



**Mayfair Holdings Limited v Omumbo & another (Environment and Land Case Civil Suit 874 of 2015) [2024] KEELC 6979 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6979 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 874 OF 2015  
SO OKONG'O, J  
OCTOBER 24, 2024**

**IN THE MATTER OF A REFERENCE FROM THE DECISION OF THE  
TAXING OFFICER HON. M.SHIMENGA DR DELIVERED ON 28TH  
MARCH 2024 IN TAXATION OF THE PARTY AND PARTY BILL OF COSTS**

**BETWEEN**

**MAYFAIR HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**WILSON AKWACHA OMUMBO ..... 1<sup>ST</sup> DEFENDANT**

**PAULINE MAUWA KDWACHA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Background**

1. The Plaintiff filed this suit against the Defendants in the High Court on 29<sup>th</sup> June 2011 as High Court Civil Suit No. 100 of 2011. The suit was transferred to this court in 2015 and given its current case number. The Plaintiff averred that at all material times, the Plaintiff was the registered proprietor of all that parcel of land known as Kisumu Municipality/Block 8/297 (hereinafter referred to as “the suit property”). The Plaintiff averred that sometime in March 2011, the Defendants unlawfully and without any reasonable cause or justification encroached onto the Plaintiff’s said parcel of land by piling bricks and constructing a structure thereon using the said bricks without the authority of the Plaintiff. The Plaintiff averred that by reason of the said unlawful acts by the Defendants, the Plaintiff had been barred from developing the suit property in spite of the fact that the plans for such development had been approved by the relevant local authority. The Plaintiff averred that it had lost the use of and prospective income from the premises for which it held the Defendants liable. The Plaintiff averred that the suit property had a fixed boundary and that it had carried out a survey that confirmed that the Defendants had indeed encroached upon the property.



The Plaintiff prayed for judgment against the Defendants for:

- a. A declaration that the Plaintiff(sic) had trespassed upon the suit property and ought to be evicted.
  - b. An order of permanent injunction restraining the Defendants either by themselves, their agents, servants or invitees from continuing to trespass on the suit property.
  - c. Loss of user at the rate of Kshs. 20,000/- per month from the date of trespass until vacant possession.
  - d. General and exemplary damages for trespass until the date of vacant possession.
  - e. Costs of the suit.
  - f. Interest on (c), (d) and (e) above at court rates.
  - g. Any other or further remedy this court may deem just and expedient to grant.
2. The Defendants filed a joint statement of defence on 5<sup>th</sup> December 2011. The Defendants denied the Plaintiff's claim in its entirety. The Defendants denied that the Plaintiff was the registered owner of the suit property and that the Defendants had trespassed thereon. The Defendants averred that they were in possession of the suit property as of right having acquired the same lawfully. This court heard the matter and delivered a judgment in favour of the Plaintiff against the Defendants on 12<sup>th</sup> October 2023 on the following terms;
- a. A declaration that the 2<sup>nd</sup> Defendant had trespassed upon the parcel of land known as Kisumu Municipality/Block8/297 owned by the Plaintiff.
  - b. An order that the 2<sup>nd</sup> Defendant vacates the parcel of land known as Kisumu Municipality/Block8/297 within 60 days from the date of the judgment in default of which the Plaintiff was to be at liberty to apply for a warrant for her forceful eviction from the property.
  - c. An order of a permanent injunction restraining the 2<sup>nd</sup> Defendant either by herself, her agents, servants, employees or assigns from trespassing upon the parcel of land known as Kisumu Municipality/Block8/297 after vacating the same or being evicted therefrom pursuant to order (b) above.
  - d. Kshs. 100,000/- being general damages for trespass.
  - e. Costs of the suit.
  - f. Interest on (d) at court rate from the date hereof until payment in full.
3. On or about 22<sup>nd</sup> February 2024, the Plaintiff filed a party and party bill of costs for taxation against the Defendants. The bill of costs that had 65 items was drawn in the sum of Kshs. 834,001/-. The Plaintiff's bill of costs was taxed on 28<sup>th</sup> March 2024 at a total sum of Kshs. 318,886/-. In taxing the bill, the taxing officer Hon. M. Shimenga applied 2006, 2009 and 2014 editions of the Advocates Remuneration Order (ARO). The taxing officer taxed instruction fees (Item 1) at Kshs. 180,000/- and getting up fees (Item 2) being 1/3 of instruction fees at Kshs. 60,000/-. According to her ruling, the taxing officer taxed items 28, 29, 30, 31, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, and 63 at Kshs. 1,100/- each. Items 34, 35, 36, 47, and 48 were taxed at Kshs. 2,300/- each. Item 64 was wholly taxed off while item 65 was taxed at Kshs. 12, 265/-.



## The reference

4. The Defendants were aggrieved with the said taxation. On 8<sup>th</sup> April 2024, the Defendants' advocates on record wrote to the deputy registrar/taxing officer asking several questions regarding the taxation. In an e-mail dated 11<sup>th</sup> April 2024, the taxing officer forwarded to the Defendants' said advocates a copy of the ruling of the taxing officer on the taxation and informed them that the reasons for the taxation of the various items were contained in the said ruling. On 22<sup>nd</sup> April 2024, the Defendants filed the present application seeking; leave to file a reference out of time against the decision of the taxing officer, stay of further proceedings in this matter, the setting aside of the entire decision of the taxing officer made on 28<sup>th</sup> March 2024 on the Plaintiff's bill of costs dated 22<sup>nd</sup> February 2024, the taxation a fresh of the said bill of costs by the court or a different taxing officer, and the costs of the application.
5. The Defendants contended that the bill of costs as taxed was manifestly high given the award that was given to the Plaintiff in the judgment of the court. The Defendants contended further that the taxing officer was biased against them. In their affidavit in support of the application sworn by the 2<sup>nd</sup> Defendant, the Defendants contended that the taxation of the Plaintiff's bill of costs was erroneous and breached Schedule 6(a)(i)(j) of the ARO. The Defendants averred that their advocates sought reasons for the decision of the taxing officer and it was not until 11<sup>th</sup> April 2024 that the said advocates received a response by which time, the time within which to file a reference had lapsed.
6. The Plaintiff opposed the application through grounds of opposition dated 29<sup>th</sup> April 2024. The Plaintiff contended that the reasons given by the taxing officer for taxing the Plaintiff's bill of costs in the manner she did was sound. With regard to the limb of the application seeking a stay of proceedings, the Plaintiff contended that the Defendants had sought a stay in the Court of Appeal a ruling on which was pending. The Plaintiff urged the court to dismiss the application.
7. The application was argued by way of written submissions. The Defendants filed their submissions dated 4<sup>th</sup> October 2024. The Defendants submitted that if the order for a stay of proceedings was not granted, the Defendants would be greatly prejudiced. With regard to the reference, the Defendants cited several authorities on the law underpinning the jurisdiction of the taxing officer. The Defendants submitted that the sum of Kshs. 180,000/- that the taxing officer awarded to the Plaintiff as instruction fees was plucked from the air. The Defendants submitted that the instruction fees should have been taxed at Kshs. 75,000/- where the value of the subject matter of the suit was not known. The Defendants submitted that having regard to the fact that the Plaintiff was only awarded Kshs. 100,000/- by the court, the total award of Kshs. 313,186/- was excessive and amounted to an error of principle. The Defendants submitted that the taxing officer erred by failing to take into account the nature of the dispute, the amount that was involved and the general conduct of the proceedings. The Defendants urged the court to allow the application.
8. The Plaintiff filed submissions dated 29<sup>th</sup> April 2024. The Plaintiff submitted that the Plaintiff was not opposed to the extension of time to file a reference being granted. On the issue of stay, the Plaintiff submitted that the Defendants had already been evicted from the suit property and what was pending was only the recovery of costs and the sum of Kshs. 100,000/- that was awarded to the Plaintiff as damages. On the reference, the Plaintiff submitted that the Defendants seemed to object only to the taxation of the instruction fees. The Plaintiff submitted that it had claimed Kshs. 520,000/- as instruction fees which the taxing officer reduced to Kshs. 180,000/-. The Plaintiff submitted that having regard to the value of the subject matter of the suit which was a parcel of land in Kisumu town, the sum of Kshs. 180,000/- awarded by the taxing officer as instruction fees was reasonable. The Plaintiff urged the court to uphold the taxation by the taxing officer.



## Analysis and determination

9. In *Kipkorir, Tito & Kiara Advocates v. Deposit Protection Fund Board* [2005] eKLR the court stated as follows:

“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.”

10. In *Kamunyori & Company Advocates v. Development Bank of Kenya Limited Civil Appeal No. 206 of 2006*[2015]eKLR, the court stated as follows:

“.. 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 instruction fee is arrived at on the wrong principles, it will be set aside”

11. In *Joreth Limited v Kigano & Associates* [2002] EA 92 the court stated that:

“C.K. Njai Esq. had declined to take into account the valuation letters proffered by Mr. Kigano to enable him to assess the capital value of the suit premises for the purposes of assessing the instruction fee. He said:

“Under item No. 1, the applicant charges Shs.13,500,000/=. In arriving at this amount he has estimated the value of the suit land at Shs. 1 billion. Two "opinions of value" have been tendered giving the average value of suit land as 1.2 Billion. These valuations or opinions as they are referred to are not (in the) pleadings. They cannot be relied on here. For a money value the subject matter of a suit to be the basis of assessing instruction fees, that value has to be ascertainable from the pleadings, judgment, or settlement. (See Schedule VIA1).”...

“...In our view C.K. Njai quite correctly rejected the "opinions of value" as proffered by Mr. Kigano from the bar. These opinions are not evidence. In any event these relate to properties known as L.R. Nos. 4920/1 and 4921/1 as well as L.R. Nos. 4920 and 4921. The letter of 21st July, 1998 addressed to Mr. Kigano by Mr. R.K. Lang'at is really not a valuation...”

“...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 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...”



...What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.”

12. I have considered the Defendants’ application and the response thereto by the Plaintiff. I have also considered the submissions by the advocates for the parties. I will not consider the limb of the application seeking a stay of proceedings as the court takes judicial notice that the Defendants had applied for a stay of execution in the Court of Appeal which considered the application and dismissed the same on 19<sup>th</sup> July 2024. With regard to the reference, the Applicant had a duty to satisfy this court that the taxing officer made an error of principle warranting interference by this court.
13. The Defendants challenged the taxing officer’s taxation of the bill of costs dated 22<sup>nd</sup> February 2024 generally. I believe this is not the best way to challenge a taxation of a bill of costs. The Defendants were supposed to point out the items in the bill of costs whose taxation they were objecting to and the reason for the objection. What they have raised in the reference is a blanket objection to the whole decision of the taxing officer. As I mentioned earlier, the Plaintiff’s bill of costs had a total of 65 items that were taxed by the taxing officer. A part from the instruction fees and the getting up fees (items 1 and 2), I have not appreciated the objection if any that the Defendants have with regard to the taxation of the other items in the bill of costs dated 22<sup>nd</sup> February 2024. I have perused the bill of costs dated 22<sup>nd</sup> February 2024. I have considered how the taxing officer taxed each item in the bill of costs. From my perusal of the bill of costs in the court file and notes made by the taxing officer, I have noted the following; item 1 of the bill was taxed at Kshs. 180,000/-, item 2 at Kshs. 60,000/-, items 3 and 4 were taxed as drawn, item 5 was taxed at Kshs. 3000/-, items 6 to 27 were taxed as drawn, items 28 to 33 were taxed at Kshs. 1,100/- each, items 34 to 36 were taxed at Kshs. 2300/- each, items 37 to 46 were taxed at Kshs. 1,100/- each, items 47 and 48 were taxed at Kshs. 2,300/- each, items 49 to 63 were taxed at Kshs 1,100/- each, items 64 and 65 being filing fees were taxed at a total of Kshs. 12,265/-, the 2<sup>nd</sup> and 3<sup>rd</sup> sub-items under item 65 were taxed as drawn while sub-item 4 was taxed off wholly.
14. What I have set out above is however not fully captured in the ruling of the taxing officer dated 28<sup>th</sup> March 2024. In the ruling, the taxing officer stated that she would tax the bill of costs under the 2006, 2009 and 2014 editions of the ARO. The taxing officer thereafter taxed items 1 and 2 of the bill of costs (instruction fees and getting up fees) at Kshs. 180,000/- and Kshs. 60,000/- respectively. As correctly submitted by the advocates for the Defendants, there is no explanation on how the taxing officer arrived at the instruction fees of Kshs. 180,000/-. The taxing officer stated as follows: “Item 1 “instruction fees” is reasonably taxed at Ksh. 180,000”. How the taxing officer came to the conclusion that the said sum of Kshs. 180,000/- was reasonable is not explained. In assessing the instruction fees, the taxing officer was supposed to apply the 2006 edition of the ARO. Instruction fees is based on the value of the subject matter of a suit. The taxing officer had a duty while assessing the instruction fees to ascertain first the value of the subject matter of the suit from the pleadings or the judgment of the court. If the taxing officer had managed to ascertain the value of the subject matter of the suit, she would then assess a reasonable instruction fees with the minimum scale fees provided in the ARO as the basis for such assessment. If the taxing officer was unable to ascertain the value of the subject matter of the suit from the pleadings and the judgment of the court, the taxing officer in line with the decision of the court in *Joreth Limited v. Kigano & Associates* (supra), was supposed to use her discretion to assess such



instruction fee as she considered just. In *Eastland Hotel Limited v. Wafula Simiyu & Co. Advocates* [2014] eKLR the Court of Appeal stated that:

“This Court’s decision in *Joreth Limited v Kigano & Associates* (supra) which was cited to us by both the appellant and the respondent, states 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. But where the same is not ascertainable from the pleadings, judgment or settlement, the taxing officer is entitled to use his/her discretion to assess instruction fees. In so doing, the taxing officer will have to take into account, amongst other matters, the nature and importance of the cause or the matter, the interest of the parties, the general conduct of the proceedings and other relevant factors which may include the complexity of the case and its urgency. It is the value of the subject matter in dispute which determines the amount of instruction fees payable to an advocate.”

15. In my view, the taxing officer erred in not first ascertaining the value of the subject matter of the suit before assessing the instruction fees. It is uncertain how the taxing officer arrived at the sum of Kshs. 180,000/-. It is no wonder that the Defendants have contended that the figure was picked from the air. This was an error of principle that warrants interference with the decision of the taxing officer.
16. There is also no indication in the ruling of the taxing officer on how she taxed items 3, 4, 5, and 6 to 27. As I mentioned earlier in the ruling, from the notes in the file, the taxing officer taxed items 3 and 4 as drawn, item 5 at Kshs. 3000/- and items 6 to 27 as drawn. These did not however find themselves in the ruling of the taxing officer. The notes made by the taxing officer in the court file are not part of the ruling. Without looking at the said notes the parties would have no idea how items 3, 4, 5, and 6 to 27 were taxed by the taxing officer. It is not surprising therefore that in their notice of objection to taxation, the Defendants asked how the taxation was done rather than objecting to taxation of any particular item. Failure on the part of the taxing officer to indicate in the ruling how she taxed items, 3, 4, 5, and 6 to 27 of the bill of costs dated 22<sup>nd</sup> February 2024 also amounted to an error of principle.
17. In *Kipkorir Titoo & Kiara Advocates v. Deposit Protection Fund Board*(supra) the court stated as follows:

“And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – *D’Sonza v Ferrao* [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires.”
18. I find no compelling reason why I should tax the bill of costs herein. I am of the view that the taxing officer would be better placed to tax the bill which has to be taxed afresh since the taxation of the whole bill of costs was contested.

## **Conclusion**

19. In conclusion, the ruling and orders made by the taxing officer, Hon. M. Shimenga on March 28, 2024 on the Plaintiff’s bill of costs dated February 22, 2024 are set aside. The said bill of costs is remitted back to any other taxing officer for taxation afresh. Each party shall bear its costs of the application dated April 1, 2024.

**DATED AND DELIVERED AT KISUMU ON THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**S. OKONG’O**



**JUDGE**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERRING PLATFORM IN THE PRESENCE OF:**

Mr. Odhiambo for the Plaintiff

Mr. Mwamu for the Defendants

Ms. J. Omondi-Court Assistant

