



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kibos Distillers Limited & 4 others v AdegA & 3 others (Civil Application  
153 of 2019) [2024] KECA 830 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KECA 830 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 153 OF 2019  
HA OMONDI, JA  
JULY 19, 2024**

**BETWEEN**

**KIBOS DISTILLERS LIMITED ..... 1<sup>ST</sup> APPELLANT  
KIBOS POWER LIMITED ..... 2<sup>ND</sup> APPELLANT  
KIBOS SUGAR & ALLIED INDUSTRIES LIMITED ..... 3<sup>RD</sup> APPELLANT  
COUNTY GOVERNMENT OF KISUMU ..... 4<sup>TH</sup> APPELLANT  
KENYA UNION OF SUGAR PLANTATION AND ALLIED  
WORKERS ..... 5<sup>TH</sup> APPELLANT**

**AND**

**BENSON AMBUTI ADEGA ..... 1<sup>ST</sup> RESPONDENT  
ERICK OTIENO OPIYO ..... 2<sup>ND</sup> RESPONDENT  
BETHER ATIENO OPIYO ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL ENVIRONMENTAL & MANAGEMENT AUTHORITY  
(NEMA) ..... 4<sup>TH</sup> RESPONDENT**

*(In the matter of the Reference on the Ruling of the Deputy Registrar of  
the Court of Appeal at Kisumu (Wambillianga, DR.) dated 31st January  
2020).in Civil Appeal No. 153 of 2019 and Civil Appeal No, 162 of 2019)*

**RULING**

1. The genesis of this matter is that the appellants were aggrieved with the decision in Kisumu Environment and Land Court (ELC) Petition No.08 of 2019, and separately lodged appeals to this Court, being Kisumu Civil Appeal No. 153 of 2019 Kibos Distillers Limited vs. Benson Ambuiti AdegA & Others; and Civil Appeal No. 162 of 2019 Kenya Union of Sugar Plantations & Allied



Workers vs. Benson Ambuti Adegga & Others. There were four other appeals, namely Civil Appeal No. 187 of 2019 involving Kibos Sugar & Allied Industries Limited and Kibos Power Limited; Civil Appeal No. 188 of 2019 Kibos Sugar & Allied Limited and Kibos Power Limited; Civil Appeal No. 189 of 2019 are Kibos Sugar & Allied Limited and Kibos Power Limited; and Civil Appeal No. 367 of 2019 -The County Government of Kisumu. All filed against the same respondents.

2. The appeals were consolidated with Kisumu Civil Appeal No.153 of 2019 for purposes of hearing being the holding file; subsequently, judgment was delivered on 31<sup>st</sup> January, 2020 and the appellants were awarded costs of the appeal and that of the High Court. The Judgment in Civil Appeal No. 153 of 2019 was to apply mutatis mutandis to all other appeals.
3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants filed their bills of costs in the holding file and in their specific appeals. According to the taxing officer what was before her was the bill of costs in Civil Appeal No. 153 of 2019 and the bill of costs in Civil Appeal No. 162 of 2019 dated on the 3<sup>rd</sup> November, 2022 involving ten items amounting to Kshs.53,089,739.20. She acknowledged that the six files had been consolidated; and proceeded to tax the same in line with rule 113(1) and (2) of the Court of Appeal Rules [2022].
4. On instruction to support the appeal, guided by the provisions of Paragraph 9(2) of the third schedule and the decision in Joreth Limited v Kigano & Another [2002] E.  
A. 92, the court set out various factors that are to be considered in determining the instruction fee namely; as well as the case of Premchand Raichand Ltd vs. Quarry Services of East Africa Ltd (No. 3) [1972] EA 162, where the Court outlined principles governing the assessment of costs, the taxing officer stated thus:  

“The amount proposed by the 4<sup>th</sup> appellant is Kshs. 44,000,000/=. I find that the amount proposed is too high considering the fact that costs should be reasonable and not used to enrich a party. I agree that the appeal was complex but the amount proposed is way too high, I therefore tax item No. 3 at Kshs.3,500,000/-. On item No. 4 which is instructions to support the application, the same is taxed off as that has been considered under item No 3.”
5. The appellants submit that with regard to reference dated 27<sup>th</sup> June 2023, the Taxing Officer, vide her ruling dated 20<sup>th</sup> June 2023, taxed the appellants’ bills of costs as follows;
  - i. The 1<sup>st</sup> appellant’s bill of costs dated 7<sup>th</sup> April 2021 was taxed at Kshs.3,725,856.75.
  - ii. The 2<sup>nd</sup> appellant’s bill of costs dated 3<sup>rd</sup> November 2022 was taxed at Kshs.3,699,517.50.
  - iii. The 3<sup>rd</sup> appellant’s bill of costs dated 24<sup>th</sup> August 2021 was taxed at shs.3,730,749.75.
6. It is also pointed out that in respect of Kisumu Civil Appeals Nos. 162, 187,188, 189 and 367, all of 2019, the Taxing Officer, vide the ruling dated 30<sup>th</sup> June 2023, refused to tax the appellants’ bills of costs and dismissed them. This is the subject of the reference by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants dated 7<sup>th</sup> July 2023.
7. To justify the fee on instruction to lodge an appeal against the decision of Kibunja, J. given on 31<sup>st</sup> July 2019 by which the learned Judge granted; I reproduce verbatim what the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 6<sup>th</sup> respondents described as sweeping orders of declaration of operating licenses of the appellant unconstitutional, illegal and in contravention sections 58, 59, 60, 61, 62 and 63 of EMCA and several regulations and that were un-procedurally acquired; an order closing the operations of the appellant; an order of environmental restoration by way of demolition of any structure of the appellant, that is to say factory buildings, an act which was to be undertaken by the 6<sup>th</sup> respondent in conjunction with the 7<sup>th</sup> respondent and on appeal this Court found that the Superior Court did not have jurisdiction to



determine the dispute between the parties, the learned Judge of the superior court erred cancelling the initial No.0000259, the court erred in retroactively applying the 2010 constitution to events prior to its promulgation; and further that the order to its promulgation and further that the order of demolish and restoration was disproportionate in the circumstances.

8. The appellants stated further that taking into account the nature, importance, urgency and difficulty of the appeal touching on cancellation of the operational licenses duly issued and demolition of factory buildings; and without mentioning of the magnitude of that factory, the interest of the parties in the face of destruction of colossal sums invested in the factory considering the value of the investment generally and risk of over 4,000 workers of the appellant being rendered jobless and the impact on the society social, economically and the general conduct of the proceedings; the amount of work included having several meetings with the client, drafting of pleadings and carrying out extensive research in the area of dispute which among other things involves the respondents seeking compensatory damages of Kshs.100,00,000/-; and the court wholly set aside the judgment of the Superior Court Kshs. 50,000,000.00. That in addition to this were instructions to file an application dated 5<sup>th</sup> August 2019 for stay of execution under certificate of urgency. The application certified urgent and heard in Nairobi on 15<sup>th</sup> August 2019 and urged that Kshs.1,500,000.00 be allowed with costs.
9. The appellants draw to this Court's attention, that, Taxing Officer while acknowledging the complexity of the matter, awarded Kshs.3,500,000/- as instruction fees to the appellants.
10. Aggrieved by this outcome, the respondents wrote to the taxing officer pursuant to the provision of paragraph 11 of the Advocates Remuneration Order objecting to the taxation of instruction fees, and getting up fees which they complained was never considered. The appellants' lament is that the Taxing Officer did not take into account that there was already a judgment in place where Kshs.100,000,000/- was sought as damages; and prayers for demolition of factories and restitution of land, factors which ought to have been taken into consideration. In support of this proposition, reference is made to the Environment and Land Court decision by Ombwayo, J, in the case of Peter Muthoka & Anor v Ochieng & 3 Others [2019] eKLR wherefrom the record availed to me the bill was taxed the court held:

“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”.

It is argued that an award of Kshs.3.5 million is inordinately low to amount to an error in principle, and that in the afore cited decision, while acknowledging that the Taxing Master had discretion on instruction fees, the learned judge was of the view that such discretion would only be exercised after proper consideration of either the pleadings, the judgment or the settlement; and that it was not open to the taxing officer to choose one or the other or to use them in combination, and that prayers for compensation and restitution of property must be taken into consideration when awarding instruction fees.

11. With regard to the Reference dated 7<sup>th</sup> July 2023, the appellants point out that in her ruling dated 30<sup>th</sup> June 2023, the Taxing Officer found the 1<sup>st</sup> to 3<sup>rd</sup> appellants' bills of costs to be irregular and dismissed them without any taxation. The respondents contend that this was an error in interpreting the consolidation of the appeals, as the consolidation of the appeals did not take away the right of a party to file specific bills in their respective appeals as the court's judgment clearly stated that all



- the six appeals were consolidated with the consent of the parties; the holding file would be Kisumu Civil Appeal No.153 of 2019; and the judgment applied mutatis mutandis to all the six appeals as consolidated.
12. In seeking that the reference be allowed, the appellants urge that instruction fees for each reference be increased to at least Kshs.12,000,000/-; in the alternative the reference dated 7<sup>th</sup> July 2023 be allowed and the bills of costs be remitted for taxation before a different taxing officer.
  13. From what has been availed to me on the record the orders were that:
    - a. In CA No. 162 of 2019 bill of costs dated on the 3<sup>rd</sup> November, 2022 was taxed at Kshs.3,699,517.50/-, with instruction fee being taxed at Kshs.3,500,000,
    - b. In Civil Appeal No. 153 of 2019, the bill of costs dated 3<sup>rd</sup> June, 2021 had a proposed amount of Kshs.41,926,540/- with thirty-one items, the key item being instructions fee which was proposed at Kshs.30,107.500/- but the taxing officer held that it was too high considering the fact that costs should be reasonable and not used to enrich a party. Thus, despite the complexity of the appeal complex instruction fee was taxed at Kshs.3,500,000/-. The grand total taxed was and Kshs.5,067,265. 35/=.
  14. I have tried my best to trace from the record availed to me, the bills of costs dated 7<sup>th</sup> April 2021 which was taxed at Kshs.3,725,856.75; and bill of costs dated 24<sup>th</sup> August 2021 taxed at shs.3,730,749.75/-, but I have not been able to locate them. What is available are the bills of costs relating to the two files I have already alluded to in this decision. The respondents did not file any response or written submissions.
  15. The issue that arises in this reference is whether the learned Taxing Officer, in awarding the instruction fee, misapprehended the principles of taxation in relation to instruction fees to such an extent as to render the award grossly inadequate; why the taxing officer did not address herself to the issue of getting up fees in CA. No.162 of 2019; and whether consolidation of the suits effectively barred the appellants from filing a bill of costs in the other 4 files.
  16. The appellants have aptly referred to the case of Premchand Raischand Limited & Another v Quarry Services of East Africa Limited & Another (supra) in recognition of the position that taxation of costs is not a mathematical exercise, but a matter of opinion based on experience; and interference with the award of a taxing officer, merely because it thinks the award somewhat too high or too low is treated with caution, unless it is shown that the decision was based on an error in principle as to result in an injustice.
  17. In the present case, the appellants argue that the appeal giving rise to the impugned taxation required application of the mind given the nature of the appeal, the importance and difficulty of the appeal, the interests of the parties including cancellation of the operational licenses duly issued and demolition of factory buildings; the interest of the parties in the face of destruction of colossal sums invested in the factory considering the value of the investment generally; and risk of over 4,000 workers of the appellant's employees being rendered jobless; and the social, economic impact.
  18. In addition to this, was the general conduct of the proceedings; the amount of work including having several meetings with the client, drafting of pleadings and carrying out extensive research in the area of dispute. He states that the value of the subject matter also speaks to the nature, interest of the parties and importance of the appeal, which are also key considerations in awarding instruction.
  19. They complain that in reaching his decision the learned Taxing Master did not refer to, or deliberate on any issue or factor, simply stating that the matter was complex yet the nature of the subject matter



also speaks to the nature, interest of the parties and importance of the appeal, which are also key considerations in awarding instruction.

20. In determining the issue of taxation of costs Paragraph 9(2) of the Third Schedule of the Court of Appeal 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 interests of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to be the costs and all other relevant circumstances.”

21. In *Kipkorir, Titoo & Kiara v Deposit Protection Fund Board* [2005] eKLR, this Court held:

“On a reference to a judge from the taxation 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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:

“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”.

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur v Nyeri Electricity Undertaking* (supra) or where the taxing officer has overemphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel* (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - *D’Souza vs. Ferrao* [1960] EA 602. The judge has however, a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji vs. Kanji Naran Patel* (No. 2) (supra).”

22. I have considered the submissions by the parties; the authorities cited and the legal principles applicable, unfortunately the appellant did not avail to me the judgment of this Court, so as to assist me in assessing and appreciating the purported complexity of the matter; and I can only go by what is listed in the prepared schedule in the Bill of Costs, as the alleged complexity or novelty. It is clearly apparent that in CA No. 153 of 2019, the Taxing Officer addressed her mind to the legal provisions referring to paragraph 9(2) of the Third Schedule to the Court’s Rules she referred to case law which set out the principles governing assessment of costs, and acknowledged that the matter was a complex one, obviously, she did not pull this out of a magician’s hat, the information regarding the complexity was well set out in detail in the drawn schedule of the bill of costs and I do not detect any misapprehension of the law or legal principles that ought to guide a Taxing Officer.



23. As regards Getting Up Fees, indeed she also addressed the matter in the following terms:

“On item No. 2 which is getting up fees, I refer to Paragraph 9(4) of the third schedule which states that: ‘other costs shall be subject to the provisions of paragraphs 10, 11 and 12 be awarded in accordance with the scale set out below or, in respect of any matter for which no provision is made in those scales, in accordance with the scales applicable in the High Court.’

Based on the above, I further refer to the ARO, schedule 6 Paragraph 3 whereby the amount should be a third <sup>(1/3)</sup> of the instruction fees which is Kshs.1,166,667/=.”

I need not say more on this, in my view the taxing officer duly considered the law, legal principles and properly exercised her discretion, and clearly there is no reason to fault the Taxing Officer.

24. I also confirm that in the ruling by the taxing officer in CA No. 162 of 2019, there was no mention of getting up fees, and no reason was given for the omission; it would appear to me to be an error of omission. In this regard the appropriate way to deal with a reversible error in taxation is to remit the matter to the Taxing Master for reconsideration, and I so direct.

25. The appellants also complain that the in respect of Kisumu Civil Appeals Nos. 162, 187,188, 189 and 367, all of 2019, the Taxing Officer, vide the ruling dated 30<sup>th</sup> June 2023, refused to tax the appellants’ bills of costs and dismissed them. This is said to be the subject of the reference by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants dated 7<sup>th</sup> July 2023, and which has not been placed before me. As a matter of fact, even the ruling dated 7<sup>th</sup> July 2023 does not form part of the record availed to me; and I have no basis upon which to make the decision.

26. Ultimately the only issue that succeeds, and remitted to the Taxing Master for reconsideration is with regard to the Getting Up Fee in CA No. 162 of 2019. As the respondents did not file any responses or submissions, I make no orders on costs.

**DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JULY, 2024.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

