order, 2009.
3. The application is based on the grounds on its face and is supported by an affidavit sworn by Josephine Chelangat Chesang, the administrator of the estate of the appellant/applicant (deceased). The applicant avers that she was dissatisfied with the decision of the Deputy Registrar to award instructions fees at Kshs. 1,000,000 as the Deputy Registrar erred in principle in failing to take into account the provisions of paragraph 9 (2) of the Third Schedule to the Court of Appeal Rules, 2022



which expressly stipulates the factors that ought to be considered by a taxing officer in determining the fees to be allowed for instructions to appeal or to oppose an appeal.

4. The applicant contends that the Deputy Registrar erred in principle in failing to take into account the nature of the appeal as required under paragraph 9(2) of the Third Schedule of the Court of Appeal Rules; and failed to take into account that the appeal emanated from dismissal of an application for review filed at the trial court; erred in principle in failing to consider the importance and difficulty of the appeal as required under paragraph 9(2) aforesaid; that the Deputy Registrar erred in principle in failing to consider the importance and difficulty of the appeal, which could be discerned from the issues determined by the judgment of this Court dated 6th November 2020, which were not novel issues and included the question whether the judgment dated 25th January 2013 should have been reviewed and set aside as prayed in the application dated 25th February 2013.
5. The applicant asserts that the appeal was not complex since the review application was hinged on only one ground which was sufficient reason and exercise of the court's discretion to award the said prayer for review; and that the nature of the proceedings was straight forward. The applicant further asserts that the Deputy Registrar erred in principle by failing to apply the settled principle 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; and erred in principle in failing to properly apply paragraph 9(2) of the Third Schedule of the Court of Appeal Rules by failing to take into account the amount involved in the appeal or value of the subject matter.
6. The applicant notes that the Deputy Registrar noted that the award before the High Court was Kshs 31,485,615 but should have married the principles of taxation that you not only consider the award but the nature of the appeal while assessing the instruction fees. It is the applicant's case that an award of Kshs. 100,000 as instructions fees would be sufficient since the appeal was straightforward. Accordingly, in the applicant's view, the Deputy Registrar failed to exercise her discretion reasonably and fairly by failing to apply the correct and relevant principles in determining the instruction fees and therefore arrived at an erroneous, manifestly high and excessive instruction fees of Kshs. 1,000,000 in relation to the work done, the time taken and the complexity of the matter.
7. In submissions dated 9th July 2024, the applicant reiterates her averments and the arguments set out in the grounds in support of the application. She further cites decisions of this Court, inter alia Premchand and Raichand v Quarry Services (No.3) 1972 EA 162 and First American Bank of Kenya v. Shah & Others [2002] EA 64 in which the court cautioned taxing masters and judges against allowing costs to rise to such levels as to deprive all but the wealthy of access to justice.
8. The applicant also cites the case of Outa v Odoto *Et 3 others (Petition 6 of 2014)* [2023] KESC 75 (KLR) (Civ) (22 September 2023) (Ruling) and Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission and 2 others [2018] eKLR in support of her contention that the issues in the appeal were not complex and the instructions fees of Kshs 1,000,000 are excessive, punitive, and unreasonably high and warrant reduction by this Court.
9. The respondents oppose the reference by an affidavit sworn by John Kristler Coors on 7th July, 2024. They also filed submissions dated 5th July, 2024. The respondents argue that the instructions fees of Kshs. 1,000,000 awarded by the Deputy Registrar are properly charged to scale; and that under paragraph 6 and 8 of the ruling, the Deputy Registrar took into account all the principles of taxation as envisioned under paragraph 9(2) of the Third Schedule to this Court's Rules and the case of Joreth Ltd v Kigano & Associates Civil Appeal (2002) 1 EA 92.



10. It is the respondents' case that the Deputy Registrar clearly demonstrates her reasons by appreciating the nature of the appeal, importance thereof, the interests of the parties and the general conduct of the proceedings; that she analysed the judgment of the High Court in the main suit in order to determine the correctness of the averments made by the applicant; that she did not rely solely on the value of the subject matter but appreciated all applicable principles.
11. Having considered the application and the response thereto, the ruling of the Deputy Registrar and the submissions of the parties, I find that the sole issue for determination is whether the Deputy Registrar properly exercised her discretion in taxing item 1 of the respondents' bill of costs. It is well settled that a court will not interfere with the exercise of a taxing master's discretion except in exceptional cases where it appears that the sum allowed is manifestly excessive or so low, having regard to the nature of the suit or proceedings, that the Court is driven to the conclusion that the taxing master must have acted on a wrong principle- see *Arthur v Nyeri Electricity Undertaking* [1961] EA 497 and *Kipkorir, Tito & Kiara Advocates v. Deposit Protection Fund Board* [2005] eKLR.
12. What emerges from these decisions is that where there has been an error in principle, the court will interfere. However, questions solely of quantum are regarded as matters with which taxing officers are particularly fitted to deal, and the court will interfere only in exceptional cases. See also *Joreth Limited v. Kigano & Associates* (supra).
13. With respect to assessment of costs, rule 9(2) of the Third Schedule to this Court's Rules provides that:

The fees to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs, and all other relevant circumstances.
14. In its decision in *Joreth Limited vs. Kigano and Associates* (supra), the Court laid down the applicable principles on a taxation as follows:

“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 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.”
15. Further, in *Peter Muthoka vs. Ochieng and 3 others* [2019] eKLR this Court stated:

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. Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement. 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.”

16. In the present case, the taxing officer was dealing with a bill of costs following a dismissal of an appeal challenging a ruling of the High Court declining to review its judgment. In the judgment the subject of the review application, the High Court had found for the respondent in a claim for USD\$ 203,133, the equivalent of Kshs. 31,485,615. In assessing the instructions fees, the taxing officer stated as follows:

“7. The value of the subject matter can be ascertained from the Judgment of the High Court which is as submitted by the Respondent in the sum of Kshs. 31,485,615. The Appellant sought to review this Judgment and his application was dismissed in the High Court. The Court of Appeal dismissed the appeal seeking to review the ruling and order dismissing the review application. Accordingly, the Judgment stands and the value is as stated above.”

17. Having established what she considered the value of the subject matter, the taxing officer went on to analyse the principles against which she would arrive at the instruction’s fees:

8. As required under the Rules, I have also considered the nature of this appeal, importance thereof, and interests of the parties, the general conduct of the proceedings before this court, and all other relevant factors under the Rules.”

18. She then went on to assess the instructions fees at Kshs. 1,000,000. The applicant contends that the taxing officer erred in her assessment, asserting that a sum of Kshs. 100,000 would have been adequate. I find, however, that the taxing master properly addressed her mind to the applicable principles in assessing the instructions fees. In the review the subject of appeal, the applicant was seeking to set aside a judgment in which an ascertained amount had been awarded to the respondents. The value of the subject matter, what was at stake for the parties had the application for review succeeded in the High Court, or before this Court on appeal, was the amount adjudged by the trial court to be due to the respondents. This was the proper basis for assessing the instructions fees on the appeal.

19. Accordingly, I find that the taxing officer properly exercised her discretion in assessing the instructions fees. I therefore find the reference dated 4th June 2024 against the taxation of the respondents’ bill of costs to be without merit, and it is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

