



**Muchai v Muchai & another (Civil Appeal (Application)
279 of 2019) [2025] KECA 667 (KLR) (11 April 2025) (Ruling)**

Neutral citation: [2025] KECA 667 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 279 OF 2019
SG KAIRU, JA
APRIL 11, 2025**

BETWEEN

NAOMI WANGUI MUCHAI APPLICANT

AND

JOHANNA MWAURA MUCHAI 1ST RESPONDENT

MARY WANJIRU MUCHAI 2ND RESPONDENT

(Being an application from the Ruling on Taxation of the Court of Appeal of Kenya at Nairobi (J. Wambilyanga, DR.) dated 15th November 2024 in Civil Appeal No. 279 of 2019)

RULING

1. In a ruling on taxation dated 15th November 2024, Hon. J. N. Wambilyanga, the Deputy Registrar of the Court in her capacity as taxing officer taxed the applicant's Bill of Costs at Kshs. 1,066,695.00. Dissatisfied, the applicant, by a letter dated 21st November 2024, applied under Rule 117 of the Court of Appeal Rules, to refer the matter to a judge on grounds that the taxing officer considered the wrong principle in determining the instruction fee, which was assessed and awarded in the amount of Kshs.1,000,000.00.
2. I heard counsel on the reference on 22nd January 2025. Mr. Andrew Wandabwa learned counsel appeared for the applicant. Miss. Muthee learned counsel appeared for the respondent. Counsel orally highlighted their respective written submissions.
3. Counsel for the applicant submitted that in assessing the instruction fee, the taxing officer did not consider the value of the subject matter and did not explain the criteria she applied in arriving at the award of instruction fees in the amount of Kshs.1,000,000.00; that the taxing officer made an error of principle by relying on one principle that costs should not rise to a level too high to confine access to justice.



4. Citing decisions in *Nairobi Bottlers Limited vs. Mark Ndumia Ndungu & Another*, SC Petition (Application) No. E024 of 2023 together with applications Nos. E030, 034 & E038 of 2024 [2024] KESC75 (KLR); *Joreth Limited vs. Kigano and Associates* [2002] 1 EA 92; and *First American Bank of Kenya vs. Shah and Others* [2002] EA 64, Mr. Wandabwa submitted that a single judge is entitled to interfere with the decision of a taxing officer, where, among other considerations it is shown there is an error of principle or where the award is shown to be manifestly excessive or manifestly inadequate.
5. It was urged that the instruction fee the applicant had proposed in the amount of Kshs. 121,565,836.00 is based on the value of the estate of approximately Kshs. 3.5 billion, which the taxing officer ought to have considered.
6. In opposition, Miss. Muthee submitted that the taxing officer properly exercise her discretion in assessing the instruction fee, and there is no basis for the judge to interfere with that decision. It was submitted that the applicant did not establish that the taxing officer misapprehended principles on taxation or used the wrong principles that resulted in an erroneous decision.
7. Citing decisions in the case of *R. Billing & Co. Advocates vs. Kundan Singh Construction Limited (Now KSC International Limited)* [2020] KECA 544 (KLR) as well as the case of *Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board, Nbi C.A. No. 220 of 2004* [2005] eKLR, Miss. Muthee submitted that the court can only interfere with a decision of a taxing officer where there is an error of principle “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”.
8. It was submitted further that the argument that the taxing officer should have considered the value of the deceased’s estate, estimated at Kshs.3.5 billion, as a basis of computing instruction fee is misplaced. The subject matter of the appeal, counsel urged, was not the estate of the deceased, but the question of validity of a power of attorney.
9. Counsel concluded by urging the Court to find that the applicant has failed to make out a case to interfere with the decision of the taxing officer and that the reference should be dismissed with costs.
10. I have considered the reference, the replying affidavit and the submissions. As the Supreme Court of Kenya stated in *Kenya Airports Authority vs. Otieno Ragot and Company Advocates (Petition E011 of 2023)* [2024] KESC 44 (KLR), there is a rationale in the prescription and regulation of litigation costs underpinning the Advocates Remuneration Order. The same rationale holds true, in my view, regarding Part V of the Court of Appeal Rules relating to fees and cost. In that case, the Supreme Court explained that:

The overall objective is to prevent exploitation of parties to a suit/transaction with regard to remuneration of advocates and compensation of costs or expenses incurred by a successful party as well as maintain the standards of the legal profession. Differently put, it is to ensure that fees/costs paid to an advocate and a successful party are reasonable. Of importance, is that what amounts to reasonable costs can only be determined on a case-by-case basis. In that regard, the Court of Appeal in the locus classicus case of *Premchand Raichand Ltd vs. Quarry Services of East Africa Ltd. (No. 3)*[1972] EA 162 captured the rationale best by formulating the following guiding principles in assessing costs under the Advocates Remuneration Order:

- a. That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy;



- b. That a successful litigant ought to be fairly reimbursed for the cost he has had to incur;
- c. That the general level of remuneration of advocates must be such as to attract recruits to the profession; and
- d. That so far as practicable there should be consistency in the award made...”

The object of taxation is therefore to ensure that the litigation costs recoverable are reasonable.

11. The Registrar of the Court is empowered, under Rule 116 of the Court of Appeal Rules, to tax the costs arising out of any application or appeal to the court as between party and party.

Rule 116(2) prescribes that costs shall be taxed in accordance with the Third Schedule. Of relevance to the present matter, paragraph 9(2) of the Third Schedule provides as follows:

- “(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 sub-paragraph 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.”

12. The taxing officer is therefore conferred with discretion to determine what is reasonable quantum of costs. Rule 117(1) restricts a reference to “any matter of law or principle”. Under Rule 117(3) there is scope for reference of a decision of a taxing officer to a judge on the basis that the bill of costs as taxed is manifestly excessive or manifestly inadequate. A person dissatisfied with the decision of a taxing officer must bring themselves within that ambit. A reference “on a question of quantum only” is not permissible under Rule 117(3).

13. The circumstances when a judge may interfere with the decision of the taxing officer are limited. As Spry, JA. stated in *Steel & Petrol (EA) Limited vs. Uganda Sugar Factory Ltd.* [1970] EA 141:

“An appellate court will not interfere with an assessment of costs by a taxing officer, unless the taxing officer has misdirected himself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.”

14. In the same vein, this Court in *R. Billing & Company Advocates vs. Kundan Singh Construction Limited (Now KSC International Limited)* [2020] eKLR reinforced the pronouncement in *PremchandRaichand Limited & Another vs Quarry Service of East Africa Limited & Another* (1972) EA 162 that “taxation of costs is not a mathematical exercise: but is entirely a matter of opinion based on experience and that “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” but would only do so “ if it thinks the award so high or so low as to amount to an injustice to one party or the other”. The Court “emphasized that the judges must extend some latitude to taxing officers and avoid unnecessary interference with questions of quantum in which taxing officers have greater experience, unless, of course there is some misdirection.”



15. More recently, the Supreme Court Nairobi Bottlers Limited vs. Mark Ndumia Ndungu & Another (above) reiterated that the decision of a taxing officer may be interfered with if there is an error of principle committed by the taxing officer; or if the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy, or is manifestly deficient as to amount to an injustice to one party.
16. It is incumbent upon a party applying for a reference to bring themselves within the ambit of interference by demonstrating the error of law or principle or that the award of costs made by the taxing officer is manifestly excessive or manifestly inadequate. Did the applicant discharge that burden in this case?
17. The main thrust of the applicant's reference is that the taxing officer failed to appreciate or consider that the value of the subject matter, which according to the applicant involves an estate of approximately Kshs. 3.5 billion. The applicant in seeking instruction fee of Kshs. 121,565,836.00 posited that the appeal involved a challenge to the legal capacity to manage an estate valued at Kshs. 3,500,000,000. The respondent on the other hand proposed an amount of Kshs.700,000.00 as instructions fees.
18. As the Court stated in Joreth Limited vs. Kigano and Associates (above) 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.
19. In the present case, the appeal involved a challenge of a decision of the High Court given on 22nd March 2017 upholding a power of attorney. In addition to challenging the holding that the power of attorney was valid, the manner in which the High Court conducted the proceedings was also impugned. In the reasons for the judgment of this Court delivered on 27th September 2024, the Court at paragraph 20 of its judgment expressed that the "main issue for determination before us is the manner in which the superior court handled the matter to arrive at the impugned decision. The question that should be answered first however, is whether this appeal is moot due to the death of the donor." Whereas the subject of the power of attorney was the mandate to deal with assets and claims relating to Samuel Kinyanjui Muchai, who was then alive, the estate of Samuel Kinyanjui Muchai was not the subject of the appeal.
20. I am therefore fully in agreement with the taxing officer when she stated in paragraph 5 of the impugned ruling:

"The amount proposed by the respondents is Kshs. 121,565,836. Counsel submitted that they considered the value of the subject matter such that what is being challenged was the respondent's capacity to be issued the power of attorney to manage the entire estate valued at Kshs. 3,500,000,000/= . The appellant on the other hand proposed a figure of Kshs. 700,000/= and submitted that the subject matter in the trial Court and the Court of Appeal was the power of attorney issued to the 1st respondent. I have gone through the reasons of the Court delivered on 27th September, 2024 and noted that indeed the issue was the power of attorney therefore as the taxing officer, I will not consider the value quoted by the respondents as the basis of apportioning instruction fees."
21. I discern neither an error of principle or an error of law. It has not been shown that the taxing officer considered matters she should not have, or failed to consider matters she should have, or that the decision is plainly wrong. Whereas the decision by the taxing officer would have been enriched by an



explanation of how the award of Kshs. 1. Million was arrived at, the applicant has not demonstrated, beyond mischaracterising the nature of the subject matter of the appeal, why the award of instruction fee is considered manifestly inadequate.

22. In the result, I find that the reference has no merit and is accordingly dismissed with costs.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

