



REPUBLIC OF KENYA



Disa Enterprises Limited v Milgo & 61 others (Environment & Land Case 478 of 2018) [2025] KEELC 766 (KLR) (24 February 2025) (Ruling)

Neutral citation: [2025] KEELC 766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 478 OF 2018
JA MOGENI & AM COCKAR, JJ
FEBRUARY 24, 2025**

BETWEEN

DISA ENTERPRISES LIMITED PLAINTIFF

AND

CECILIA CHERUNO MILGO & 61 OTHERS & 61 OTHERS & 61 OTHERS & 61 OTHERS DEFENDANT

RULING

1. The instant Application/Reference dated 10/06/2024 is brought pursuant to the provisions of Rule 11 (2) of the Advocates (Remuneration) Order and in respect of which the Plaintiff/Applicant prays for the following orders;
 1. This Honourable Court be pleased to set aside and/or vary the Ruling delivered on 28th May 2024 by Honourable T.E Marienga towards the Plaintiff's Bill of Costs dated 12th April 2024.
 2. The decision of the Learned Taxing Master with respect to item 1 of the Party and Party Bill of Costs dated 12/04/2024 taxed at Kshs. 750,000/- on 28/05/2024 be set aside and be taxed afresh by this Honourable Court or be remitted for taxation afresh.
 3. The costs of this Application be awarded to the Plaintiff.
2. This Reference is anchored on the grounds on the face of it and further supported by the Affidavit of the Applicant sworn on even date and to which the deponent has annexed eight documents in support of the reference. The grounds relied upon are that:-
 1. That the learned Taxing Master delivered a Ruling on 28th May, 2024 and Taxed the Plaintiff's Bill of Costs dated 12th April 2024 at Kshs. 1,360,071.50/-.



2. That the Taxing Officer erred in law and fact when she made a finding that the subject matter is Kshs. 100,000/- which was the value of general damages for trespass awarded by the Court to the Plaintiff vide the Judgement delivered on 22nd February 2024.
 3. That that it is the suit property, L.R. Number 209/11620 that was under the threat of loss and therefore the Taxing Master ought to have used the value of the suit property of Kshs. 350,000,000/- as the subject matter of the case as presented by the Plaintiff/Applicant in the Valuation Report dated 6th August 2012 while calculating the instruction fees and which Report should have been taken into account during Taxation.
 4. That at the very least, the Taxing Officer while calculating instruction fees ought to have used the value of Kshs. 120,000,000/- as the subject matter of the case as presented by the 3rd Batch of Defendants represented by the firm of Mwagambo & Okonjo Advocates.
 5. That the Taxing Officer erred in law and in principle by failing to consider the Plaintiff/Applicant's submissions particularly regarding items No 1 and 2 (instruction fees and getting up fees) in the Bill of Costs.
 6. That the award is riddled with errors and inconsiderately low.
3. The instant Application/Reference dated 10/06/2024, is brought pursuant to the provisions of Rule 11 (2) of the Advocates (Remuneration) Order as already stated above.
 4. The Application is opposed vide the Replying Affidavit of the 1st, 2nd, 5th, 6th 9th 14-17th, 19th, 28th, 30th, 31st, 46th-50th 52nd, 57th - 62nd Defendants (3rd batch of Defendants) sworn by Donald Okonjo the Advocate for the 3rd batch of Defendants.
 5. His response refers to item 1 and 2 of the Bill of Costs which I note is erroneous since the Plaintiff is only challenging Item 1 of the Bill of Costs. He avers that the Plaintiff was relying on a valuation done by the valuer of the 3rd batch of Advocates which places the value at Kshs. 120,000,000/-. That the Plaintiff sued only 18 owners of 22 plots and failed to join the 29 others.
 6. Further that even if the Taxing Master was right in not relying on the value of the property since the properly joined share ownership of the suit property would amount to Kshs. 51,720,000/- and that Kshs. 75,000/- would be sufficient instruction fees as per Schedule VI of the Advocate Remuneration Order, 2024.
 7. It is the contention of the 3rd batch of Defendants that the increase of the statutory instruction fees for Kshs. 75,000/- properly mandated to Kshs. 750,000/- is an enormous increase in fees. That the getting up fees ought to be reduced to Kshs. 25,000/- which is a 1/3 of the correct amount of instruction fees down from the award of Kshs. 250,000/-. He contends that in her Ruling of 28/05/2024, the Taxing Master at paragraph 10 indicated that the responsibility entrusted to the Plaintiff's Counsel was quite ordinary and called for nothing but normal diligence such as must attend the work of a professional in any field.
 8. That the Taxing Master erred in principle and in exercising judicial discretion and did not bear in mind the principles enshrined in Sections 1A and 1B of the *Civil Procedure Act*.
 9. The Court gave directions on disposal of the Application by way of written submissions which the parties filed and I have considered the said submissions dated 19/07/2024 filed by the Plaintiff and those dated 10/10/2024 filed by the 3rd batch of Defendants.



10. The other Defendants choose not to participate in the Application despite being served they did not file any responses.

Determination

11. It is now trite law that the High Court (read Environment and Land Court), will only interfere with the decision of a Taxing Master in cases where it is evident that there is an error in principle.
12. The Court finds that there are two aspects to this Reference; Whether the value of the subject matter was ascertainable and, secondly whether the Ruling given on 28/05/2024, set aside.
13. However, before analyzing the above issues, it must be emphasized that matters of quantum of taxation are matters purely within the province, competence and judicial discretion of the Taxing Officer. This Court will not interfere with an award of quantum by the Taxing Officer, unless there was an error in principle or the discretion was improperly exercised, resulting in injustice. The Court in the case of Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board [2005] eKLR was categorical that;

“On 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.”
14. The proper exercise of discretion by the Taxing OfficerS was restated in Kamunyori & Company Advocates vs. Development Bank of Kenya Limited (2015) Civil Appeal 206 of 2006, where it was held that;

“.. Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside”
15. The Applicant is seeking an order that the Ruling delivered on 28/05/2024, be set aside. The principles of setting aside the decisions of Taxing Master were well established in the cases of Premch and Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162, First American Bank of Kenya vs Shah and Others (2002) EA 64 and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92. These includes:-
 - a. That there was an error of principle.
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the Court to the wealthy.
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred.
 - d. That so far as practicable there should be consistency in the award.
16. With these principles in mind, the issues for determination are whether the Taxing Officer herein rightly exercised her discretion in determining and taxing off instruction fees in the Party to Party Bill



of Costs dated 12/04/2024. In the case of Joreth Ltd vs Kigano & Associates [2002] 1 E.A. 92, this Court addressed the issue thus;

“We would at this stage point out that the value of the subject matter of a suit for the 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

17. This Court in considering the matter before it would like to emphasize two issues. First, in taxing an Advocate’s Bill of Costs, the value of the subject matter must be ascertained a priori. Where the value of the subject matter of a suit is known or can be determined from the pleadings, Judgment or settlement, the Taxing Officer has no discretion in assessing instruction. However, where the value of the subject matter is unknown or cannot be ascertained, then the Taxing Officer is expressly permitted, in exercising his or her discretion to take into account any such matters as he or she may consider to assess instructions fees.

18. The passage also stresses the three levels from which the value of the subject matter may be ascertained. Before the hearing of an action, from the pleadings, or at the end of a trial, from the Judgment or where a suit has been compromised, from a settlement. (See Peter Muthoka & another vs. Ochieng & 3 Others [2019] eKLR, Kamunyori & Co Advocates vs. Development Bank of Kenya Limited [2015] eKLR, and Lucy Waithira & 2 others vs. Edwin Njagi T/A E. K Njagi & Company Advocates [2017] eKLR.)

“The Taxing Master has to consider the following factors as settled in First American Bank of Kenya (supra) the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any directions by the trial Judge.”

19. The Plaintiff/Applicant has an issue with the instruction fees. It is trite that instruction fees are charged from the value of the subject matter, but there are suits where the value cannot be drawn from pleadings or Judgment.

20. The Court will only interfere with the decision of the Taxing Master where there is a clear error of principle or the sum awarded are manifestly high or low so as to lead to an injustice.

21. The Plaintiff/Applicant has contended that the Taxing Master failed to take into account the correct valuation of the suit property as at the time the Judgment was being delivered and further that the Taxing Master failed to consider other factors such as the nature and importance of the case or parties, the complexities of the matter whether novel issues were raised, duration of the matter and the scope of work done.

22. In the case of Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others [2006] eKLR, the Court held that;

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... The 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 manifestly excessive as to justify interference 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. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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 reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for.... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon Counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by Counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs”

23. Further this Court in recent case of ELC Civil Suit No. 175 of 2011 Eunice Nyakiumba Waweru vs NIC Bank Limited & 2 Others held while considering the discretion of a Taxing Master stated as follows:

“Whereas I am not persuaded that the Taxing Master could speculate on the value of the suit property taking into account appreciation outside the valuation report considered by the Hon Judge, she did increase the instruction fee from Kshs. 249,500 to Kshs. 600,000. This was based on what she stated “...being the complexity of the case...”. There is no doubt that the Advocate Remuneration Order provides for minimum instruction fees with discretion to the Taxing Master to increase the fees based inter alia on the complexity of the case provided the discretion is exercised in a fair and reasonable manner.”

24. The Plaintiff/Applicant did not file a valuation report in the pleadings and chose to introduce a valuation report when he filed the Bill of Costs. Now, having perused the decision by the Taxing Master, the Court notes that in her decision, the Taxing Master valued the suit property by referring to the general damages awarded by the Court for trespass at Kshs. 100,000/= and in valuing the same, the Taxing Master appreciated that the suit herein was filed in the year 2011, that the period taken to resolve the matter was 13 years.
25. Having perused the Application, it is not in doubt that the Taxing Master referred to the general damages awarded by this Court in awarding the instruction fees at the aggregate of Kshs. 750,000/-.



The 3rd batch of Defendants have opposed the award and even stated that the Taxing Officer should have in the least referred to the valuation report of the Defendants at Kshs. 120,000,000/-. This has not been rebutted by the Applicant, save to state in their submissions that he had filed a valuation dated 6/08/2012 of Kshs. 113,450,000/- and that the instruction fees was based on a value of Kshs. 10,500,000/-. This then begs the question whether submissions are pleadings?

26. In answering the foregoing question in the negative, reliance is placed in Nairobi Civ Appeal No. 240 of 2011 Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR where the Court held;

“Submissions are generally parties’ “marketing language”, each side endeavoring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. Regarding the punitive damages sum of shs.50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st Respondents. We were unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained.”

27. This does not mean that the Court will ignore the submissions. What the Court does is to look at their relevance and take them into consideration, but is not bound by them. (See Mombasa Civ Appeal No. 68 of 2012 Imperial Bank Limited v Bakari Juma Bechpende [2016] eKLR).

28. The Taxing Master was under no obligation to be bound by the submissions, as she considered that a speculative amount. Given the circumstances, the Court upholds the decision of the Taxing Master to conclude that there was no value of the subject matter disclosed from the pleadings or Judgment and that the Taxing Master was right in principle in the award given using her discretion.

29. As already stated taking into account the above analysis, the Court finds that the instruction fees of Kshs. 750,000/= awarded by the Taxing Master is appropriate.

30. To this end, the Court finds the Chambers Summons Application dated 10/06/2024, is umerited and the same is dismissed.

Who shall bear costs of this Application?

31. This Court has discretion to grant costs. However, it is trite that costs usually follow the events unless special circumstances present themselves. The Court herein finds no special circumstances in this case and therefore the costs are awarded to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

Ms. Ouma for Plaintiff/Applicant

Ms. Welima holding brief for Mr. Okongo for 3rd Batch Defendants



No appearance for 1st and 2nd Batch Defendants

Mr. Melita - Court Assistant

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MOGENI J

JUDGE

