



**Kenya Airports Authority v Otieno, Ragot & Company Advocates (Civil Application E001 of 2021) [2023] KECA 303 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 303 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E001 OF 2021  
PO KIAGE, K M'INOTI & M NGUGI, JJA  
MARCH 17, 2023**

**BETWEEN**

**KENYA AIRPORTS AUTHORITY ..... APPLICANT**

**AND**

**OTIENO, RAGOT & COMPANY ADVOCATES ..... RESPONDENT**

*((An application for certification and leave to appeal to the Supreme Court against the judgment of the Court of Appeal (Ouko, Gatembu & Murgor, JJ.A) dated 19th May, 2021 in Nairobi Civil Appeal No.39 Of 2017)*

**RULING**

- 1 By a notice of motion dated June 2, 2021, the applicant seeks for orders that;
  - “1. (Spent)
  2. (Spent)
  3. This Honourable Court be pleased to issue an order of stay of execution of the judgment and decree issued by this Honourable Court on 19<sup>th</sup> May 2021, directing that the respondent’s instruction fees be taxed in the sum of Kshs.196,044,750.50 pending the hearing and determination of the intended appeal.
  4. This honourable court be pleased to certify that the intended appeal to the Supreme Court raises questions of general public importance and to grant leave to the applicant to appeal to the Supreme Court.
  5. This honourable court be pleased to Issue any other order as it may deem just and appropriate to grant in the circumstances.
  6. The costs of this application be provided for.”



- 2 The application is based on grounds that, the intended appeal raises substantial questions of law which impact on the wider public's right to legal representation and the right to access to justice as enshrined under article 48 of the Constitution. The questions are;
  - a. The proper interpretation of the provisions of Schedule VI Part A and B of the [Advocates Remuneration Order, 2014](#) and in particular whether the phrase 'fees prescribed in A above increased by one-half' effectively takes away the taxing master's judicial discretion in the taxation of an Advocate-Client bill of costs;
  - b. The proper judicial interpretation of the term 'subject value' in instances where the subject matter of a dispute although pleaded is fictitious and unsubstantiated and hence unascertainable from the pleadings without valuation.
  - c. Whether a certificate of taxation of party and party costs is binding per se on the taxing master in the taxation of the Advocate-Client bill of costs and whether such certificate completely fetters discretion and appreciation of actual work done in assessing Advocate-Client instruction fees.
  - d. Whether the costs awarded to an Advocate should be allowed to be so punitive (in this case being an increment of instruction fees by the majority Court of Appeal from Ksh. 5,000,000 to Ksh. 196,044,750.50) with the effect of impeding access to justice as guaranteed under article 48 of the Constitution.
- 3 The application is supported by an affidavit sworn on June 2, 2021 by Margaret Munene, the acting Corporation Secretary of the applicant. In the affidavit, the applicant reiterates the grounds of the application while expressing its intention to appeal against this court's majority decision in which the court ordered that the respondent's instruction fees as contained in the Advocate-Client bill of costs be taxed at Kshs.196,044,750.50. The applicant deems that decision erroneous in its interpretation and application of the principles of taxation of Advocate-Client bills of costs in the context of Schedule VI Part A and B of the [Advocates Remuneration Order, 2014](#) (ARO). Further, it is averred that payment of such a large sum of money from the coffers of the applicant, which is a public entity, would be an affront to the provisions of article 201(d) of the Constitution which require all public entities to ensure prudent and responsible use of public resources.
- 4 In reply, the respondent lodged a replying affidavit sworn on June 18, 2021 by Mr. David Otieno, a partner in the respondent law firm. The respondent gives the background of the case, the origin of the dispute being the applicant's instructions to the law firm to represent it in Kisumu High Court Civil Case No. 156 of 2009 where the applicant had been sued by several persons for compensation in the sum of Kshs.13,932,000,000 for land which had been acquired by the Government of Kenya on behalf of the applicant for the expansion of the Kisumu International Airport. Thereafter, it is averred, parties differed over how much fees the applicant was obligated to pay the respondent, resulting in the respondent filing its bill of costs in court for taxation as between Advocate and Client. The respondent contests the applicant's claim as set out in the application, asserting that it never raised the issue of the unconstitutionality of the bill of costs before the taxing officer, the High Court nor before this court. The respondent urges that the dispute in this matter is strictly one between the parties, and it does not transcend their interests. Hence, certification and leave to appeal ought not to be granted.
- 5 By way of written submissions dated June 24, 2021, drawn and filed by the law firm of Iseme, Kamau & Maema Advocates for the applicant, it is submitted that the substantive legal question for which the applicant seeks the Supreme Court's interpretation is with regard to the proper interpretation of the provisions of Schedule VI Part A and B of the [ARO](#) and the extent to which such interpretation limits



- the exercise of the taxing master's judicial discretion in taxation of Advocate-Client bills of costs. The applicant challenges the majority decision, contending that, the determination that once a certificate of taxation is issued in a party and party bill of costs, the taxing master, while taxing the Advocate-Client bills of costs, should merely increase the instructions fees by one half without interrogating the costs claimed by the advocate, curtails the exercise of the taxing master's discretion in taxation of the bill, particularly where the value of the subject matter cannot be ascertained.
- 6 It is further argued that the impugned decision is at variance with this court's decision in [\*Moronge & Company Advocates v Kenya Airports Authority\*](#) [2014] Eklr where the court found that in instances where the plaintiff has merely put a figure in its pleadings which cannot be justified by way of supporting documents, such a figure cannot form the basis for determining the value of the subject matter and, consequently, the taxing officer ought to have exercised her discretion in taxing the Advocate-Client bill, taking into account the interest of the parties, the general conduct of the proceedings, any direction by the trial judge, and all other relevant circumstances. It is urged that owing to the contrasting findings, it is for the common good of the public for the apex court to provide certainty in the law of taxation of costs.
  - 7 The applicant further asserts that the legal question on whether the mere mention of a figure in pleadings, without more, can be a proper basis to determining the subject matter value for purposes of taxation, and whether a taxing officer is estopped from exercising judicial discretion and inquiring if such a figure is representative of the value of the subject matter, are questions that touch on the general public with respect to threatening the right to access to justice, as enshrined under article 48 of the Constitution. Moreover, the applicant submits, matters affecting fundamental rights and freedoms are matters of general public importance, reliance being placed on the decisions in [\*Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture, Horticulture and Allied Workers' Union \(kefbau\) Represented By Its Promoters David Benedict Omulama & 9 others\*](#) [2018] eKLR, and [\*Telkom Kenya Limited v John Ochanda & 996 others\*](#) [2015] eKLR.
  - 8 It is urged that the intended appeal meets the criteria of what constitutes matters of general public importance as set out in the *locus classicus* decision of [\*Hermanus Phillipus Steyn v. Giovanni Gnecciruscone\*](#) [2013] eKLR and In [\*Town Council of Awendo v Nelson Oduor Onyango & 13 others\*](#) [2015] eKLR as Cited In [\*Mitu - Bell Welfare Society v Kenya Airport Authority Ltd & 2 others\*](#) [2018] eKLR. The applicant in the end seeks a stay of execution of the orders of this Court in the impugned judgment pending the hearing and determination of the intended appeal.
  - 9 In opposition to the application, the respondent through its learned counsel, Mr. David Otieno lodged written submissions dated July 9, 2021 in which it rehashes the context of the matter. The respondent further reiterates its displeasure with the fact that the applicant was raising new issues in the application. For instance, the respondent contends, the claims that the award of fees to it and the principles applied by this court in arriving at that decision raise issues of the right of access to justice under Article 48 of the Constitution and is an affront on the prudent and responsible use of public resources as provided in Article 201 of the Constitution, have been raised for the first time in the application. The Supreme Court decision in [\*Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others\*](#) [2015] eKLR is cited for the proposition that for an application for certification to succeed, the issues raised by the applicant ought to have emanated from the Court of Appeal, entailing matters that have come through the hierarchy of courts and have been substantively determined.
  - 10 Next, the respondent asserts, matters which the applicant intends to pursue at the apex court are not of general public importance to warrant certification. Rather, they are matters of the applicant's own financial interests. The respondent posits that the Supreme Court's jurisdiction is not to be invoked where the law is clear and well settled as in the instant case, citing this court's decision in [\*Langata\*](#)



*Development Co. Limited v Mary Wanjiru Dames* [2019] eKLR. To the respondent, the law on what a taxing officer is enjoined to do in taxing an Advocate-Client bill of costs where there has been a determination of the party and party costs is couched in clear and mandatory terms in Schedule VI of the *ARO* and in authorities. That is, once a determination of party and party costs has been made under part A of the schedule, the taxing officer applying part B has no discretion in the matter. It is further contended that matters of valuation of the subject matter should have been raised before the taxing officer. On the prayer for stay of execution, the respondent opposes the same on grounds that the Court of Appeal has no jurisdiction to stay its own judgments. Moreover, the court only gave a declaration about what the instructions fees was, an order that was not executable.

- 11 We have considered the application, the grounds in support thereof, the submissions by parties, and the law. An appeal from this court to the Supreme Court arises in only two instances as set out in Article 163(4) of the Constitution; 163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-
  - a. As of right in any case involving the interpretation or application of this Constitution; and
  - b. In any other case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”
- 12 An intending appellant is obliged to demonstrate that the matter in question carries specific elements of real public interest concern. The Supreme Court in *Hermanus Phillipus Steyn* (*supra*) spoke of the transcendent quality of the matters that qualify for the engagement of its appellate jurisdiction thus; Before this court ‘a matter of general public importance’ warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: it impacts and consequences are substantial, broad based, transcending the litigation – interests of the parties, and bearing upon the public interest.”
- 13 The apex court proceeded to authoritatively set down the following as the governing principles in the determination of what entails a matter of general public importance: -
  - (i) For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal transcends the circumstances of the particular case, and has a significant bearing on the public interest;
  - ii. Where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
  - iii. Such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;
  - iv. Where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
  - vi. Mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of article 163 (4)(b) of the Constitution;
  - vii. The intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;



- vii. Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.” (See also *Malcolm Bell v. Daniel Toroitich Arap Moi & another* [2013] eKLR)
- 14 Does the application before us satisfy the test? The applicant seeks that the Supreme Court determines, in the main, the legal question on the proper interpretation of the provisions of Schedule VI, Part A and B of the *ARO* and the extent to which such interpretation limits the exercise of the taxing officer’s judicial discretion in taxation of Advocate-Client bill of costs, especially where the value of the subject matter of a dispute, although pleaded, is not substantiated. According to the applicant, this question impacts on the wider public’s right to legal representation and the right to access to justice as enshrined under article 48 of the *Constitution*.
- 15 The respondent contests that claim, questioning why the applicant never raised the constitutional issues that it now mentions in previous proceedings before this court. Further, the respondent contends, the matters that the applicant seeks to advance at the apex court are not of general public importance, but those of its own financial interests. Moreover, the law on what a taxing officer is enjoined to do in taxing Advocate-Client bill of costs where there has been a determination of the party and party costs is clearly framed in mandatory terms in Schedule 6 of the *ARO* and in authorities.
- 16 We think, when the principles in *Hermanus Phillipus Steyn* (*supra*) are considered against the majority and minority decisions of this court in the impugned judgment, this seems a case meriting the Supreme Court’s attention. The majority decision was to the effect that once the instruction fees in party and party costs are ascertained, they become the basis of computation of the instruction fees in the Advocate-Client bill. The instruction fees in the party and party bill are then increased by one half to arrive at the instruction fees for the Advocate-Client bill. No further exercise of discretion by the taxing officer is required at that point, the majority held.
- 17 Conversely, the minority judge opined that, where the value of the subject matter cannot be ascertained from the pleadings for purposes of taxation, and the suit is struck out at a preliminary stage, the taxing officer should use his discretion to determine such instruction fees as he considers just, taking into account all relevant considerations. Those divergent views call for the Supreme Court’s final and authoritative resolution.
- 18 The upshot is that we find that the application is meritorious and we hereby grant it to the extent of the plea for certification. We agree with counsel for the respondent that our stay of execution jurisdiction is limited to intervention pending appeals to this court, not from our orders. We shall not arrogate to ourselves a non-existent jurisdiction.
- 19 We direct that the applicant shall file a notice of appeal within 14 days of the date hereof and serve it as provided under rule 16 of the *Supreme Court Rules*, 2020. The costs of this application shall abide the outcome of the intended appeal.
- 20 Before we end this ruling, we must sincerely apologise to the parties for the delay in the delivery of the same. This was due to a heavy work load besetting members of the bench both within and outside the country, which caused the matter to be overlooked. We trust that the parties will bear with us and that not too much harm has been caused by the unfortunate and uncharacteristic oversight.

**DATED AND DELIVERED AT KISUMU THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

