



REPUBLIC OF KENYA



**Kung'u v Registrar & another (Civil Appeal (Application)  
67 of 2018) [2024] KECA 1105 (KLR) (19 August 2024) (Ruling)**

Neutral citation: [2024] KECA 1105 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 67 OF 2018  
LA ACHODE, JA  
AUGUST 19, 2024**

**BETWEEN**

**DOROTHY MARGARET WANJIRU KUNG'U ..... APPELLANT**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**AKASH HIMATLAL DODHIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at  
Nairobi (K. Bor J) dated 12th October, 2017 In Nairobi ELC No. 1577 of 2014)*

**RULING**

1. Dorothy Margaret Wanjiru Kung'u the appellant herein, filed an appeal in this Court against the judgment of K. Bor J, dated 12<sup>th</sup> October 2017 in ELC Case No 1577 of 2014 that was in favour of Akash Himatlal Dodhia the 1<sup>st</sup> respondent. Upon hearing the appeal on merit, the Court dismissed it with costs to the 1<sup>st</sup> respondent. Consequently, the 1<sup>st</sup> respondent filed his bill of costs which was placed before a taxing master for determination. Upon hearing the parties, the taxing master taxed the bill at Kshs 802,714.50, precipitating the reference dated 29<sup>th</sup> September 2023 brought under Rule 112 of the [Court of Appeal Rules 2010](#), seeking for orders:

“That the taxation of the Bill of Costs dated 21<sup>st</sup> July 2021 which was delivered by Hon Deputy Registrar L.D. Ogombe on 22<sup>nd</sup> September 2023, whereby the 1<sup>st</sup> respondent's costs were allowed at Kshs 802,714.50 be reviewed as the same is excessive and unjustified.”

2. The application is grounded on an affidavit of even date sworn by Gikandi Ngibuini, the applicant's counsel. He deposes that the 1<sup>st</sup> respondent filed a bill of costs claiming a sum of Kshs 765,090. On 22<sup>nd</sup> September 2023, the taxing master allowed the bill at Kshs 802, 714.50. He avers that the scale of costs is covered in the Second Schedule, Part 3 of the [Court of Appeal Rules, 2010](#); and that it is rare in



instances where the value of the subject matter is not known, for the Court of Appeal to exceed the sum of Kshs 100,000. Therefore, the cost allowed by the taxing master is highly exaggerated compared to the costs allowed by law. He therefore, seeks for the bill to be re-taxed.

3. The appellant filed submissions dated 31<sup>st</sup> October 2023 through the firm of M/S Gikandi & Co. Advocates, while the 1<sup>st</sup> respondent filed his dated 31<sup>st</sup> October 2023 and through the firm of M/S Hamilton Harrison & Mathews.
4. The appellant contends that it is wrong for the taxing master to rely on Kshs 20,000,000 as the cost of the subject matter, when it was neither pleaded, nor covered in the superior court judgment. That notwithstanding, she submits that even if the stated figure is to be taken as a guiding factor, the formula set out under part 3 of the 2<sup>nd</sup> schedule under paragraph 2 of the *Court of Appeal Rules* prescribe that the maximum amount allowable is Kshs 100,000.
5. Additionally, the appellant states that the taxing master did not give any reason why she found it appropriate to award instruction fees in the sum of Kshs 750,000. She referred to the decision in Civil Appeal No 102 of 2018 Maindi, *Mount Elgon Beach Properties Limited v Harrison Mwanongo & another*, where the taxing officer's decision was set aside for failing to give reasons for the value he taxed.
6. In rebuttal, the 1<sup>st</sup> respondent submits that the taxing master was guided by paragraph 9(2) of the Third Schedule of the *Court of Appeal Rules 2022*. In her ruling she indicated the factors she considered while exercising her judicial discretion to arrive at the sum. He submits that the value of the subject matter is stated in paragraph 4 of the plaint. The respondent relied on *Joreth Limited v Kigano & Associates* (2002) 1EA 92 where it was held that the value of the subject matter ought to be determined from the pleadings, judgment or settlement. It is also urged that the taxing officer considered that the appeal raised unique and complex issues for determination.
7. The respondent contends that the appellant has not demonstrated that the taxing master erred in law, or principle for this court to exercise its discretion under Rule 117(1) of the Rules of this Court and interfere with her decision. Further, that the appellant's allegation that it is rare for costs in the Court of Appeal to exceed Kshs 100,000 has no basis.
8. I have considered the rival arguments in the submission made before me and the applicable law. The jurisdiction of the Court to intervene is found under Rule 117 of this *Court's Rule* which provides that:
  - (1) Any person who is dissatisfied with a decision of the Registrar in his capacity as taxing officer may require any matter of law or principle to be referred to a judge for his decision and the judge shall determine the matter as the justice of the case may require.
  - (3) 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 and except as provided in this sub rule provided, there shall be no reference on a question of quantum only.
9. In *Thomas James Arthur v Nyeri Electricity Undertaking* (1961) E.A 492 the court held 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 interfere only in exceptional cases.”



10. Also, in *Kipkorir, Too & Kiara Advocate v Deposit Protection Fund Board* (2005) eKLR this Court held that:

“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.”

11. The instant application evinces that the complaint is not against the quantum solely. It questions the principle employed in determining it. The applicant avers that the cost of the subject matter is unknown, and even if it were known the instruction fees should not exceed Kshs 100,000. The respondent on the other hand argues that the cost of the subject matter was pleaded, and the taxing master was guided by paragraph 9(2) of the Third Schedule of the *Court of Appeal Rules 2022* in her ruling.

12. A taxing master may ascertain the value of the subject matter as was stated in *Joreth Ltd v Kigano & Associates* (2002)1 EA 92, where it was held that:

“The value of the subject matter for 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 ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking into account, amongst other matters, the nature and the 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.” (Emphasis added).

I am satisfied that the taxing master was not in error in relying on the sum of Kshs 20,000,000. A perusal of the plaint reveals that this was the sum pleaded as the value of the subject matter.

13. Turning to whether the bill of costs should not exceed Kshs 100,000, I had recourse to the decision in *Mount Elgon Beach Properties Limited v Mwanongo & another* (Civil Appeal 102 of 2018) [2023] KECA 277 (KLR) (17 March 2023) (Ruling), where this Court held that:

“Firstly, part 3 of the second schedule does not deal with payment of costs. It deals with fees chargeable. Accordingly, it is not the provision upon which costs are to be taxed. Taxation of costs is provided for in the third schedule and paragraph 9(2) thereof 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 and all other relevant circumstances.”

14. I agree with the exposition in *Mount Elgon Beach Properties Limited* (*supra*). It is observed that in paragraph 14 of the impugned ruling, the taxing officer stated as follows:

“14. In awarding instruction fees, I am guided by Paragraph 9(2) of the Third Schedule of the Court of Appeal Rules. Applying the criteria therein I have considered the following: 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. All other relevant factors”



15. Further, in paragraph 16 and 17 of the ruling the taxing officer went on to hold that:

“16. The value of appeal is readily ascertainable from the judgment. The sale agreement giving rise to this appeal provides the purchase price as Kshs 20,000,000. This was the value in 2011 as per the agreement of the parties. It is submitted that the value has since appreciated but there is no evidence or current valuation to this effect. I will therefore use the value of Kshs 20,000,000 which is stated in the pleadings and judgment of this court.

17. As required under the Rules, I have considered the nature of this appeal. This being a land related dispute, the matter was certainly of importance and great interest to the parties. The general conduct of the proceedings before this court have also been considered.”

16. A plain reading of paragraph 16 and 17 of the ruling therefore, evinces that the taxing officer explained why she considered the factors in paragraph 14 relevant to this matter. Consequently, I find that there was no error in principle, in determining the instruction fees. Accordingly, the reference dated 29<sup>th</sup> September 2023 is found to have no merit and is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF AUGUST, 2024.**

**L. ACHODE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

