



**Misnak International (UK) Limited v 4MB Mining Limited c/o Ministry
Of Mining, Juba Republic Of South Sudan & 3 others (Civil Appeal
(Application) 118 of 2018) [2023] KECA 311 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 311 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 118 OF 2018
P NYAMWEYA, JA
MARCH 17, 2023**

BETWEEN

MISNAK INTERNATIONAL (UK) LIMITED APPELLANT

AND

**4MB MINING LIMITED C/O MINISTRY OF MINING, JUBA REPUBLIC OF
SOUTH SUDAN 1ST RESPONDENT**

TOTAL LINK LOGISTICS 2ND RESPONDENT

UNION LINK LOGISTICS 3RD RESPONDENT

FREIGHT FORWARDERS (K) LIMITED 4TH RESPONDENT

*(A reference from the decision and ruling on taxation by the Deputy
Registrar of this Court (Hon. H. Adika) dated 17th December 2020)*

RULING

1. The Appellant in this appeal, Minsak International (UK) Limited, appealed the decision of the High Court to dismiss its preliminary objection on the jurisdiction of the said Court to hear a suit filed against the Appellant by 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan, the 1st Respondent herein.. This Court (Visram, Kairu, & Murgor JJA) found merit in the interlocutory appeal in a judgment delivered on July 25, 2019, and set aside the High Court’s ruling, substituting it with an order upholding the Appellant’s preliminary objection on account of lack of leave to serve the Appellant, which was a foreign domiciled company, with summons outside of the jurisdiction. It was also ordered that the 1st Respondent meets the costs of the High Court proceedings and of the appeal.



2. The Appellant subsequently filed a Party and Party Bill of Costs dated July 9, 2020 for the sum of Kshs 40,003,000/=, which was taxed by the Deputy Registrar of this Court (Hon. H. Adika) as the Taxing Officer, and a ruling on the taxation dated December 17, 2020 awarded the Appellant the sum of Kshs 1,033,740/= as costs. The Appellant, being dissatisfied with the decision and ruling of the Taxing Officer, and particularly the decision to tax the instruction fees in the Party and Party Bill of Costs at Kshs 1,000,000/-, filed a reference against the said ruling by a letter dated December 22, 2020. The Appellant contends that as a result of errors of law and principles, the taxation with regard to the instruction fees is in all circumstances manifestly inadequate, and requires that the Bill of Costs to be referred to a Judge to make such addition as would render the Bill reasonable.
3. A virtual hearing of the reference was held by this Court on 1st February 2023, and learned Counsel, Mr. Okere appeared for the Appellant and relied on his written submissions dated 2nd December 2022, while learned counsel, Mr Ngonze appeared for the 1st Respondent, and similarly relied written submissions dated January 30, 2023.
4. The Appellant's case is that the Taxing Officer erred in law and in principle by failing to ascertain the subject matter of the appeal or its value when taxing the instruction fees in the Bill of Costs; by aligning his decision in the with the decision cited by the 1st Respondent in *Alcon International Limited v Standard Chartered Bank of Uganda & 2 others* (Reference No. 1 of 2014), East African Court of Justice at Arusha Appellate Division) (hereinafter "the Alcon International Case"); by failing to specify or clarify the nature, importance and the interest of the parties in the Appeal, by elevating the assessment of the legal arguments in the appeal over and above the collective considerations stipulated under Paragraph 9 (2) of the Third Schedule of the *Court of Appeal Rules*, 2010; for failing to give reasons for his decision taxing the Bill of Costs dated 9th July 2020; and by taking into consideration irrelevant factors to determine the issue before the Court of Appeal, and in particular the stage at which the suit had reached in deciding the amount of instruction fees under the Bill of Costs.
5. The 1st Respondent position in summary, was that the amount awarded as instruction fees by the Taxing Officer was manifestly excessive, and that the Party and Party Bill of Costs was taxed according to the Rules set out in the Third Schedule of the *Court of Appeal Rules* of 2010.
6. Rule 111 of the *Court of Appeal Rules* of 2010, which was applicable at the time of taxation of the subject Bill of Costs, provided that the Deputy Registrar has the power to tax the costs arising out any application or appeal to the Court as between party and party, which taxation is to be done in accordance with the rules and scale set out in the Third Schedule of the Rules. The remuneration of an advocate by his clients in respect of application or appeal is on the other hand to be governed by the rules and scales to proceedings in the High Court. Under Rule 112 any person who was dissatisfied with a decision of the Deputy Registrar in his capacity as taxing officer, could refer any matter of law or principle to a judge for decision, or where it is contended that a bill of costs as taxed is manifestly excessive or manifestly inadequate.
7. The principles that apply both in the taxation of a Party and Party Bill of Costs, and in the determination of a reference from such a taxation as set out in the said Rules are firstly, the judicious exercise of discretion, secondly, the interests of justice; thirdly, reasonableness, and the taxing officer and judge shall in this respect have power to make such deduction or addition as will render the bill reasonable; and lastly, there shall be no reference on a question of quantum only, except in so far as it is alleged to be unreasonable. Similar requirements are provided in Rules 116 and 117 of the *Court of Appeal Rules* of 2022.



8. According to the Appellant's counsel, the interlocutory appeal against the decision of the High Court determined the entire suit, therefore it was imperative for the Taxing Officer to ascertain the subject matter of the suit and confirm the value. Further, the claim initiated at the High Court, which was at stake on appeal, was USD 8,134,705.17, and that by omitting to consider the subject matter or its value or the value involved in the Appeal, the Taxing Officer erred in principle in assessing instruction fees. The counsel placed reliance on the decisions in *Kamunyori & Company Advocates v Development Bank Of Kenya Limited* [2015] eKLR where the Court stated that failure to ascertain the correct subject matter in a suit and to ascribe the correct value to the subject matter for the purpose of taxation is an error of principle; and on the case of *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92 where this Court held that the value of the subject matter of a suit for the purpose of taxation of a Bill of Costs ought to be determined from the pleadings, judgment or settlement.
9. The counsel also made reference to the written submissions of the 1st Respondent dated September 25, 2020 admitting that the subject matter was valued at USD 8,134,705.17, and the 1st Respondent's application for judgment in default of defence in the High Court, where the same amount was pleaded as special damages. Additionally, that once special damages had been pleaded, the Court was not required to go into the value of such special damages or the contract of the suit for the purposes of taxation of the Bills of Costs, and only needed to ascertain the amount pleaded to derive the value of the subject matter of the claim for breach of contract. Reliance was placed on the decision in *Governors Balloons Safaris Limited v Skyship Company Limited & another* [2015] eKLR in this regard.
10. The counsel further submitted that the impugned ruling of the Taxing Officer failed to take into consideration nature of the appeal and the importance of and interest in the appeal in accordance with Paragraph 9 (2) the Third Schedule of the *Court of Appeal Rules* of 2020. The counsel relied on the decision of this Court in *Lucy Waitbira & 2 Other v Edwin Njagi T/A E. K. Njagi & Company Advocates* [2017] eKLR and of the High Court in *R v Ministry of Agriculture & 2 others Ex parte Muchiri W'Njunguna & 6 others* [2006] eKLR, that a Taxing Officer's decision is not exercised judicially where a relevant consideration has not been taken into account. Likewise, that the Taxing Officer elevated the element of the difficulty or complexity of the appeal above the collective considerations provided in paragraph 9(2), when he decided that the arguments pertaining to Order 5 of the *Civil Procedure Rules* 2010 which were not very complex was the issue that this Court was dealing with, in order to determine what fees were reasonable. The counsel relied on the case of *Charter House Investment limited v Simon K. Sang & 3 others* [2012] eKLR in which he stated that a Bill of Costs for an interlocutory appeal on an injunction was taxed at nearly Kshs 7 million where the value of the subject matter was considered as Kshs 100 million.
11. Lastly, on the Alcon International Case, the counsel submitted that the said decision was incongruent with the facts of the present case, as it concerned the enforcement of an arbitral decision that had already been taken and concluded and there was no contention on jurisdiction, therefore the Appellant Division of the East African Court of Justice decline to consider the value of the subject matter. However, that in the present case, where the dispute between the parties was primary and had yet to be finally decided, and was an active adjudication over jurisdiction in which the value of the subject matter had been clearly pleaded.
12. The 1st Respondent's counsel in reply submitted that the scale of cost appearing in the Third Schedule of the *Court of Appeal*, 2010 was not pegged on the value of any subject matter as is the norm in the High Court and the subordinate Courts, since the value of any subject matter cannot be a live issue on appeal. In addition, that the issue before Court of Appeal revolved around Order 5 of the *Civil Procedure Rules*, 2010 with respect to the jurisdiction over a foreign based entity. Further, that the purpose of Party and Party Costs was not to enrich the victorious party or to punish and/or impoverish



the losing party, but to compensate the victorious party for actual cost incurred in the pursuit of its claim. The counsel placed reliance on the decisions in *Peter Muthoka & Another v Ochieng & 3 others* [2019] eKLR and *R v Ministry of Agriculture & 2 others Ex parte Muchiri W’Njunguna & 6 others* (*supra*) eKLR for the propositions that the Court cannot interfere with the Taxing Officer’s decision unless it was shown that it was either based on an error of principle or the fees awarded was manifestly excessive as to justify an inference that it was based on an error of principle, and that it was open to the Taxing Officer to consider only such factors as may have existed in the actual case before him.

13. According to the counsel, the arguments that the Taxing Officer failed to specify or clarify the nature, importance and the interest of the parties, elevated the assessment of the legal arguments in the appeal over and above the collective considerations stipulated under Paragraph 9 (2) of the Third Schedule to the *Court of Appeal Rules*, and took into account irrelevant considerations were manifestly fallacious and misleading when viewed against the entire contents of the impugned ruling. Lastly, that the Alcon International Case was not cited in the impugned ruling, and that in any event, the Taxing Officer was not precluded from being guided by similar judicial precedent. In conclusion the counsel submitted that the instant reference was misguided as it is on quantum only, while attempting to disguise peripheral issues as arguments on principle, and that the award of Kshs 1,000,000.00/- as instruction fees ought to be revised downwards to Kshs 1,500/- as provided for in Item 1 of the scale of costs in the Third Schedule of the *Court of Appeal Rules* of 2010.
14. Paragraph 9 (1) and (2) of the Third Schedule of the *Court of Appeal Rules* in this regard specifically provides as follows on the quantum of instruction fees:

- (1) The fee to be allowed for instruction to make, support or oppose any application shall be such sum as the taxing officer shall consider reasonable but shall not be less than one thousand shillings.
- (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...”

In addition, Paragraph 11 of the Third Schedule specifically enjoins the taxing officer to allow such costs, charges and disbursements as shall appear to him to have been reasonably incurred for the attainment of justice, while paragraph 12 grants the taxing officer an overriding discretion having regard to all the circumstances, to make such deduction from the total bill after taxation, as will in his opinion render the sum reasonable.

15. The Deputy Registrar in this regard found as follows on the instruction fee in the impugned taxation ruling:
 4. From the foregoing, the issue before the Court was whether the High Court had jurisdiction to entertain the suit or not. The Court did not go into merits of the suit and did not certainly go into the substantive issues or the values of the contracts of the suit.
 5. In justifying the instructions fees, the Appellant has stated that the subject matter of the suit was 800,000,000.00 and had based his instruction fees on the same. While it is an accepted procedure that when taxing, the taxing master should consider the value of subject matter, it is not the only parameter. One must look at the person or the institution that is being condemned to pay the cost, one must not tax the bill so exorbitantly to discourage people from coming to Court and the Taxing master must also look at the issues being canvassed before the Court.



6. In this case while the value of the subject matter may be or stated by the Appellant, the most important issue is the issue that the Court was dealing with which is Order 5 of the Civil Procedure Rules. To My mind, this is not a very complex legal issue and I say this with utmost respect to the Counsels to this matter. It was an issue where the Court needed to find out if there was jurisdiction to even handle the subject matter. To this end, I find that an amount of 40,003,000.00 is way too high for the work done by Counsel. I find that a figure of Kshs 1,000,000/- is sufficient and that is what I award for instruction fees.”
16. The taxing officer as taxed of a number of items in the Party and Party Bill of Costs, namely items 2, 5, 6, 11, 22, 27, 29, 30, 36, 37, 38, as they were deemed to be part of the instruction fees. It is evident that the Taxing Officer did consider various factors including the fact that the matter before this Court was not substantively decided on merit, and the value of the subject matter of the appeal as pleaded by the Appellant which was discounted for the reason that the matter was not complex. The exercise by the Taxing Officer of his overriding discretion was in the circumstances not only judicious, but guided by the applicable principles set out in Rules 111, 112 and the Third Schedule of the *Court of Appeal Rules* of 2010 as explained earlier on in this ruling, and took into account factors that are specifically provided for in Paragraphs 9, 11 and 12 of the Third Schedule of the *Court of Appeal Rules*.
17. It is also notable that the Appellant’s counsel did not provide a digest of authorities he relied upon for this Court to confirm the contents thereof, and many of the reported decisions relied on by both the Appellant’s and 1st Respondent’s counsel are not applicable to the circumstances of this reference. In particular, the decisions in *Kamunyori & Company Advocates v Development Bank Of Kenya Limited (supra)*, *Joreth Ltd v Kigano and Associates (supra)*, *Lucy Waitihira & 2 Other v Edwin Njagi T/A E. K. Njagi & Company Advocates (supra)*, Peter Muthoka & Another v Ochieng & 3 others [supra] and *R v Ministry of Agriculture & 2 others Ex parte Muchiri W’Njunguna & 6 others (supra)* eKLR clarified the principles applicable to the taxation of an advocate/client’s Bill of Costs in the High Court , whereas the present reference concerns the taxation of a party and Part Bill of Costs to which different principles of law apply as demonstrated in the foregoing.
18. The decision in *Governors Balloons Safaris Limited v Skyship Company limited & another (supra)* was on a stay application of a taxation ruling by the High Court and the arguable merits of the appeal therefrom, and was not on the merits of a taxation of a Party and Party Bill of Costs in this Court; while the relevance of the reported decisions on *Charter House Investment limited v Simon K. Sang & 3 others (supra)* was not evident, as one did not involve taxation, and the other involved extension of time to file a reference from the decision of a Taxing Officer under Rule 112(3) of the *Court of Appeal Rules*, which application was declined and the ruling thereon did not address the merits of the taxation ruling made by the Taxing Officer. Lastly, as noted by the 1st Respondent’s counsel, there was no citation of, or reliance on the Alcon International Case by the Taxing Officer in the impugned ruling.
19. The conclusion that I have therefore reached is that the reference filed by way of the letter dated December 22, 2020 is without merit, and is hereby dismissed with costs to the 1st Respondent.
20. Orders accordingly.

Dated and Delivered at Mombasa This 17th Day of March 2023.

P. NYAMWEYA

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UDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

