Kaur alias Kaur v Suri (Environment & Land Case 738 of 2013) [2024] KEELC 14083 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14083 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 738 OF 2013

JO MBOYA, J

DECEMBER 11, 2024

BETWEEN

PARMJIT KAUR ALIAS KAUR .... PLAINTIFF

AND

AVTAR SINGH SURI .... DEFENDANT

RULING

Introduction and Background

1. Vide Chamber Summons Application [Reference] dated the 8th July 2024 and brought pursuant to Rule 11[1] & [2] of the *Advocates Remuneration Order*; the Plaintiff/Applicant herein has sought for the following reliefs;

   i. That the decision of the taxing officer in the Ruling dated and delivered on the 24th June 2024 with respect to items numbers 1, 9, 20, 28, 44, 61, 69, 84, 90, 104, 115, 132, 164, 167 and 172 in the Plaintiff's Party and Party Bill of Costs dated the 30th October 2023 be set aside and taxed afresh by this Honourable court.

   ii. That the decision of the taxing officer to deprive the Plaintiff of VAT on costs be set aside and this Honourable Court do award the Plaintiff VAT on the costs.

2. The Application beforehand is anchored on various grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the Affidavit of one Evan Mbugua, advocate sworn on the 8th July 2024; and to which the deponent has annexed a copy of the Ruling rendered by the taxing officer on the 24th June 2024.

3. Upon being served with the application under reference, the Defendant/Respondent filed a Replying Affidavit sworn on the 11th September 2024. For coherence, the Replying Affidavit has been sworn by one Brian A Moturi, Advocate. Instructively, the deponent of the Replying Affidavit has averred

that the Ruling of the taxing officer properly captured the principles applicable in taxation of bill of costs. In this regard, it was thus contended that the Reference beforehand is therefore misconceived and legally untenable.

4. The Reference came up for directions on the 9th October 2024 whereupon the advocates for the parties covenanted to dispose of the Reference by way of written submissions. To this end, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

5. The Applicant filed written submissions dated the 11th October 2024 whereas the Respondent filed written submissions dated the 21st October 2024. For coherence, the two [2] sets of written submissions form part of the record of the court.

Parties' Submissions

a. Applicant's Submissions:

6. The Applicant filed written submissions dated the 11th October 2024 and in respect of which the Applicant adopted the grounds contained at the foot of the Reference. In addition, the Applicant also reiterated the contents of the Supporting Affidavit.

7. Furthermore, learned counsel for the Applicant ventured forward and canvassed various issues. For good measure, learned counsel for the Applicant has highlighted four [4] salient issues for consideration and determination by the court.

8. Firstly, learned counsel for the Applicant has submitted that the learned taxing officer misapprehended and misconceived the value of the subject matter, namely, the suit property. Learned counsel for the Applicant has submitted that the learned taxing officer proceeded to assess and tax instructions fees on the basis of the pro-rata rents that were decreed and awarded by the court and not on the value of the subject matter.

9. Additionally, it was submitted that the dispute beforehand touched on and concerned the Applicant's entitlement to a portion of LR No. 209/662 [hereinafter referred to as the suit property] and which property is situated along Riverside within the City of Nairobi. Besides, it was also submitted that other than the claim pertaining to half share of the suit property, the Plaintiff/Applicant also sought to recover half share of the rents that ha been collected by the Defendant/Respondent from the suit property.

10. Arising from the foregoing, learned counsel for the Applicant has therefore submitted that in deploying the half share of the rental income in determining the instructions fees payable to the Applicant, the learned taxing officer misapprehended the applicable principles. In this regard, learned counsel for the Applicant has invited the court to find and hold that there is an error of principle predicated on misapprehension of the value of the subject matter.

11. Secondly, learned counsel for the Applicant has submitted that even though the Defendant/ Respondent had filed a Defence and Counterclaim, the learned taxing officer failed to tax and award instructions fees on account of the Counterclaim. In this regard, it was posited that a Counterclaim is a cross suit and thus same [counterclaim] attracts independent instructions fees.

12. Further and at any rate, learned counsel for the Applicant has submitted that in failing to tax and award instructions fees on account of the Counterclaim, the learned taxing officer committed an error of principle and thus the impugned Ruling and the Certificate of Taxation ought to be set aside.

13. To support the foregoing submissions, learned counsel for the Applicant has cited and referenced the holding in the case of *Kenyariri & Associates v Salama Beach Hotel & 4 Others* [2014] eKLR, where the court found and held that a Counterclaim is a separate and distinct suit. To this end, counsel has therefore invited the court to find and hold that the failure to award instructions fees on account of the Counterclaim represents yet another error of principle that was committed by the taxing officer.

14. Thirdly, learned counsel for the Applicant has submitted that the learned taxing officer erred in law and in principle in failing to tax and award instructions fees for presenting/opposing various applications which had been filed in the matter. In this regard, learned counsel for the Applicant cited and referenced the Applications dated the 24th June 2013; 12th August 2013; 18th February 2014; 31st October 2014; 11th June 2015; 25th November 2019; 17th August 2020; 5th January 2021 and 10th November 2022, respectively.

15. Flowing from the foregoing, learned counsel for the Applicant has submitted that the various applications [which have been referenced in the preceding paragraph] attract instruction fees in accordance with the Advocates Remuneration Order. In this regard, it has been contended that the failure to tax and award instructions fees in respect of the applications constitutes an error of principle.

16. Fourthly, learned counsel for the Applicant has submitted that the learned taxing officer also committed an error of principle in failing to consider the relevant scale applicable to awarding getting up fees. In any event, it has been contended that the manner in which the instructions fees were reckoned and computed has impacted upon Getting up fees.

17. Other than the foregoing, learned counsel for the Applicant has submitted that the Getting up fees was improperly assessed and/or taxed. To this end, the court has been invited to find and hold that the learned taxing officer improperly exercised her discretion in awarding the fees due on account of Getting up fees.

18. Finally, learned counsel for the Applicant has submitted that the learned taxing officer also failed to take into account relevant information/material and thus denied the Applicant herein her entitlement to Value Added Tax [VAT]. In this regard, it was submitted that the Applicant herein was enjoined to instruct and retain counsel because of the offensive actions by the Respondent.

19. Furthermore, it was contended that the services of the advocate who was instructed and retained by the Applicant are vatable and thus the Applicant was called upon to pay Value added tax [VAT]. Consequently, it has been posited that the Applicant is entitled to recover VAT from the Respondent.

20. To buttress the submissions pertaining to and concerning entitlement to charge value added tax, learned counsel for the Applicant has cited and reference Section 2 of the *Value Added Tax Act*. In addition, learned counsel for the Applicant has also referenced the holding in the case of *Mathenge & Another v Belle Holdings Ltd & 2 Others* [2023] KEELC 1942 [KLR] and *East African Society Ltd v A. C. A D'suaza & Another* Court of Appeal Civil Application No. 59 of 1995 [UR].

21. Flowing from the foregoing submissions, learned counsel for the Applicant has invited the court to find and hold that the Ruling of the taxing officer and the consequential Certificate of Taxation is replete with errors and thus same [Ruling] ought to be set aside.

b. Respondent's Submissions:

22. The Respondent filed written submissions dated the 21st October 2024 and wherein same [Respondent] has adopted and reiterated the contents of the Replying Affidavit sworn on the 11th

September 2024. In addition, the Respondent has ventured forward and highlighted four [4] salient issues for consideration by the court.

23. First and foremost, learned counsel for the Respondent has submitted that the learned taxing officer properly deployed and used the pro-rata rents [half rent] which was ordered by the court in taxing the instructions fees due and awardable to the Applicant. At any rate, it was contended that the value of the subject matter could not be used and/or relied upon insofar as the Applicant herein was already registered as the proprietor of the half of the suit property.

24. Secondly, learned counsel for the Respondent has submitted that the amended Plaint dated the 24th June 2013, which premised the Applicant's claim did not contain and/or advert to any monetary claim. Instructively, it was contended that the amended Plaint sought for declaration, permanent injunction and an order for subdivision of the suit property.

25. Owing to the foregoing, learned counsel for the Respondent has submitted that the learned taxing officer was therefore right and within the law in deploying the sum of Kes. 22,078,207/= only [being the rent arrears] as the basis for assessing instructions fees.

26. Thirdly, learned counsel for the Respondent has submitted that the suit beforehand was summarily determined after the parties recorded a Consent. To this end, learned counsel for the Respondent has contended that the matter was therefore fully heard. Furthermore, it has been submitted that the claims at the foot of the Plaint and the Counterclaim, were never canvassed.

27. Arising from the fact that the claims at the foot of the Plaint and the Counterclaim were never fully canvassed, learned counsel for the Respondent has contended that the learned taxing officer was right in declining to tax and award any costs on the basis of the Counterclaim.

28. Fourthly, learned counsel for the Respondent has submitted that the amounts claimed on account of instructions fees for the Applications in terms of items numbers 9, 20, 28, 61, 69, 84, 115, 132, 164 and 167, respectively, were rightly declined by the learned taxing officer. In particular, it has been contended that instructions fees can only be awarded once and hence the claim for instructions fees on the basis of the Applications would amount to duplicity.

29. For the avoidance of doubt, learned counsel for the Respondent has submitted that the instructions fees to represent/oppose the various Applications, which had been adverted to were/are covered by the instruction fees awarded in terms of item 1. To this end, learned counsel for the Respondent has submitted that instruction fees for representing or opposing the Applications were rightfully declined.

30. Finally, learned counsel for the Respondents has submitted that the Bill of Costs which was presented for taxation was a Party and Party Bill of Costs. To this end, learned counsel for the Respondent has contended that such bill of costs cannot attract value added tax.

31. On the contrary, it was submitted that value added tax can only be levied and charged on an Advocate-Client Bill of Costs and not otherwise. In this regard, learned counsel for the Respondent has cited and referenced the holding in the case of *Pyramid Motors Ltd v Langata Gardens Ltd* [2015] eKLR.

32. Arising from the foregoing, learned counsel for the Respondent has implored the court to find and hold that the Ruling of the learned taxing officer and the consequential Certificate of Taxation, accord with the established principles.

33. Consequently and I this regard, the court has been invited to find and hold that the Application beforehand is devoid of merits.

Issues For Determination:

34. Having considered the Chamber Summons Application [Reference] and the Response thereto and upon consideration of the written submissions filed on behalf of the respective parties, the following issues crystalize [emerge] and are thus worthy of determination:

    i. Whether the learned taxing officer committed errors of principle in the course of taxing the Applicant's Bill of Costs or otherwise.

    ii. What reliefs/orders if any ought to be granted.

Analysis And Determination

Issue Number 1 Whether the learned taxing officer committed errors of principle in the course of taxing the Applicant's Bill of Costs or otherwise.

35. The Applicant has filed the instant Application [Reference] and wherein same [Applicant] contends that the learned taxing officer committed several errors of principle in the course of taxing the Bill of Costs dated the 30th October 2023. To this end, the Applicant has therefore implored the court to find and hold that the impugned Ruling and the Certificate of Taxation, is vitiated and thus warrants being set aside.

36. Insofar as the Application beforehand seeks to impugn the Ruling and the consequential Certificate of Taxation of the taxing officer, it is imperative to state and underscore that the court can only interfere with and/or set aside a Certificate of Taxation on circumscribed reasons. Furthermore, before a court ventures forward to interfere with a Certificate of Taxation, it is incumbent upon the court to satisfy itself that the learned taxing officer either failed to take into account relevant factors; took into account irrelevant factors or better still, committed an error[s] of principle.

37. Additionally, it is worth stating that the court is called upon to exercise deference to the taxing officer and more particularly, when the Reference seeks to challenge the quantum of taxation. To this end, it is trite and established that the taxing officers are the ones seized of the technical competence to undertake the taxation. Simply put, the court is called upon to exercise restraint, caution and circumspection before endeavouring to interfere with the Ruling of the taxing officer.

38. Suffice it to underscore that the principles that underpin the jurisdiction of the court to interfere with the Ruling of the taxing officer and the consequential Certificate of Taxation, have been elaborated in a plethora of decisions. For good measure, it shall be apposite and expedient to sample but a few of the decisions.

39. To start with, the circumstances under which a court can interfere with the Ruling of the taxing officer and the consequential Certificate of Taxation were highlighted and elaborated upon by the Court of Apppeal in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR where the Appellate Court held as follows:

    > On a 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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:

> "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases."

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see Arthur v Nyeri Electricity Undertaking (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel* (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle.

40. Likewise, the principles that govern the interference with the Ruling of a taxing officer and the consequential Certificate of Taxation were also highlighted/elaborated upon in the case of *Peter Muthoka v Ochieng* [2019] eKLR, where the court stated as hereunder:

> It has long been the law as was stated in *Arthur v Nyeri Electricity* (Supra), that where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional cases. What we now have to decide is whether there was an error of principle which would have called upon the learned Judge to interfere with the taxing masters' decision.

41. The Supreme Court of Kenya has also had occasion to address the parameters to be deployed and applied before interfering with a Certificate of Taxation. In the case of *Non- Governmental Organizations Coordination Board v EG & 5 others* (Petition (Application) 16 of 2019) [2023] KESC 102 (KLR) (Civ) (8 December 2023) (Ruling), the Apex court stated as hereunder:

> 22. The gravamen of the applicant's reference is the taxed award of Kshs 5,000,000 for instruction fees. This court recently in *Outa v Odoyo & 3 others*, SC Petition No 6 of 2014; [2023] KESC 75 (KLR) highlighted the following principles to be considered in an application for setting aside a Certificate of Taxation: "(11)A Certificate of Taxation will be set aside, and a single Judge can only interfere with the taxing officer's decision on taxation if;
>
> a. there is an error of principle committed by the taxing officer;
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> b. the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy;(and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).
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> c. the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and
>
> d. the award proposed is so far as practicable, consistent with previous awards in similar cases. To these general principles, I may add that;

i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,

ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,

iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes."

42. Guided by the principles which have been enumerated in the various decisions [supra], it is now apposite to revert to the instant matter and to discern whether or not the learned taxing officer properly exercised her discretion in the course of taxing the Applicant's Bill of Costs dated the 30th October 2023.

43. To start with, it is important to outline that the Applicant's suit was predicated/anchored on the basis of the amended Plaint dated the 24th June 2013. For good measure, the learned taxing officer correctly appreciated the operative pleading that underpinned the Applicant's suit [See paragraph 2 of the impugned Ruling].

44. Furthermore, it is not lost on this court that the learned taxing officer also correctly observed that the suit beforehand sought for various reliefs including declaration of ownership of half of LR No. 209/662 [the suit property]; permanent injunction as well as subdivision of the suit property. Instructively, the suit property is situated along Riverside Drive within the City of Nairobi.

45. Other than the nature of the reliefs that were sought at the foot of the amended Plaint, it is also important to state that the learned taxing officer also understood that the suit property was generating substantial rents. For good measure, there is no gainsaying that this court found and held that the Applicant herein was entitled to half share of the rents which were computed and certified in the sum of Kes. 22,078,207/= only.

46. Notwithstanding the fact that the learned taxing officer appreciated the nature of the reliefs that were sought at the foot of the amended Plaint, the learned taxing officer failed to discern what was the value of the subject matter. Notably, the subject matter that was before the court was the suit property, namely, LR No. 209/662 and not the rent[s]] per se.

47. To my mind, in her endeavour to discern the monetary value, if any, the learned taxing officer was enjoined to take cognizance of the pleadings, judgment or settlement, if any, that addressed the monetary value of the subject matter. However, where the value of the subject matter was/is not discernible from the face of the pleadings, judgment or settlement, then the determination of the instruction fees fell to the discretion of the taxing officer.

48. To this end, it suffices to cite and reference the holding of the Court of Appeal in the case of *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR, where the court held thus:

> "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."

49. Suffice it to point out that in respect of the instant matter, the value of the subject property was not discernible from the pleadings and/or the judgment of the court. To the contrary, the only aspect that touched on and concerned a monetary award was the pro-rata rents due and payable to the Applicant, and which rents were certified in the sum of Kes. 22,078,207/= only.

50. I beg to repeat and reiterate that the sum of Kes. 22,078,207/= only was pro-rata rents which was found due and payable to the Applicant. For good measure, the said sum did not comprise and/or constitute the value of the subject matter. In this regard, the pro-rata rent of Kes. 22,078,207/= only could therefore not be deployed by the learned taxing officer as the value of the subject matter for purposes of taxing the instruction fees.

51. In my humble view, the deployment and/or usage of the pro-rata rents which were assessed in the sum of Kes. 22,087,207/= only as a basis of awarding instruction fees, constitutes a grave error on the part of the taxing officer. Simply put, the learned taxing officer misapprehended and misconceived the import and tenor of what [sic] constitutes the value of the subject matter, namely, the suit property.

52. Suffice it to underscore that a misapprehension and/or misconception of the value of the subject matter founds a basis to interfere with the Ruling and consequential Certificate of Taxation.

53. To this end, it suffices to cite and reference the holding of the Court of Appeal in the case of *Kamunyori & Co. Advocates v development Bank of Kenya Ltd* [2015] eKLR, where the court stated as hereunder:

    22. 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 (see *Elmandry and Others v Sali*m [1956] EACA 313). As long ago as 1961, the predecessor of this Court emphasized in *Arthur v Nyeri Electricity* [1961] EA 492 that "where there has been an error in principle, the Court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will intervene only in exceptional cases." That is still good law.

54. Secondly, the learned taxing officer failed to tax and award instruction fees on account of the Counterclaim. For good measure, the item touching on and concerning instruction fees on the Counterclaim was taxed off on the basis that instructions fees is static and can only be charged once.

55. To be able to understand the reasoning of the learned taxing officer, it suffices to reproduce the reasoning as highlighted at the foot of paragraph 4 of the impugned Ruling. The learned taxing officer stated thus:

"As stated above, the suit was filed in the year 2013. The Plaintiff seeks a total of Kes. 8,595,000/= only as total instruction fees. Instruction fees is a static item and can only be

charged once. It is now trite law that the taxing master has the discretion to increase this figure considering a number of factors including............"

56. Flowing from the foregoing position, the learned taxing officer proceeded to tax off the claim on instruction fees on account to the Counterclaim. According to the learned officer, the taxation and award on instruction fees for filing the suit would suffice. Consequently and according to the Learned Taxing Officer, no further instructions fees could thus be charged for defending the Counterclaim or otherwise.

57. Though the learned taxing officer was right in finding and holding that the instruction fees is static and is charged only once, the learned taxing officer however fell in error and did not appreciate that a Counterclaim is a separate and distinct suit. In this regard, just as instruction fees would be charged and/or is chargeable for filing a suit, one, the Applicant not excepted, would be called upon to levy and charge instruction fees on a Counterclaim, if any.

58. To my mind, had the learned taxing officer internalized the principle governing the charging of instructions fees and had the learned taxing officer appreciated that a Counterclaim is a separate suit, same [taxing officer] would have proceeded to award instruction fees on account of the Counterclaim.

59. To buttress the exposition of the law that a Counterclaim is a separate and distinct suit and thus attracts instructions fees, it suffices to cite and reference the decision of the Court of Appeal in the case of *County Government of Kilifi v Mombasa Cement Ltd* [2017] eKLR, where the court stated thus:

> " ....The counter-claim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter- claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit......"

60. The fact that a Counterclaim is a separate and distinct suit was also elaborated by the Court of Appeal in the case of *Provincial Insurance Company of East Africa v Lenny Maxwel Kivuti* [1997] eKLR.

61. For good measure, the court stated thus:

> The learned judge, although he was not asked to do so, proceeded to strike out the insurer's counterclaim. That order was, in our view, wrong and ought to be set aside. The counterclaim, although interwoven with the defence, is a distinct claim and does not merit striking out as was done.

62. Finally, the distinct nature of a Counterclaim was also adverted to and highlighted in the case of *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 Others* [2014] eKLR, where the court stated as hereunder:

    1. A Counter-claim contains assertions that a defendant could have made by starting a lawsuit if the Plaintiff had not already begun an action. It is governed by almost the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant

files in response to the Plaintiff's claim. A Counter claim is therefore in all respects a suit by the Defendant.

1. The Applicant is therefore entitled to instruction fees on the Counter claim. The taxing officer erred in not awarding the Applicant instruction fees on the Counter claim.

63. To my mind, the instruction fee that was awarded for prosecuting the suit vide a Plaint cannot be said to suffice for purposes of defending the Counterclaim. For good measure, the Counterclaim was a separate and distinct suit and hence same [counterclaim] attracted instruction fees.

64. Thirdly, it is not lost on this court that the learned taxing officer also declined to tax and award instruction fees on account of the various Applications that were presented/opposed by the Applicant. To this end, it suffices to recall that the Applicant had charged instruction fees as pertains to various Applications, namely, the Applications dated 24th June 2013; 12th August 2013; 18th February 2014; 31st October 2014; 11th June 2015; 25th November 2019; 17th August 2020; 5th January 2021 and 10th November 2022, respectively.

65. Even though the Applicant had raised and charged instruction fees for the various Applications [details highlighted in the preceding paragraph], the learned taxing officer declined to award the instruction fees on the basis that same were covered vide item 1. For good measure, item 1 related to instruction fees to represent the suit and not Applications.

66. Pertinently, the various Applications [details in terms of paragraph *64* above] were filed long after the suit was filed. Though filed in the main suit, the Applications attracted separate and independent instruction fees. In any event, the Advocates Remuneration Order clearly provides a scale fees for Applications.

67. It is difficult to appreciate and fathom the reasoning of the learned taxing officer that the Applications were duly provided for vide item 1. In any event, the taxing and award of instruction fees on an application does not amount to duplicity or unjust enrichment. Additionally, the charging and awarding of instruction fees on an application does not violate the principle that instruction fees is static and is only chargeable once.

68. Perhaps at this juncture, it is apposite to draw the attention of the learned taxing officer to the fact that, the principle that instruction fees is static and is only chargeable once denotes that one cannot charge instruction fees for say, filing the suit twice. In particular, if a party instructed two [2] advocates at different points of the proceedings, instruction fees can only be charged once and not otherwise.

69. Notwithstanding the foregoing, the principle that instruction fees is static and is only chargeable once does not operate to deny and/or deprive a party from charging instruction fees for every aspect of a matter that is prosecuted and/or defended. Instructively, Applications attract instruction fees and same is clearly provided for under the Advocates Remuneration Order.

70. Finally, it is also important to underscore that where a matter is confirmed for Hearing, then the successful party is entitled to levy and charge Getting up fees. Suffice it to underscore that Getting up fees is levied at 1/3 of instruction fees. Instructively, the quantum chargeable on Getting up fees is dependent on the instruction fees awarded.

71. From the foregoing analysis, there is no gainsaying that the learned taxing officer failed to take into account relevant factors; took into account irrelevant factors and thus committed grave errors of principle. To my mind, the impugned Ruling and the consequential Certificate of Taxation, is riddled with errors of commission and omission.

72. In a nutshell, I come to the conclusion that the Applicant herein has clearly established and demonstrated the requisite ingredients, to warrant the interference with the impugned Ruling and the consequential Certificate of Taxation. In this regard, the Application is merited.

Issue Number 2 What reliefs/orders if any ought to be granted.

73. Having found and held that the Ruling of the learned taxing officer and the consequential Certificate of Taxation is riddled with errors of commission and omission, the next question that does arise is what ought to happen once the impugned Certificate of Taxation is set aside.

74. Suffice it to posit that the Applicant herein has invited the court to remit the Bill of Costs dated 30th October 2023 for taxation before a taxing officer other Hon Tessy Marienga. In this regard, I beg to underscore that where the court comes to the conclusion that the Certificate of Taxation is vitiated with errors of principle, the obvious course to adopt and deploy is to remit the Bill of Costs for re-taxation before a different taxing officer.

75. To this end, it is imperative to cite and reference the decision of the Court of Appeal in the case of *Joreth v Kigano* [2002] eKLR, where the court highlighted the position in the following terms:

> It was stated by the predecessor of this Court in the case of *Steel Construction & Petrol eum Engineering (E.A.) Ltd v Uganda Sugar Factory Ltd* (1970) EA 141 per spry JA at page 143:
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> "Counsel for the appellant submitted, relying on *D'Souza v. Ferao* [1960] EA 602 and *Arthur v Nyeri Electricity Undertaking* [1961] EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re-assessed on different principles, the proper course is to remit to the same to another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion."

76. Arising from the foregoing and taking into account the observation highlighted elsewhere herein before, I come to the conclusion that it is apposite to remit the Applicant's Bill of Costs dated the 30th October 2023 to the taxing officer [other than Hon Tessy Marienga] to undertake the taxation in line with the directions of the court.

Final Disposition:

77. Having considered the issues that were outlined in the body of the Ruling herein, it must have become crystal clear that the Applicant has established and demonstrated the requisite principles to warrant the impeachment of the Ruling and the consequential Certificate of Taxation.

78. In the premises, the final orders that commend themselves to the court are as hereunder:

    i. The Chamber Summons Application [Reference] dated the 8th July 2024 be and is hereby allowed.

    ii. The Ruling of the Learned Taxing Officer dated 24th June 2024 and the consequential Certificate of Taxation be and are hereby set aside.

    iii. The Applicant's Bill of Costs dated the 30th October 2023 be and is hereby remitted to the Taxing Officer for purposes of taxation in accordance with the directions hereof and the relevant Advocates Remuneration Order.

iv. For good measure, the taxation of the Applicant's Bill of Costs shall be undertaken by a taxing officer other than Hon Tessy Marienga.

v. The taxation of the Applicant's Bill of Costs shall be undertaken on priority basis.

vi. Costs of the Reference be and are hereby awarded to the Applicant.

vii. For good measure, the costs in terms of clause [vi] be and is hereby assessed in the sum of Kes. 30,000/= only.

79. It is so Ordered.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF DECEMBER 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. E M Kamau for the Plaintiff/Applicant

Mr. Byan Muturi for the Defendant/Respondent

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