



**Oike Keenyokie Suswa Trust Registered Trustees v County Government
of Narok & 2 others (Environment & Land Case E003 of 2022)
[2024] KEELC 13273 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E003 OF 2022
CG MBOGO, J
NOVEMBER 20, 2024**

BETWEEN

OIKE KEENYOKIE SUSWA TRUST REGISTERED TRUSTEES PLAINTIFF

AND

COUNTY GOVERNMENT OF NAROK 1ST DEFENDANT

COUNTY LAND REGISTRAR NAROK 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Before this court for determination is the chamber summons dated 29th July, 2024 filed by the plaintiff/applicant and it is expressed to be brought under Rule 11 (2) of the Advocates (Remuneration) Order seeking the following orders: -
 1. That this honourable court be pleased to vacate and set aside in its entirety the ruling of the Honourable Daniel Ngayo, Deputy Registrar, dated and delivered on 17th July, 2024.
 2. That this honourable court be pleased to exercise its discretion and to tax the Bill of Costs dated 1st February, 2024 itself.
 3. That in the alternative to (2) above this court be pleased to refer the applicant's Bill of Costs dated 1st February 2024 for fresh taxation before the Taxing Master and with suitable directions.
 4. That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that the taxing officer erred in taxing the Bill of Costs at Kshs. 1,365,453.33/- by taxing off Kshs. 49,489,292.06/- in total disregard of the value of the



subject matter which in this case was Kshs. 2,527,798,000/-, contrary to the procedures and practices laid in law.

3. The application was further supported by the affidavit of Livingstone Musanka Kisotu, one of the registered trustees of the plaintiff/ applicant sworn on even date. The plaintiff/ applicant deposed that on 24th January, 2024, judgment was delivered in this matter where the 1st defendant/ respondent was condemned to pay costs, and that they filed a party and party Bill of Costs dated 1st February, 2024 with a valuation report to aid in the assessment of the subject value of the suit seeking for costs of Kshs. 50,854,745.39/-. Further, that the bill of costs was erroneously taxed at Kshs. 1,365,453.33/- wherein they filed a notice of objection.
4. That upon perusal of the reasons for taxation, the taxing officer made the following errors: -
 - a. The learned taxing officer erred in fact and in law in taxing the bill of costs dated 1st February, 2024 at Kshs. 1,365,453.33/- by taxing off Kshs. 49,489,292.06/- in total disregard of the value of the subject matter which in this case was Kshs. 2,527,798,000/- contrary to the procedures and practices laid in law.
 - b. The learned taxing officer erred both in fact and law in taxing item A of the bill of costs at Kshs. 1,000,000/-. The taxation of instruction fees is guided by the amount and value of the subject matter, which in this case is Kshs. 2,527,798,000/; the interest of the parties, nature and importance of the cause, volume of the documents involved, complexity of the issues raised and the novelty of points of law.
 - c. The learned taxing officer erred in law and fact by failing to appreciate that the suit in issue was in respect of property whose value was above Kshs. 2,527,798,000/- and that in exercising his discretion the taxation of item 1; instruction fees could not possibly and reasonably be Kshs. 1,000,000/-.
 - d. The learned taxing officer erred in law and fact in holding that Kshs. 1,000,000/- is reasonable instruction fees by premising his reason for the same on the time taken in the matter, scope of the work done and the nature of the dispute therein, while at the same time disregarding the complexity of the matter, the interest of the parties and the amount and/or value of the subject matter, particulars of which were well before the honourable taxing officer, and which are all important factors to be considered when taxing instruction fees.
 - e. The learned taxing officer erred in law and fact in failing to abide by Rule 13 of the Advocates Remuneration Order together with several binding precedents which allowed for the use of a valuation report in order to peg the value of the subject matter and aid in assessment of the instruction fees.
 - f. The subsequent getting up fees is thus wrongly awarded as it is based on an erred taxation of the instruction fees.
 - g. There is an error of principle and use of discretion in the learned taxing officer's ruling and/or reasons thereof.
 - h. The decision of the learned taxing officer if allowed to take effect will render useless the mandatory legal requirements established in the Advocates Remuneration Order as well as numerous binding precedents from superior courts that regulate the taxation of bill of costs.
5. The application was opposed by the replying affidavit of John Mayiani Tuya, the County Secretary of the 1st defendant/ respondent sworn on 16th September, 2024. The 1st defendant/ respondent deposed



that on instructions and getting up fees, the plaintiff/ applicant has sought the services of a private valuer and used the value of the subject matter at Kshs. 2,527,798,000/- suggested in his valuation report to calculate the instruction fees and the getting up fees. The 1st defendant/respondent deposed that the taxing officer rightly found that the value of the subject matter was not found in the pleadings, proceedings or judgment, and that the said valuation report filed after judgment was prejudicial to the defendant/ respondent as it was filed after judgment.

6. The 1st defendant/ respondent deposed that the taxing officer was within the law by disregarding a valuation report filed after judgment, and that it was correct to hold that there was nothing to show that the matter was complex or novel. Further, it was deposed that the matter having been filed on 11th April, 2022 took an extremely short time in court hence little time was expended on the matter. It was also deposed that the plaintiff/ applicant has not demonstrated sufficient reasons that warrant the ruling of the taxing officer to be set aside, vacated or the bill of costs to be re-taxed as the ruling was well guided by law, practice and numerous precedents.
7. The application was canvassed by way of written submissions. The plaintiff/ applicant filed its written submissions dated 2nd October, 2024 where it raised one issue for determination which is whether the valuation report can be relied on by the plaintiffs in order for it to provide guidance as to the taxation of its costs. While relying on the case of Masore Nyanga'au & Co. Advocates v Kensalt Limited [2019] eKLR, the plaintiff/ applicant submitted that a valuation report can be annexed at the time of taxation in order for the court to properly assess the costs due. It was submitted that the subject matter of the suit from the course of proceedings was 6,322.19 acres whose large acreage speaks for itself as to the complexity and the high stakes involved in the dispute.
8. The plaintiff/ applicant further submitted that from the plaint, hundreds of millions were expended on the suit property, and which the 1st defendant/ respondent had illegally transferred into its name in order to deprive the plaintiff/ applicant of its land. It was also submitted that the specific valuation of the property was not in contention due to the fact that the same did not form the substratum of the case, and that it does not preclude the plaintiff/ applicant from claiming its costs based on the actual market valuation of the property.
9. The plaintiff/ applicant further submitted that Rule 13 of the Advocates Remuneration Order allows the taxing officer to call for evidence such as valuation reports for purposes of determining a dispute before it. To buttress on this submission, the plaintiff/ applicant further relied on the case of Tom Ojienda & Associates Advocates v County Government of Narok (Miscellaneous Application E608 of 2019) [2021] KEHC 452 (KLR) (Commercial and Tax) (16 June 2021) (Ruling). It was further submitted that the 1st defendant/ respondent has not contested the validity or expert assessment of the subject matter from the valuation report that it has relied on, and neither has it offered any alternative valuation to be considered. Reliance was further placed in the case of Kaira Nabasenge t/a Kutto & Kaira Nabasenge Advocates v Sum (Environment and Land Miscellaneous Application E016 of 2023) [2023] KEELC 21137 (KLR) (31 October 2023) (Ruling).
10. The 1st defendant/ respondent filed its written submissions dated 28th October, 2024 where it raised three issues for determination as follows: -
 - a. Whether the value of the subject matter was ascertainable and what are the factors to consider while taxing a Bill of Costs where value of the subject matter is unknown.
 - b. Whether filing the valuation report after judgment by the plaintiff was lawful and procedural and whether it occasions unfairness and is prejudicial to the 1st defendant/respondent who did not interrogate the report nor challenge it.



- c. Whether by filing the valuation report ex parte the plaintiff usurped the powers of court as donated by Rule 13A of the Advocates Remuneration Order.
11. On the first issue, the 1st defendant/ respondent submitted that at the time of delivery of the judgment, the value of the subject matter being unknown, the plaintiff/ applicant preposterously introduced a new document/evidence in the name of a valuation report after judgment, an action that is not only grossly unprocedural but also legally incorrect. Further, they submitted that the framers of the Advocates Remuneration Order envisaged a situation where the value of the subject matter was unascertainable thus they provided a remedy under those circumstances. They relied on the cases of *Otieno, Ragot & Company Advocates v Kenya Airports Authority (Civil Appeal 39 of 2017)* [2021] KECA 587 (KLR), *Joreth Limited vs Kigano & Associates* [2002] eKLR, *Mwiti & Another v Viljoen & Another (Civil Case E002 of 2022)* [2023] KEHC 24906 (KLR) (8 November 2023 (Ruling), and *Sammy Some Kosgei v Grace Jelel Boit (Environment & Land Case 411 'B' of 2012)* [2014] KEELC 353 (KLR).
12. The 1st defendant/ respondent submitted that the plaintiff/ applicant has misconstrued the provisions of Rule 13A of the Advocates Remuneration Order, and that the power to summon and examine any witness, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him has only been given to the taxing officer.
13. On the third issue, the 1st defendant/ respondent submitted that the plaintiff/ applicant by filing the valuation report without moving the court amounted to usurping the powers of the taxing officer, and it placed on himself the powers and authority that he does not have.
14. I have carefully considered the reference, the replying affidavit and the submissions filed by the respective parties. I am of the view that the issue for determination is whether the plaintiff/ applicant has demonstrated sufficient cause to call for this court's interference with the decision of the taxing officer.
15. The plaintiff/ applicant filed the party and party bill of costs dated 1st February, 2024 seeking to have the bill taxed at Kshs. 50,854,745.39/-. The Bill of Costs was accompanied by a valuation report dated 30th January, 2024 as well as a copy of the title deed and official search. Being dissatisfied with the ruling delivered on 17th July, 2024, the plaintiff/ applicant contended that the taxing officer erred in taxing item A of the Bill of Costs at Kshs. 1,000,000/-, and that the taxation of instruction fees is guided by the amount and value of the subject matter, which in this case is Kshs. 2,527,798,000/-. The plaintiff/ applicant further faulted the taxing officer for failing to consider the interest of the parties, nature and importance of the cause, volume of the documents involved, complexity of the issues raised and the novelty of points of law.
16. In the case of *First American Bank of Kenya v Shah & Others* [2002] 1 EA 64, the Court of Appeal held as follows;
- “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 an inference 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.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.”

17. The plaintiff/ applicant challenges the decision of the taxing officer to award the sum of Kshs. 1,000,000/- as instruction fees since there was annexed to the Bill of Costs a valuation report to aid the court in its assessment. I have looked at the impugned ruling delivered on 17th July, 2024 where the taxing officer in arriving at his decision, relied on the case of Sammy Some Kosgei v Grace Jelel Boit [2014] eKLR, to exercise his discretion in assessing the laid down principles of taxation. The taxation officer was not persuaded that there was anything to show that the matter was complex or novel and also the time expended in this case.
18. I have further perused the record in this matter and I note that the plaintiff/ applicant filed a plaint dated 8th April, 2022 seeking judgment against the defendants for: -
 - a. A declaratory order that the registration of Title No. Cis Mara/Suswa Kitet/2 in the name of the 1st defendant was fraudulent, illegally and unprocedurally obtained.
 - b. An order directing the Land Registrar Narok County to cancel the title in respect of Cis Mara/Suswa Kitet/2 registered in the name of the 1st defendant and instead register the same in the name of the plaintiff.
 - c. A permanent injunction restraining the defendants from entering, erecting structures, subdividing, alienating or using in any manner of Cis /Mara/Suswa Kitet/2 or any part thereof.
 - d. Costs of this suit.
19. In the plaint, the plaintiff/ applicant pleaded particulars of fraud, illegality and procedural impropriety as well as trust, injury and legitimate expectation. Nowhere in the plaint was any sums of money stated to have been lost or incurred. Equally, the value of the subject matter was not disclosed. At the end, this court found merit in the plaint and in the judgment delivered on 24th January 2024, granted the following prayers: -
 1. A declaratory order is hereby issued that the registration of Title No. Cis Mara/Suswa Kitet/2 in the name of the 1st defendant was unlawfully and unprocedurally obtained.
 2. The Land Registrar, Narok County is hereby directed to cancel the certificate of title in respect to Cis Mara/Suswa Kitet/2 registered in the name of the 1st defendant.
 2. The Land Registrar, Narok County is hereby directed to register the property known as Cis Mara/Suswa Kitet/2 in the name of the plaintiff.
 3. The plaintiff is entitled to costs of this suit, which is to be incurred by the 1st defendant.

Orders accordingly.

20. Whereas the plaintiff/ applicant contends that the valuation report filed was to aid in assisting the taxing officer determine the value of the subject matter, I am not persuaded by that reason for the reason that if at all, the plaintiff/ applicant intended it to be so, the valuation report should have formed part of the pleadings and/or the plaintiff/ applicant should have sought leave to produce the same in its



party and party bill of costs for consideration. In the case of *Joreth Ltd vs Kigano & Associates* [2002] 1 E.A. 92, the Court of Appeal stated as follows;

“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.”

21. Also, in the case of *Peter Muthoka & another vs Ochieng & 3 others* [2019] eKLR it was stated that;

“It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.” (emphasis mine)

22. I would agree with the 1st defendant/respondent and the taxing officer that the inclusion of the valuation report was prejudicial to the 1st defendant/ respondent as it was not anticipated. The taxing officer in my opinion exercised his discretion correctly and properly applied his mind to the laid down principles that govern taxation. I see no reason whatsoever to fault his finding.

23. Arising from the above, the chamber summons dated 29th July, 2024 therefore lacks merit, and it is hereby dismissed. Each party shall bear its own costs.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 20TH DAY OF NOVEMBER, 2024.

HON. MBOGO C.G.

JUDGE

20/11/2024.

In the presence of :-

Mr. Meyoki Pere – C.A

