



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority v Universal Corporation Ltd (Civil Appeal
(Application) 150 of 2018) [2024] KECA 1103 (KLR) (19 August 2024) (Ruling)**

Neutral citation: [2024] KECA 1103 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 150 OF 2018
K M'INOTI, JA
AUGUST 19, 2024**

BETWEEN

KENYA REVENUE AUTHORITY APPELLANT

AND

UNIVERSAL CORPORATION LTD RESPONDENT

(Reference on Taxation from the ruling of the Registrar of the Court of Appeal (Hon. Ogombe) as a taxing officer, dated 3rd March 2023 in Civil Appeal No. 150 of 2018)

RULING

1. On 3rd March 2023, the Deputy Registrar of the Court of Appeal (Hon. Ogombe, hereafter the taxing officer), in her capacity as a taxing officer, taxed the respondent's (Universal Corporation's) Party and Party Bill of Costs at Kshs 3, 282,465.50. The appellant, the Kenya Revenue Authority, was aggrieved by the award and on 9th March 2023, preferred a reference under rule 117 of the [Court of Appeal Rules](#).
2. The appellant's grievance is against the award of Kshs 3,00,000.00 as instruction fees in Item No.1 of the respondent's Bill of Costs dated 4th February 2021.
3. A short background to the reference is as follows. On 28th November 2013, the appellant demanded in writing from the respondent payment of Kshs 427,918,035 within 30 days, being alleged Value Added Tax for the period January 2008 to November 2013. The respondent challenged the demand in High Court Judicial Review Application No. 460 of 2013, Republic v Kenya Revenue Authority, ex parte Universal Corporation Ltd. In the said application the respondent prayed for an order of certiorari to quash the demand notice, an order of prohibition to stop the appellant from enforcing the demand notice or demanding the sum therein, and costs.
4. The application was consolidated with two other related applications, which are not relevant to this reference, and heard by Odunga, J. (as he then was), who by a judgment dated 10th June 2016 allowed



the application. The appellant was aggrieved and filed Civil Appeal No. 150 of 2018, challenging the decision of the High Court on 13 grounds, which this Court compressed into three issues, namely whether the High Court erred:

- i. By assuming jurisdiction over a matter which ought to be to have been heard and determined by the Customs & Excise Tribunal;
 - ii. In its appreciation and application of the doctrine of legitimate expectation; and
 - iii. In its appreciation and application of the doctrine of proportionality.
5. By a judgment dated 7th August 2020, the Court (Nambuye, Karanja & J. Mohammed, JJA.) found in favour of the respondent, upheld the judgment of the High Court and dismissed the appellant's appeal with costs. On 4th February 2021 the respondent filed its Party and Party Bill of Costs claiming Kshs 6, 618,770.50 as instruction fees. The appellant's counsel did not attend the taxation though he was duly notified of the date of the taxation, and as earlier stated, the taxing officer taxed the instruction fees at Kshs 3,000,000.
 6. In its reference and written submission dated 9th March 2023 challenging the award of the instruction fees, the appellant, represented by Mr. George Ochieng, learned counsel, submits that the taxing officer erred by failing to take into account relevant factors and misapplying settled legal principles on taxation and thereby arrived at the wrong decision. In particular, Counsel contends that by basing the instruction fees on the alleged value of the subject matter, the taxing officer committed an error of principle and as a consequence awarded a manifestly excessive amount.
 7. It was the respondent's argument that the taxing officer failed to appreciate that the appeal arose from a judicial review application in which the main issue in dispute was not the value of the subject matter, but the appellant's decision-making process.
 8. Counsel relied on paragraph 9(2) of the Third Schedule to the [Court of Appeal Rules](#) and submitted that in determining the instruction fees, the taxing officer is enjoined to take into account several factors, among them the amount involved, the importance and difficulty of the appeal, the interest of the parties, other costs to be allowed, the general conduct of the proceedings, and the fund or person to bear the costs. He submitted that the taxing officer considered only two of the factors, namely, the subject matter and the nature of the appeal, and ignored all the others.
 9. On the nature of the appeal, counsel contended that the taxing officer failed to appreciate that the dispute was not on the value of the subject matter, but on the legality of the process by which the appellant had arrived at its decision. Counsel cited the decision of this Court in [Peter Muthoka & another v Ochieng & 3 others](#) [2019] eKLR and [Republic v Nyeri County Government ex parte Kenya Coffee Mills Ltd](#) [2017] eKLR in support of the proposition that the nature of the subject matter is as adjudged by the trial court and that in the appeal that gave rise to this reference, the issue was orders of certiorari and prohibition, not the quantum of taxes.
 10. It was further submitted that the appeal did not raise any novel or complex points of law and turned on issues of administrative law and the doctrine of legitimate execution, which are well settled in this jurisdiction.
 11. Next, the appellant submitted that the taxing officer failed to take into account the interests of the parties and the character of the fund or person to bear the costs. It was urged that the appellant is a public body with no private business interest and that the costs awarded to the respondent were to be paid from public coffers. The appellant relied on the decision of the Supreme Court in [Kenya Revenue](#)



Authority & 2 Others v Mount Kenya Bottlers Ltd & 4 Others [2021] KESC 26 (KLR) in support of the contention that caution is required in assessing costs against public bodies.

12. It was counsel's further submission that under paragraph 9(2) of the Third Schedule, the taxing officer was required to take in to account "any other relevant circumstances" which she did not. It was urged that one such circumstance was the fact that the appellant's appeal was heard together with two others, namely, Civil Appeal No 382 of 2017 and Civil Appeal No. 383 of 2017, which raised the same issues. If the learned taxing officer had considered that fact, counsel argued, she could have realised that awarding Kshs 3,000,000 as instruction fees in each of the appeals was exorbitant and manifestly excessive.
13. Mr. Ochieng additionally submitted that the taxing officer erred by failing to specify which factors she had taken into account and instead opted for generalisation. In support of the submission that the taxing officer must specify the factors taken into account in arriving at the instruction fees, counsel relied on *Ramesh Naran Patel v Attorney General* [2012] eKLR and *Republic v Minister of Agriculture ex parte Samuel Muchiri W'Njuguna* [2006] eKLR.
14. Lastly, the appellant submitted that the award was manifestly excessive, contrary to public interest and policy, and was based on wrong principles. He urged the Court to interfere with the learned the taxing officer's discretion and award Kshs 800,000.00 as instruction fees or remit the matter back for re-taxation.
15. The respondent opposed the reference vide a replying affidavit sworn by its learned counsel, Dr. Jotham Arwa, on 26th June 2023 and written submission dated 15th December 2023. In the respondent's view, there was no issue of law or principle involved in the reference and that all the appellant was doing was to attempt to re-tax the Bill of Costs, having failed to file submissions and to attend the taxation before the taxing officer.
16. Dr. Arwa submitted that the awarded amount was not excessive and that despite the appellant's failure to oppose the Bill of Costs, the taxing officer still taxed-off over Kshs 5,000,000 from the amount claimed by the respondent. Counsel added that under paragraph 9(2) of the Third Schedule, the taxing officer has discretion to award such sum as he or she considers reasonable for instruction fees. He relied on *Donholm Rabisi Stores (Firm) v EA Portland Cement Ltd* [2005] eKLR and submitted that taxation of costs is the remit of the taxing officer.
17. The respondent further submitted that the fact of the appellant being a public body should not bar a successful litigant from fair reimbursement for costs incurred in litigation. Citing *Philip Muchiri Mugo v Mbeu Kithakwa* [2016] eKLR, counsel submitted that the purpose of award of costs is to indemnify a party who has been unjustly compelled to initiate or oppose litigation.
18. On whether the award was manifestly excessive, counsel submitted, relying on *Joreth Ltd v Kigano & Associates* [2002] 1 EA 92, that instruction fees are based on the value of the subject matter as determined from the pleadings, judgment or pleadings. In this case, he contended that the subject matter was the colossal sum of Kshs 427,918,035 demanded by the appellant from the respondent. In counsel's view, the decision in *Republic v Ministry of Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna & 6 Others* (*supra*) is not applicable in this case because it is limited to cases where the taxing officer has increased or decreased the prescribed instruction fees.
19. Lastly, the respondent urged the Court not to interfere with the discretion of the taxing officer and cited the decisions of the Supreme Court of Uganda in *Paul Ssemogerere & another v Attorney General*, SCCA No.5 of 2001 in support of the view that taxation involves intricate balancing and that the Court will not interfere with the discretion of the taxing officer except for compelling reasons.



20. I have carefully considered this reference. It is apposite at this early stage to dispose of the respondent's submission that I should not entertain the reference because it is a disguised attempt to re-argue the taxation by a party who failed to participate in the taxation, although it was duly served with a notice of taxation. While it is true that the Court does not take kindly the dilatory conduct of litigants, the question whether the taxing officer committed an error of law or principle is not dependent on whether or not the appellant participated in the taxation. In other words, if the appellant is able to demonstrate that there was an error of law or principle in the taxation, the fact that it did not participate in the taxation will not cure the error. Accordingly, I am satisfied that the lack of participation by the appellant in the taxation is not a bar to the hearing and determination of this reference.
21. At the heart of the reference are two issues, namely, whether the learned taxing officer erred by basing her award as regards instruction fees on the value of the subject matter and thereby committed an error of law or principle, and whether she erred by failing to consider all the factors set out in paragraph 9 of the Third Schedule to the Court of Appeal Rules. Before addressing these issues, it is necessary to recap the principles that guide the taxing officer, and by extension, a reference from the decision of the taxing officer.
22. In *Kenya Airports Authority v Otiemo Ragot & Co. Advocates*, Pet. No. E011 of 2023, the Supreme Court explained the purpose of the Advocates Remuneration Order as follows:
- “...the Advocates Remuneration Order, just as its name suggests, relates to the remuneration of advocates. As evinced by rule 2 thereof, it relates to assessment of costs incurred in a contentious matter which can be reimbursed to a successful party/litigant by the other party. More specifically, it prescribes and regulates the remuneration of advocates in respect of professional business undertaken, and the recompense of costs/expenses incurred by a successful party in a suit. 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.” (Emphasis added).
23. It bears emphasising that the purpose of taxation of costs is to ensure fair and reasonable recompense, not to enrich a litigant or its advocate, or to penalise the losing party. What constitutes reasonable recompense is determined on a case-by-case-basis. In *Republic v Ministry of Agriculture & 2 Others ex parte Samuel Muchiri W’Njuguna & 6 Others* [2006] eKLR, the High Court (Ojwang, J., as he then was), held:
- “...the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious.”
24. In *Premchand Raichand Ltd v Quarry Services of East Africa Ltd*. (No. 3) [1972] EA 162, the former Court of Appeal for Eastern Africa identified some of the principles of taxation of costs to include:
- i. that costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy;
 - ii. that a successful litigant ought to be fairly reimbursed for the costs that he or she has had to incur;



- iii. that the general level of remuneration of advocates must be such as to attract recruits to the profession; and
 - iv. that so far as practicable, there should be consistency in the awards made.
25. The other relevant principle is that the discretion in taxation is vested in the taxing officer, who is the master of taxation. In the words of paragraph 9 (2):

“The fees to be allowed for instruction to make, support or oppose an appeal shall be such sum as the taxing officer shall consider reasonable...” (Emphasis added).

26. Accordingly, the courts will only interfere with the award of the taxing officer in exceptional circumstance, for example, where the taxing officer has made an error of law or principle or where the taxed costs are manifestly excessive or manifestly inadequate. It is because discretion is vested in the taxing officer that rule 117(1) of the *Court of Appeal Rules* prohibits a reference to a single judge on the question of quorum only. In *Steel & Petrol (EA) Ltd v Uganda Sugar Factory Ltd*. [1970] EA 141, Spry, JA stated the principle as follows:

“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.”

27. The High Court (Ringera, J., as he then was) expressed the same principle as follows, in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR:

“First, I find that on the authorities, 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...Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

28. Similarly, in *Bank of Uganda v Banco Arabe Espaniol*, SCU CA No. 23 of 1999, on a reference from the decision of the taxing officer on the basis of rules that are in *pari materia* with ours, Mulenga, JSC, sitting as a single judge, explained the parameters of review of a taxing officer’s discretion as follows:

Before considering those grounds, however, I should reiterate briefly some pertinent principles applicable to review of taxation, such as I am called upon to do in this reference. Counsel would do well to have them in mind when deciding to make, and/or when framing grounds of, a reference.

The first is that save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer consider to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied, a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.



Thirdly, even if it is shown that the taxing officer erred on principle the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.

29. However, the fact that discretion is vested in the taxing officer does not mean that the taxing officer is free to exercise the discretion arbitrarily. The taxing officer does not determine what is reasonable arbitrarily, capriciously, whimsically or by guesswork. Paragraph 9(2), obligates the taxing officer, in determining what is reasonable, to take into account a number of tabulated factors, namely, the amount involved in the appeal, its nature, importance, difficulty, the interest of the parties, other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.
30. In *Republic v Ministry of Agriculture & 2 Others ex parte Samuel Muchiri W’Njuguna & 6 Others* (*supra*) the High Court set out how the discretion of the taxing officer should be exercised:

“From the foregoing analysis, it is clear that I am not of the opinion that the taxing officer was properly guided when she conducted the taxation which has been challenged in the two applications – and certainly not, with regard to the item on advocate’s instruction fees. Her exercise of discretion was, in my view, and with much respect, done perfunctorily and as a mere formality. It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could

permit of assignment of mystical figures of taxed costs. Since the sum awarded as instruction fees herein, namely Kshs20,000,000/=, was not shown to have been guided by the relevant principles, nor was it transparently accounted for, it appeared, in my assessment, as a mystical figure which cannot be allowed to stand.”

This reasoning was cited with approval by the Supreme Court in *Kenya Airports Authority v Otieno Ragot & Co. Advocates* (*supra*).

31. An additional principle in taxation of costs is that the award should not impede access to justice as guaranteed by Article 48 of the Constitution. In *Kenya Airports Authority v Otieno Ragot & Co. Advocates* (*supra*), the Supreme Court found an increase of instruction fees from 5,000,000.00 to 196,044,750.50 to constitute impediment to Justice. (See also *Nyangito & Co. Advocates v Doinyo Lessos Creameries* [2014] eKLR).
32. In this reference, the appellant faults the taxing officer for basing instruction fees on the value of the subject matter, while the dispute involved judicial review remedies of certiorari and prohibition. It is well settled that where a dispute has been determined and judgment rendered, determination of the real subject matter is based on the terms of the judgment rather than from settlement or pleadings. Thus for example, this Court held as follows in *Peter Muthoka & 3 Others* [2019] eKLR:

“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.” (“Emphasise added).

That reasoning was also upheld by the Supreme Court in *Kenya Airports Authority v Otiemo Ragot & Co. Advocates* (*supra*).

33. A careful reading of the judgment of the High Court which ultimately led to this reference leaves no doubt that the subject matter of the dispute was not per se the amount of Kshs 427,918,035, but rather, whether the appellant had in law the power to make the demand for payment. First, the learned judge considered the proper role of the judicial review court in the application before him and emphasised that he was not concerned about the merits of the appellant’s decision but only the decision-making process, to ensure fair treatment of the individual, and that, it was not the role of the court to substitute its opinion for the of the authority constituted by law to decide the question.
34. Next, the learned judge considered whether the judicial review court was the proper forum to address the issue as to whether or not taxes were due from the respondent. He cited the decision of this Court in *Pili Management Consultants Ltd. v Commissioner of Income Tax, Kenya Revenue Authority* [2010] eKLR, where the Court held that it was not for it or the High Court to determine whether, or the quantum of taxes payable by the appellant. The learned judge also referred to the judgment of the High Court in *Republic of Kenya v Kenya Revenue Authority ex parte Bata Shoe Co. (K) Ltd* [2014] eKLR where the court held that it cannot usurp the functions of the taxman.
35. Ultimately, the learned judge concluded as follows:

“In other words the issue whether or not tax is due and payable ought to be left to an appellate Tribunal as opposed to a judicial review Court since such issues go to the merit of the decision rather than the process.”

I am therefore satisfied that from the judgment of the High Court, the learned judge was crystal clear that the dispute before him was not on about the sum of Kshs 427,918,035 but whether the appellant had power under the law to make the demand.

36. When the matter came on appeal, this Court understood the essence of the dispute to be exactly as stated by the learned judge in the High Court. The Court explained as follows:

“Applying the above threshold to the rival positions before the court, the learned judge made a finding that the final decision in the judicial review proceedings that the court was seized of did not rest on the determination of the issue as to whether or not the appellant was legally entitled to collect the short levied taxes and or whether or not the short levied taxes were actually due and payable by the respondent to the appellant, but whether the process adopted by the appellant in the exercise of its statutory mandate to collect short levied taxes from the respondent was procedural and on that reasoning ruled that the facts on the record as apprised and appreciated by the learned judge; and the court’s application of the relevant law to those facts, the substance of the JR proceedings before the court fell squarely within the JR jurisdiction.”

37. The taxing officer, in determining instruction fees, crisply held:

“In awarding instruction fees, I am guided by the requirements under paragraph 9(2) of the Third Schedule of the *Court of Appeal Rules*, and various case law. I have considered the sum



in dispute, and the nature of the appeal. In exercise of my discretion, I hereby award Kshs 3,000,000.00 as instruction fees. The balance is taxed off.”

37. Unfortunately, the manner in which the taxing officer considered “the sum in dispute” and “the nature of the appeal” is not readily apparent from the ruling and that is exactly what the court decreed in *Republic v Ministry of Agriculture & 2 Others ex parte Samuel Muchiri W’Njuguna & 6 Others* (*supra*). I am not persuaded by the respondent’s contention that the application of that decision is limited to instances where the taxing officer increases or decreases the instruction fees. On the contrary, it is a sound pronouncement on how the discretion of the taxing officer should be exercised. In addition, and as I have already stated, the sum of Kshs 427,918,035 was not really “the sum in dispute” in the High Court and in this Court, as erroneously held by the taxing office. The dispute was on the power of the appellant to demand the sum of Kshs 427,918,035 or any other sum from the respondent, including Kshs 1.00.
38. Accordingly, I am persuaded that the learned taxing officer made a clear error of principle which warrants interference with her exercise of discretion.
39. I also agree with the appellant that there were several other relevant factors set out in paragraph 9 (2) which the taxing officer was obliged to consider, but did not. A reasonable award cannot be arrived at without consideration of those factors, where they are applicable. I am aware that in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others* (*supra*), the High Court opined that not all the said factors may exist in any given taxation and that it is open to the taxing officer to consider any such factors as may exist in the actual case before him or her. I agree with that view, but in this reference, and is crystal clear from the appellant’s submissions, there were other relevant factors which the learned taxing officer did not consider. As held in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others* (*supra*), failure to take into account relevant factors constitutes an error of principle.
40. Where the Court finds that the taxing officer has made an error of law or principle, the Court may re-tax the bill and award an appropriate amount, or remit the matter back to be taxed by a different taxing officer. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 492 and *Steel & Petrol (EA) Ltd v Uganda Sugar Factory Ltd.* (*supra*) it was held that as a general rule, it is good practice to remit the question of quantum to a taxing officer. In *First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others* (*supra*), the court held as follows:
- “If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for re-assessment unless the judge is satisfied that the error cannot materially have affected the assessment.”
- (See also *Joreth Ltd v Kigano & Associates* [2002] eKLR)
41. In this reference, there were a number of relevant factors that the taxing officer did not consider. In deference to the jurisdiction vested by law on the taxing officer, I am persuaded that it is more appropriate, in line with the general rule, for these factors to be first considered by a taxing officer upon hearing the parties.
42. In the premises, I allow the appellant’s reference, set aside the taxing officer’s ruling dated 3rd March 2023, and remitted this matter back for re-taxation by a taxing officer other than Hon. Ogombe. Each party will bear its own costs of the reference. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2024.

K. M’INOTI



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

