



**Gathuru v Nyamboki & another (Civil Appeal 184 of 2004)
[2025] KECA 230 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 230 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 184 OF 2004
M NGUGI, JA
FEBRUARY 7, 2025**

BETWEEN

PETER MUJUNGA GATHURU APPELLANT

AND

HARUN OSORO NYAMBOKI 1ST RESPONDENT

ESTATE BUILDING SOCIETY 2ND RESPONDENT

*(Being a reference to a single judge from the ruling of the
taxing officer (Hon. L. D. Ogombe) dated 24th October, 2024)*

RULING

1. By the letter dated 28th October 2024, learned counsel for the applicant/1st respondent has referred the ruling of the Deputy Registrar dated 24th October 2024 for consideration under rule 117 of this Court's Rules. The reference relates to the taxation of the respondent/appellant's party and party bill of costs dated 9th May, 2024, following a successful appeal to this Court, judgment in which was delivered on 30th January 2015.
2. In the bill of costs, the respondent sought costs of Kshs.1,889,220.08, which were taxed down to Kshs.1,066,012.50. The item in contention was item 1, instructions fees. The respondent sought Kshs. 1,500,000 while the applicant asserted that Kshs. 30,000 was sufficient.
3. In his letter seeking a reference, the applicant contends that the amount taxed is manifestly excessive; that the value of the subject matter of the appeal was Kshs. 150,000 for 2½ acres, not the value of Kshs. 110,000,000 determined in the year 2019 after the decision was delivered on 30th January, 2015; that no complex issue was raised on appeal as the applicant was seeking specific performance of the contract; and that the appeal was heard ex parte as the 1st respondent did not participate in the appeal due to failure by the appellant to serve him with written submissions.



4. The applicant has filed submissions dated 29th November 2024 in support of his application. The respondent appellant filed submissions dated 3rd December 2024 in opposition to the reference.
5. I have read and considered the reference, the ruling of the taxing officer, the respective submissions of the parties, and the authorities cited in support of their respective positions on the matter. I note that there is no dispute with respect to the principles applicable in a taxation of costs before the Court.
6. Rule 117 of this Court's Rules provides that a person dissatisfied with a decision of the Registrar in his or her capacity as taxing officer may require any matter of law or principle to be referred to a judge for determination, and the judge shall determine the matter as the justice of the case may require. Rule 117(2) states that for the purpose of sub rule (1), any decision extending or refusing to extend time for the lodging of a bill of costs, or any exercise by the Registrar of the over-riding discretion given the Registrar by paragraph 12 of the Third Schedule, shall be deemed to involve a matter of principle.
7. It is settled law that on a reference, this Court will not interfere with the decision of the registrar on a taxation except in exceptional cases where it appears that the sum allowed is manifestly excessive or low, having regard to the nature of the suit or proceedings, so as to lead the Court to the conclusion that the taxing officer must have acted on a wrong principle in assessing the costs-see *Kipkorir, Tito & Kiara Advocates v. Deposit Protection fund Board* [2005] eKLR; *Joreth Limited v. Kigano & Associates* [2002] eKLR and *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, In this latter case, the predecessor of this Court observed 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 intervene only in exceptional cases.”

8. In this case, in arriving at the amount of costs now under challenge, the taxing officer considered paragraph 9(2) of the Third Schedule to the Rules of this Court and the decision in *Joreth Limited* (*supra*) and stated as follows:

“I have considered the nature of dispute. This was a land dispute involving the property registration number LR 12767/11. According to the Appellant, the property was valued at Kshs. 110,000,000 in 2019 while the 1st Respondent submitted that the value was Kshs. 150,000 being the purchase price of the suit property. I have been invited to look at the judgment for the value of property in dispute. From the Judgment of the Court, it is indeed stated therein that the purchase price in 1983 was Kshs. 150,000. However, the court being cognizant of the fact that the value of the property must have appreciated over time ordered that in the event that the suit land has been transferred to a third party, the appellant would be refunded the current market value of the said property to be determined upon valuation. In the circumstance, I am satisfied that using the purchase price of Kshs. 150,000 which was paid in 1983, would be manifestly on the lower side. The value of the property has appreciated over time. I have also considered the other required criteria under the Court of Appeal Rules: the nature, importance and difficulty of the appeal; the interest of the parties; the general conduct of the proceedings; all other relevant factors. For reasons given above, and in exercise of my discretion I hereby award Kshs 1,000,000 as instruction fees on the appeal which I deem sufficient. Balance is taxed off.”



9. Rule 9 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.

10. In *Joreth Limited* (supra) this Court laid the principles to be applied by the taxing master in assessing costs in the following terms:

“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.”

11. Further, while determining the question of the value of the subject matter in assessing the instructions fees, this Court in *Peter Muthoka vs. Ochieng and 3 others* [2019] eKLR stated as follows:

“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.” (Emphasis added).

12. Having considered the reasoning of the taxing officer and the principles applicable on taxation as they emerge from our Rules and judicial precedents set out above, I find no basis to interfere with the decision of the taxing officer. The applicant contends that the value of the subject matter ought to have been based on the 1983 purchase price, being Kshs. 150,000. I note that in its judgment, however, this Court specifically ordered that in the event that the suit property had been transferred to a third party, the appellant/respondent be refunded “the current market value of the said property to be determined upon valuation by a competent licensed land valuer...”. The suit property was valued in 2019 at Kshs. 110,000,000. This was the value of the land as adjudged by the Court, and on which the taxing officer based the instructions fees, properly so, in my view.

13. Accordingly, I find no merit in the reference against the taxation of the appellant/respondent’s bill of costs dated 9th May 2024. The reference dated October 28, 2024 is accordingly dismissed with costs to the respondent.

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.

