



REPUBLIC OF KENYA



**Chande & another v Kwale & 3 others (Civil Appeal (Application)
24 of 2020) [2025] KECA 688 (KLR) (11 April 2025) (Ruling)**

Neutral citation: [2025] KECA 688 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 24 OF 2020
LA ACHODE, JA
APRIL 11, 2025**

BETWEEN

ALI KHAMIS CHANDE 1ST APPELLANT

NASRA SHARIFF MOHAMED 2ND APPELLANT

AND

KADHI'S COURT KWALE 1ST RESPONDENT

DAVID KANDIE 2ND RESPONDENT

RUTUNE LTD 3RD RESPONDENT

LAND REGISTRAR KWALE 4TH RESPONDENT

*(Being an application for review of a ruling on taxation (Adika,
DR) dated 29th November, 2023 in Civil Appeal No. 24 of 2020)*

RULING

1. In a ruling dated 29th November, 2023 the Taxing Officer assessed the Appellants' party and party costs dated 22nd June, 2023, in Civil Appeal No. 24 of 2020 at Kshs. 1,249,025, in favour of Ali Khamis Chande and Nasra Shariff Mohamed the 1st and 2nd Appellants herein. Disputing the ruling by the Taxing Officer, David Kandie the 1st Respondent filed this application dated 4th December 2023 under rule 117(1) of the Court of Appeal Rules 2022 seeking orders:
 - i. That the ruling on the taxation be set aside and the matter be remitted for re- taxation
 - ii. That the cost of this application be in the cause.
2. The application is premised on the grounds set out on its face and is supported by the affidavit sworn by the 1st Respondent on 4th December 2023.



3. The 1st Respondent deposed that the Taxing Officer proceeded to tax the bill of costs without considering his submissions. That he failed to give reasons on how he arrived at the figure of Kshs.1,249,025 for item No. 1 on the instructions fees, despite the fact that there is a valuation report on record showing the value of the suit property as Kshs. 1 million. That he erroneously assessed instruction fees based on the value of the subject matter at Kshs. 40 million as opposed to Kshs.1 million.
4. It was deposed that Nasra Sharrif Mohamed was not a party at the High Court. She made an application dated 14th May, 2019 for joinder into the proceedings as a Third Party. Further, that the Taxing Officer taxed the bill of costs on the basis of the Court of Appeal Rules, 2022 instead of the Court of Appeal Rules of 2010, since the appeal was filed in the year 2020.
5. Messrs Ondabu & Co. Advocates, in submissions dated 30th September 2024, filed on behalf of the 1st Respondent stated that the Taxing Officer ignored their submissions and the actual subject matter and proceeded to assess the Appellants' party and party bill of costs at Kshs.1,249,025. Counsel pointed out that despite the appeals being consolidated, each dealt with different property with different values. That the consent from Msambweni Land Control Board with regard to the transfer of the property, declared the value of the said property to be Kshs.1 million.
6. Counsel submitted that parties are bound by their pleadings set out in the Record of Appeal as stated in *Joreth Limited V Kigano & Associates (2002) eKLR*. That the property value having been presented as Kshs.1 million, it is virtually impossible to justify party and party costs of Ksh.1, 249, 025, an amount that is higher than the subject matter.
7. Counsel relied on the case of *First American Bank Ltd V Shah & another (2002] 1 EA 64* to urge that this Court can interfere with the Taxing Officer's decision on taxation if it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive.
8. Counsel asserted that the threshold required to have the bill of costs re-assessed had been satisfied. He urged the Court to come to the conclusion that the Taxing Officer erred in principle, set aside the ruling dated 29th November 2023 and refer the party and party bill of costs dated 22nd June 2023 back for taxation by the same, or another Taxing Officer, with appropriate directions on how it should be done.
9. In rebuttal, the firm of Messrs Mungai Kamau & Co. Advocates filed grounds of opposition and also filed submissions dated 8th November 2024 and urged that the applicable law and rules that provide for reference of a bill of costs are the *Advocates Act* and the Court of Appeal Rules, 2022. Therefore, the application is fatally incurable as it violates rule 11 of the *Advocates Act*.
10. Counsel contended that according to rule 11(3) of the *Advocates Act*, only an Appeal from the High court should be filed in the Court of Appeal and the reference is therefore, filed in the wrong forum. That the Taxing Officer's decision ought to have been challenged in the High Court, since this Court can only exercise appellate jurisdiction from the decision of a judge and therefore lacks jurisdiction to determine this matter.
11. It was also argued that the 1st Respondent did not serve 14 days' notice on the Taxing Officer, notifying him of the items objected to, and to specifically state and itemize them as required under rule 11(1) of the *Advocates Act*.
12. Counsel asserted that the Taxing Officer properly exercised his discretion in awarding the party and party costs guided by the recent valuation report for the property dated 2nd July 2023 which provided the actual market value of the subject properties as Kshs. 33,000,000. He invoked rule 117(1) of this



Court's rules to urge that reference entails matters of law and not fact and rule 117(3) to argue that a party shall not file a reference on the question of quantum only.

13. Counsel posited that assessment of an award on quantum is purely the province of the Taxing Officer. The High Court or Court of Appeal can only interfere with the award if it is grossly exaggerated, or there is an error in principle on the award and the 1st Respondent has failed to demonstrate either of the above.
14. It was submitted that according to Schedule 3 paragraph 9(2) of the Court of Appeal Rules, the Taxing Officer has the discretionary powers to award any sum considered reasonable on instruction fees. That the three consolidated appeals filed separately by the Respondent raised complex questions of law and fact. Further, that the Taxing Officer in his ruling took into consideration the value of the properties and the complexity of the consolidated cases to award the party and party costs at Kshs.1,249,025. Like the 1st Respondent, the Appellants too placed reliance on the case of Joreth Limited (supra).
15. Counsel contended that the 1st Respondent failed to demonstrate how the Taxing Officer erred in law and, or principle, in arriving at the award since a Judge can only interfere with the award, if there was an error in principle, or the discretion of the Taxing Officer was improperly exercised. Moreover, the value of the subject matter was determined by an expert report which the Respondents did not counter and it guided the Taxing Officer in making the determination.
16. Counsel relied on the case of Peter Muthoka & Another Vs Ochieng & 3 Others [2019] eKLR to support his argument on the basis of determining subject matter value for purposes of instruction fees. He referred the Court to the case of Mbogo v Shah [1968] EA 93 for the circumstances in which it would be just and reasonable to set aside or vary the judgment if necessary, upon terms to be imposed. He also cited the case of Non-Governmental Organization Board V EG & 5 Others (Petition (Application) 16 of 2019) [2023] KESC 102(KLR) (CIV), where the grounds to be considered in setting aside a certificate of costs are to be found.
17. Finally, counsel submitted that the Appellant failed to justify the inordinate delay of 9 months in serving the application after filing it. That failure to serve the application within 3 days was fatal. That the application therefore, has no merit and should be dismissed with costs to them.
18. I have considered the reference, the affidavits on record, the submissions of the parties and the law applicable. The singular issue for determination is whether the 1st Respondent has met the threshold to justify the Court's interference with the taxing officer's award of party and party costs at Kshs.1,249,025.
19. An application under rule 117(1) of the Court of Appeal Rules is required to be served upon the parties within 3 days of filing and one of the issues raised by the Appellants herein is that they were not served until 9 months later after filing. However, it is instructive that the Appellants did not move to have the application struck out. I have therefore considered the application on its merit.
20. With regard to the reference, rule 117 (1) and (3) of the rules of this Court provide that:
 - “(1) A person who is 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 the judge's decision and the judge shall determine the matter as the justice of the case may require.

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2. A person who contends that a bill of costs as taxed is, in all the circumstances, manifestly excessive or manifestly inadequate, may require the bill to be referred to a judge and the judge shall have power to make such deduction or addition as will render the bill reasonable and except as provided in this sub rule, there shall be no reference on a question of quantum only.
21. The grounds to be considered in setting aside a certificate of costs were laid down in Non-Governmental Organization Board (supra) by the Supreme Court as follows:

“A certificate of taxation will be set aside, and a single Judge can only interfere with the taxing officer’s decision on taxation if;

 - a. there is an error of principle committed by the taxing officer;
 - b. the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy; (and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).
 - c. the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and
 - d. the award proposed is so far as practicable, consistent with previous awards in similar cases. To these general principles, I may add that;
 - i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,
 - ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,
 - iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer’s shoes.”
22. The 1st Respondent claims that according to an expert report, the property the subject matter of the suit, is valued at Kshs 1 million. Therefore, the amount of Kshs.1,249,025 is higher than the subject matter and is unjustifiable. The Appellants on the other hand state that the Taxing Officer did not err in principle. He considered the three consolidated appeals filed separately by the Respondents and the complexities of the questions of law and fact in the ruling.
23. Computation of the quantum of costs in a suit is a matter that is entirely under the ambit of the Taxing Officer, who is best suited to determine it. A judge will not interfere with the discretion of the Taxing Officer where the dispute is based only on quantum, unless it is shown that in all the circumstances, the award is manifestly excessive or inadequate.



24. This Court has in numerous decisions cautioned against interference with the Taxing Officer's decision on a reference before a single judge. In *Kipkorir, Too & Kiara Advocate v Deposit Protection Fund Board* (2005) eKLR the Court stated as follows:

“On a reference to a judge from the taxing by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”

25. Earlier in the case of *First American Bank Ltd* (supra) the Court adverted to what amounts to an error of principle thus:

“This 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 so manifestly excessive as to justify an inference that it was based on an error of principle... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter the amount or value of this subject matter involved, the interest of the parties. The general conduct of proceedings and any direction by the trial judge...not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him.”

26. The criteria that guides a Taxing Officer in awarding costs in this Court reposes in rule 9(2) of the Third Schedule of the Court of Appeal Rules, and states as follows:

- “(1) The fee to be allowed for instruction to make, support or oppose any application shall be such sum as the taxing officer shall consider reasonable but shall not be less than one thousand shillings.
2. 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
3. The sum allowed under subparagraph (2) shall include all works necessary and properly done in connection with the appeal and not otherwise chargeable, including attendances, correspondence, perusals, and consulting authorities.”

27. The discretion of a Taxing Officer is a judicial one. It is to be judicially and judiciously exercised. It is not to be exercised whimsically or capriciously according to personal inclination. The matters considered by the taxing officer should be apparent from the reasons given in the decision. This is the indicator whether or not the Taxing Officer exercised the discretion properly.

28. The parameters for consideration by the Taxing Officer are not limited. In *Joreth Limited* (supra) to which both parties referred, the Court stated 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 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.”

29. Where the Taxing Officer has properly considered the parameters applicable and exercised his discretion, the Court is not entitled to upset a taxation merely because it is of the opinion that the award is too high or too low. In the case of Premchand Raichand Limited and Anor vs Quarry Services of East Africa Limited and Anor, [1972] 562 the Court adverted to this issue in the following manner:

“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, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

30. The basis for determining subject matter value for purposes of instruction fees is dependent on the stage at which the fees is taxed. If taxation comes before judgment, the pleadings will form the basis for determining subject value. If however, judgment has been entered, recourse will be to the judgment since it determines conclusively the value of the subject matter. A claim, no matter how pleaded, gets its true value from the judgment of the court. See Peter Muthoka and Another Vs Ochieng & 3 Others [2019] eKLR).

31. The Taxing Officer has discretion to increase or reduce instruction fees after considering the basic fee. In the case of Kamunyori & Company Advocates Vs. Development Bank of Kenya Ltd, Civil Appeal No. 206 of 2006 the Court held that where the sum awarded on taxation is so manifestly excessive, an error of Principle can be inferred. The Court stated as follows:

“Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error in principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of Principle can be inferred. If instruction fee is arrived at on the wrong Principles, it will be set aside.”

32. I have considered the record and note that contrary to the 1st Respondent's assertion, the Taxing Officer considered his submissions and gave sufficient reasons in each paragraph, on how he arrived at the cost of the item in the ruling, considering the criteria. I am therefore satisfied that he made the award of the party and party costs based on the market value of the subject properties, guided by the recent valuation report for the property dated 2nd July 2023, which provided the market value. He also took in to consideration the complexities of the consolidated cases.

Consequently, the reference before me is found to have no merit and is dismissed in its entirety and costs are awarded to the Appellants.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025

L. ACHODE

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JUDGE OF APPEAL

