



**Momanyi t/a Nchogu, Omwanza and Nyasimi Advocates v Kenyatta National Hospital
(Miscellaneous Application 21 of 2019) [2025] KEELRC 1934 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1934 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION 21 OF 2019**

BOM MANANI, J

JUNE 30, 2025

BETWEEN

**JOB NYASIMI MOMANYI T/A NCHOGU, OMWANZA AND NYASIMI
ADVOCATES APPLICANT**

AND

KENYATTA NATIONAL HOSPITAL RESPONDENT

RULING

Background

1. Kenyatta National Hospital (hereafter referred to as the Applicant) filed the instant Reference dated 20th February 2024 to challenge the Taxation Order that was issued by Honourable Mbeja (the Taxing Master) on 22nd January 2024 (erroneously indicated in the application as 22nd February 2024) by which the Bill of Costs dated 29th January 2019 by Job Nyasimi Momanyi T/A Nchogu, Omwanza and Nyasimi Advocates (hereafter called the Respondent) was assessed at Ksh. 358,491,673.32. Although the Reference was filed out of time, the Applicant moved the court through its application dated 9th April 2024 for enlargement of time and for the filed Reference to be deemed as having been properly filed and served. The court granted the request through its ruling dated 31st October 2024. As such, the Reference is properly before court.
2. The Applicant's contention is that the impugned Bill of Costs had initially been taxed in the sum of Ksh. 22,436,357.45 prompting an earlier Reference by it. It contends that it succeeded in having the Taxation Order set aside and the Bill of Costs remitted for fresh taxation by a different Taxing Master.
3. The Applicant avers that following the fresh taxation, the Bill of Costs was taxed at Ksh. Ksh. 358,491,673.32 prompting filing of the instant Reference. The Applicant contends that the amount awarded by the Taxing Master is inordinately excessive. Further, it contends that since there was already a judgment in the parent suit when the Bill of Costs was filed, the Taxing Master should have taken into



- account the judgment as opposed to the pleadings in the cause to determine the value of the subject matter. As such, it contends that the Taxing Master committed an error of principle in arriving at his decision.
4. The Applicant contends that it was wrong for the Taxing Master to award the impugned costs, which it considers excessive, in a suit where the value of the subject matter could not be ascertained from the judgment of the court or the pleadings in the parent file. As such, it prays for the Taxation Order to be set aside and the matter to be remitted to another Taxing Master for re-taxation.
 5. The Respondent has opposed the Reference. It has filed a replying affidavit dated 7th March 2024 to anchor its opposition to the motion.
 6. The Respondent points out that the Reference was filed out of time without leave of the court. As such, the court lacks the requisite jurisdiction to hear it.
 7. The Respondent further contends that the instant Reference is defective as it was filed in the same cause where the initial Reference had been filed. As such and in its view, there is no Reference before the court.
 8. The foresaid notwithstanding, the Respondent avers that the Taxing Master did not commit an error of principle in arriving at the decision of 22nd January 2024. As such, it contends that the instant Reference lacks merit and should be declined.
 9. According to the Respondent, the Taxing Master took into account the efforts and time it had invested in defending the parent suit. As such, it contends that the Taxation Order should be upheld.
 10. The Respondent points out that the Bill of Costs was initially taxed at Ksh. 22,436,357.46. It however contends that the court subsequently set aside the Taxation Order and directed that the Bill be re-taxed.
 11. The Respondent contends that the learned Judge, whilst setting aside the earlier Taxation Order, indicated that the value of the subject matter could be discerned from the figures of salary and allowances which the Trade Union had demanded in the parent suit. Thus, it contends that the Taxing Master correctly relied on the pleadings in the parent suit to ascertain the value of the subject matter.
 12. The Respondent avers that the costs awarded to it are not excessive. It avers that the Taxing Master properly exercised his discretion in making the award.
 13. The Respondent contends that this court should not interfere with the impugned award merely because it considers it (the award) high. It avers that such an order will amount to improper interference with the Taxing Master's discretion.
 14. The Respondent contends that the Applicant has unduly delayed resolution of the dispute between them by deploying delaying tactics to fight the case. It contends that the Applicant's actions are unjust and should not be tolerated by the court.

Analysis

15. Although the Reference was filed out of time, this challenge was resolved when the court granted the Applicant leave to regularize its papers by enlarging the time for filing the Reference. As such, the matter is properly before the court and it (the court) is seized of jurisdiction to entertain it.
16. The Respondent contends that the Reference is defective since it was filed in the same cause where an earlier Reference which has since been determined had been filed. As such, it avers that the motion is improperly before court.



17. It is true that once a Reference is determined on the merits and the matter is remitted for re-taxation, it (the Reference) is thereby spent. As such, if the Applicant wishes to challenge the ruling that will arise from the second Taxation Order, he should ideally file a new Reference through a new miscellaneous cause.
18. In the instant proceedings, instead of the Applicant filing a fresh Reference through a separate miscellaneous cause, it filed the current Reference in the very same miscellaneous cause through which it had presented the first Reference. In my view, this was a misstep.
19. However and in my opinion, the misstep was a procedural one which should not affect the substance of the dispute before me. The fact of the matter is that despite the Applicant moving the court to challenge the new Taxation Order through a closed miscellaneous cause, the court registry admitted the application as presented.
20. Article 159 (1) (d) of *the Constitution* obligates the court to avoid paying undue regard to procedural technicalities whilst exercising the judicial authority that is bestowed on it. That being the case, the court is minded to consider the instant Reference as properly before it notwithstanding that it was filed in a closed miscellaneous cause.
21. It is noted that prior to the instant dispute, the court (differently constituted) had arbitrated between the parties in respect of an earlier Taxation Order that arose from the same Bill of Costs. In its ruling dated 12th May 2020, the court set aside the Taxation Order and remitted the Bill of Costs for re-taxation before a different Taxing Master. Thus, in this decision, this court will take into account the views that were expressed in the earlier ruling dated 12th May 2020 on some of the matters in contention.
22. The principles which govern ascertainment of the value of the subject matter during taxation are now well settled. In the case of *Joreth Limited v Kigano & Associates* [2002] KECA 153 (KLR), the Court of Appeal spoke to the matter as follows:-

“...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 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.”
23. Whilst it is apparent from the above decision that a Taxing Master should consider the pleadings, the judgment or settlement between the parties whilst determining the value of the subject matter, there was initially no clarity on when the three indicators should be deployed in the process. However, the Court of Appeal eventually provided guidance on the matter in the case of *Peter Muthoka & another v Ochieng & 3 others* [2019] KECA 597 (KLR) when it stated as follows:-

“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.



Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.”

24. In effect, the position of the Court of Appeal on the matter is that the stage at which a Bill of Costs is presented for taxation in a suit should guide the Taxing Master in determining which of the three indicators to deploy in ascertaining the value of the subject matter. If the Bill is presented before the matter has been heard and determined, the Taxing Master should look at the pleadings in order to determine the value of the subject matter for purposes of determining instruction fees. On the other hand, if the Bill is presented after the matter has been determined through judgment or settlement by the parties, he should look at the judgment or settlement.
25. Where the Taxing Master cannot ascertain the value of the subject matter after deploying the above indicators in the order suggested by the Court of Appeal, he should use his discretion to determine instruction fees. In exercising this discretion, the Taxing Master should take into account factors such as the nature and 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.
26. The above guidelines have since received the approval of the Supreme Court in the case of Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR) when it commented on the subject as follows:-

“ It is common ground that the subject matter of the suit in issue should be identified first, and then the value thereof determined. How is the value of the subject matter to be determined? Paragraph 1 of Schedule VIA is clear on this issue, and in point of fact stipulates that, “... where the value of the subject matter can be determined from the pleading, judgment or settlement of the parties”. This means that the value of the subject matter can be determined from the pleadings or judgment or settlement of the parties. In that regard, the Court of Appeal in the case of Joreth Ltd v Kigano & Associates [2002] 1 EA 92 expressed that:-

“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) ...”

Equally, the Court of Appeal in considering the issue of how the value of a subject matter can be determined in Peter Muthoka & another v Ochieng & 3 others, Civil Appeal No 328 of 2017; [2019] eKLR, stated as follows:-

“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. Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the



pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.”

We concur and approve of the foregoing findings by the Court of Appeal on the factors to take into consideration when determining the value of the subject matter.”

27. Besides the foregoing, there is the controversy regarding whether the Taxing Master should, without more, rely on figures which the parties may have pleaded in their pleadings to determine the value of the subject matter. A number of judicial pronouncements do not agree that this should be the case.

28. In his dissent in the case of *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] KECA 587 (KLR), Gatembu JA commented on the matter as follows:-

“ The mere mention, without more, of a figure in a pleading cannot, per se, determine the value of the subject matter for purposes of taxation. The mere mention of a figure in the pleadings should not prevent a taxing officer from exercising judicial discretion and inquiring whether such figure is indeed representative of the value of the subject matter for purposes of taxation. Consequently, I consider that the taxing officer and the learned Judge were right in concluding that the value of the subject matter was not ascertainable from the pleadings, in which case, the taxing officer, rightly used her discretion based on other relevant consideration to assess the instruction fee.”

29. In *M/s Lubuleliah & Associates Advocates v N K Brothers Limited* [2014] KEHC 7393 (KLR), the learned Judge rejected the proposition that merely because a figure is set out in the pleadings, the Taxing Master must take it as representing the value of the subject matter for purposes of determining the instructions fees in a claim. She expressed the view that the figure so claimed may or may not be granted by the court. As such, it will be a travesty of justice to rely on it, without more, to determine the value of the subject matter

30. In *Moronge & Company Advocates vs. Kenya Airports Authority* [2014] eKLR, the Taxing Master used the figure of Ksh. 25,542,000,000/= which had been pleaded in the parent suit to determine the value of the subject matter and therefore the applicable instructions fees. The Court of Appeal rejected this approach and stated as follows regarding the way forward in determining instructions fees in the matter:-

“ In our view, there is no way the value of the subject matter of the suit could be determined from the pleading in paragraph 12. The figure given therein was, in our view, plucked from the air. Like the learned Judge, we find and hold that the figure had absolutely no basis. It could not therefore be the value of the subject matter of the suit. The suit was dismissed on a preliminary objection. The value of the subject matter of the suit could not also be ascertained from the judgment or settlement as there was none. As the value of the subject matter could not be determined from the pleadings, judgment or settlement, the taxing officer should have used his discretion to determine such instructions fees as he considered just, taking into account, amongst other matters, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances (See *Joreth Limited vs= Kigano & Associates* [Court of Appeal, Civil Appeal No. 66 of 1999 Nairobi] (UR).”



31. In *D. Njogu & Company v Kenya National Capital Corporation* [2005] eKLR the learned Judge observed on the subject as follows:-

“So, whilst I accept that the advocate may have been instructed to sue for not only the principal sum, but also for interest thereon, at a specific rate, that fact alone cannot mean that the claim would be successful. In other words, the court could dismiss the whole claim, or grant part of the principal sum. Alternatively, the court could grant judgement for the whole principal sum, but without interest, or even with interest at rates other than those claimed. Effectively, therefore the value of the subject matter of the suit would remain indeterminate until the court passed its verdict on the case.”

32. In the instant case, in the decision of Maureen Onyango J on the first Reference, the learned Judge commented that the Taxing Officer had aptly captured the issue regarding the value of the subject matter of the suit. The learned Judge reproduced verbatim the Taxing Officer’s observations on the subject as follows:-

“The question that lingers here is: if the trial court did not find it worth to address the other issues raised in the pleading and only limited itself to the statement of dispute, would it be in order for the taxing master to look into the issue? I find that this would be improper. I shall hence look at the judgment of the court in determining the subject matter and not the pleadings.

From the judgment, the value of the subject matter cannot be ascertained. In the case of *Premchand Raichand Limited and another v Quarry Services E. Africa Limited* (1972) E.A., the Court of Appeal held that the value of the subject matter for purposes of taxation of a Bill of Costs ought if not ascertainable... (Sic) to use his discretion to assess the same.....”

33. In essence and by this observation, the learned Judge agreed with the Taxing Master’s views that the value of the subject matter in the parent suit could not be ascertained from the judgment that had been rendered in the cause. As such, she (the Taxing Master) was entitled to resort to her discretion to determine the instruction fees that was payable in the matter.

34. The learned Judge in the first Reference having come to the aforesaid conclusion regarding the methodology for ascertaining the value of the subject matter, she closed this aspect of the dispute. As such, it was not open to the Taxing Master to ignore these observations in the subsequent taxation and resort to the pleadings in the parent file to determine the value of the subject matter.

35. Once the learned Judge expressed her agreement with the Taxing Master in the first Taxation Order regarding how the value of the subject matter in the dispute was to be determined, she (the Learned Judge) conclusively determined the issue thus rendering it res-judicata. As such, the Taxing Master in the subsequent taxation was bound to go by her (the learned Judge’s) observations on the subject.

36. To the extent that the Taxing Master overlooked the learned Judge’s aforesaid views and opted to go back to the pleadings in the parent file to determine the value of the subject matter, he committed an error of principle. Once the learned Judge had resolved the aforesaid issue (expressly or by implication), it was not open to the Taxing Master to resort to the pleadings in the parent file to determine the value of the subject matter.

37. In any event, the Taxing Master’s decision to rely on the pleadings in the parent file and not the judgment to determine the value of the subject matter and therefore the applicable instruction fees in the matter appears to have been contrary to the precedent that was set by the Court of Appeal in the case of *Peter Muthoka & another v Ochieng & 3 others* (supra) and affirmed by the Supreme Court in



the case of Kenya Airports Authority v Otieno Ragot and Company Advocates (supra). As such and to that extent, the decision is amenable to being set aside.

38. But even assuming that the Taxing Master was entitled to resort to the pleadings in the parent file to determine the value of the subject matter despite the fact that the case had been determined and there was a judgment, was he entitled to rely on the figures as pleaded by the Trade Union in the Statement of Claim but disputed by the Respondent, without more, as being representative of the value of the subject matter? I do not think so.
39. The parties do not contest the fact that the figures which were deployed to determine the value of the subject matter were the proposed but contested increments in the emoluments of staff in the draft Collective Bargaining Agreement (CBA). They further do not contest the fact that the trial Judge in the parent suit declined to impose the impugned increments on the parties and directed them to go back to the negotiating table to iron out the disputed aspects of the proposed CBA.
40. In essence, the figures which the Taxing Master deduced from the pleadings in the primary suit as representing the value of the subject matter were contested by one of the parties. In its final judgment, the trial court neither affirmed nor rejected them. As such, I do not agree that the said figures are representative of the value of the subject matter.
41. In the premises, the Taxing Master ought to have invoked his discretion to determine instruction fees in the matter. As such, the items on instruction and getting up fees in the impugned Taxation Order were rendered in contravention of the existing precedent on the matter.
42. The Respondent has relied on the decision of Rika J in the case of Tom Ojienda & Associates v Nairobi City County [2021] eKLR to anchor its contention that the Taxing Master correctly relied on the pleadings in the parent suit to determine the value of the subject matter. However, that decision is distinguishable from the instant case in the sense that at the time the Advocate for the Claimant in the suit presented his Bill of Costs for taxation, the matter had not progressed to hearing. Therefore and unlike in the instant suit, there was no judgment on record in the matter. Alluding to this reality, the learned Judge observed at paragraph 24 of the decision as follows:-

“ There was no Judgment or Settlement in Industrial Court Cause Number 1410 of 2013 for the time the Advocate/Applicant herein, was retained by the Respondent herein. To know if any value could be assigned to the subject matter, the Court would have to examine the Pleadings.”
43. Further, in the aforesaid case of Tom Ojienda & Associates v Nairobi City County (supra), the dispute in the parent suit, inter alia, involved implementation of a CBA which had already been negotiated, agreed upon and registered. As such, the monetary value of the CBA, which the Claimant placed at Ksh. 10.4 billion annually, had crystalized at the time of litigation and was discernible from the instrument.
44. Conversely, in the instant dispute, the figure which the Respondent contends is representative of the value of the subject matter was a proposal by the Trade Union to be incorporated in the draft CBA but which was yet to be agreed upon. As such, the purported value of the subject matter in the dispute was only a proposal by the Trade Union which was not guaranteed to ultimately materialize. As such, it cannot be said to be a true representation of the value of the subject matter in the suit.
45. Having regard to the foregoing, I arrive at the conclusion that the Taxing Master applied the wrong principles in assessing instructions fees and getting up fees in the parent file. As such, I set aside the impugned Taxation Order so far as it relates to these two items (instruction fees and getting up fees).



46. The Applicant has also attacked the Taxing Master's ruling in respect of the other items (items 3 to 24) in the impugned Bill of Costs. It contends that the aforesaid items were taxed in a manner that contravenes the law. It avers that the Taxing Master did not provide reasons for the order he made in respect of the items.
47. In the impugned ruling, the Taxing Master expressed himself on the items as follows:-
- “The Bill was vigorously defended. (Sic) However considering all the 24 items of the Bill cumulatively, I am also satisfied that the Bill of costs dated 29th January 2019 is drawn to scale and it is taxed as presented in terms of Schedule VI Part A and B of the Advocates Remuneration Order 2014 all circumstances considered.”
48. The foregoing excerpt from the impugned ruling demonstrates that although the Applicant contends that the Taxing Master did not justify his decision in respect of items three (3) to twenty four (24) in the Bill of Costs, he (the Taxing Master) actually provided reasons for his decision on the items. He stated that the items were allowed as presented because they were drawn to scale.
49. This court is not entitled to interfere with the decision of a Taxing Master unless it is demonstrated that it was based on a wrong principle of law (*Aoro v Were* (Miscellaneous Reference Application E019 of 2022) [2022] KEHC 14628 (KLR) (31 October 2022) (Judgment)). The Applicant has not demonstrated that the Taxing Master's decision in respect of items three (3) to twenty four (24) in the Bill of Costs dated 29th January 2019 was based on a wrong principle of law. As such, I decline the invite to interfere with the said decision in respect of the aforesaid items, that is to say, items three (3) to twenty four (24) in the Bill of Costs.

Determination

50. The upshot is that the court makes the following findings and consequential orders:-
- a. The Taxing Master proceeded on the wrong principles of law in assessing items number one (1) and two (2) on instructions fees and getting up fees in the Respondent's Bill of Costs dated 29th January 2019.
 - b. As such, the Taxation Order relating to the Respondent's Bill of Costs dated 29th January 2019 which was rendered by the Taxing Master of the court on 22nd January 2024 is set aside in respect of items number one (1) and two (2) on instructions fees and getting up fees respectively in the Bill.
 - c. The Taxing Master's ruling dated 22nd January 2024 in respect of items number three (3) to twenty four (24) in the Respondent's Bill of Costs dated 29th January 2019 is valid and thus sustained.
 - d. The court directs that the Respondent's Bill of Costs dated 29th January 2019 be placed before a Taxing Master of the court other than the two Taxing Masters who have handled the previous taxations for purposes of taxing items number one (1) and two (2) on instructions fees and getting up fees only.
 - e. The Taxing Master to take into account the pronouncements in this ruling whilst assessing the aforesaid two items in the aforesaid Bill of Costs.
 - f. For the avoidance of doubt, the effect of re-taxation of items number one (1) and two (2) in the Bill of Costs as ordered above will require that the figure of Value Added Tax and the increment



of the advocates fees by one half as required under Part B of the Advocates Remuneration Order be adjusted accordingly.

g. Each party to bear own costs for the Reference.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JUNE, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

