**Kenafric Diaries Manufacturers Ltd v Kenya Power & Lighting Co Ltd (Civil Suit E119 of 2020) [2025] KEHC 3826 (KLR) (Civ) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3826 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT E119 OF 2020**

**JN MULWA, J**

**MARCH 27, 2025**

**BETWEEN**

**KENAFRIC DIARIES MANUFACTURERS LTD .................................. PLAINTIFF**

**AND**

**KENYA POWER & LIGHTING CO LTD ........................................... DEFENDANT**

**RULING**

1. For determination is the Chamber Summons dated 07/05/2024 filed by Kenya Power & Lighting Co. Ltd (the Applicant) against Kenafric Diaries Manufacturers Ltd (the Respondent) pursuant to Paragraph 11 of the Advocates Remuneration Order (ARO) seeking orders: -
    a. Spent.
    b. That this honourable Court be pleased to set aside and or vacate the decision of the taxing officer delivered on 26/04/2024 in relation to the Party and Party bill of costs dated 30/06/2023
    c. That the honourable Court be pleased to remit and or refer the Party and Party bill of costs dated 30/06/2023 before a different taxing officer for fresh taxation on the disputed items with appropriate directions on how it should be done.
    d. That in the alternative this honourable Court be pleased to tax by itself the Party and Party bill of costs dated 30/06/2023 on the disputed items.
    e. That the costs of the application be provided for.
2. The motion is premised on grounds found at the supporting affidavit sworn by Kinyanjui Theuri, stating that the taxing officer taxed the Applicant's bill of costs at Kshs. 250,230/- and in so doing

reduced the instruction fees, taxed off getting up fees, taxed off perusal of judgment costs and made an arithmetic error when calculating other legal fees in her ruling, thereby aggrieved by the taxing officer's ruling in respect of Item 1 and 2.

3. The main complaint by the Applicant is that the Taxing officer failed to consider the value of the subject matter, time and resources taken to prepare a defence, the complexity of the matter therefore leading to an erroneous decision, concluding that it is in the interest of justice that the orders sought are granted.

4. The Respondent opposes the motion by way of a replying affidavit deposed by Kori Kent Musonera sworn on 24/5/2024 together with the annexures thereto.

5. In rejoinder by way of a supplementary affidavit, Kinyanjui Theuri asserted that Respondent's response addresses peripheral issues to the reference whereas the gist of the application raises one major issue concerning whether the decision of the taxing officer was erroneous to the extent that it failed to consider the fact that the value of the subject matter could be ascertained from the pleadings.

6. The Court has considered the rival affidavit material and flags issues for determination;

   a. Whether the Applicant's reference is merited?

   b. Who ought to bear the costs of the application?

**Whether the Applicant's reference is merited?**

7. On the question at fore, this Court draws guidance from the dicta in Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd [1972] EA 162, Spry, V-P. stated at p.164 that:

> "The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat is too high or too low: it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other."
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> See also Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others (2006) eKLR

8. The Court of Appeal in the above case proceeded to lay down some principles to undergird the exercise of discretion by taxing officers in the assessment of costs as follows-:

   a. that costs be not allowed to rise to such a level as to limit access to the courts to the wealthy only;

   b. that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;

   c. that the general level of remuneration of advocates must be such as to attract recruits to the profession; and

   d. that so far as practicable there should be consistency in the awards made."

9. Similarly, Ringera, J (as he then was) in First American Bank of Kenya v. Shah & Others [2002] 1 E.A. 64 at p.69, stated; -

> "First, I find that on the authorities, this 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 so 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 cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state not all the above factors may exist in any given case, and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the Court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment."

10. From the above, it is evident that the main complaint by the Applicant is the award on Instructions Fees. Vide its submissions, the applicant called to aid the case of Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR and Joreth Limited v Kigano & Associates [2002] eKLR, arguing that the value of the subject matter herein could be ascertained from the pleadings therefore the taxing officer; and therefore was in error when she arrived at the determination that the subject value of the matter was unknown thus leading to a manifestly low award on the instruction fees, more specifically by pegging the same on the stage at which the matter was concluded.

11. On getting up fees, the Applicant submitted that the Taxing Officer failed to consider the complexity of the matter and preparation thereof fell into error by declining to award the same. Counsel thus urged that the award be set aside and or have the same re-taxed.

12. Having set out the above and further keeping in mind the earlier captured principles, the Court has duly considered the arguments in the rival affidavit material and later amplified in the Applicant's submissions.

13. The Applicants Bill of Costs dated 30/06/2023 was taxed at Kshs. 200,000/- Instructions fees-Item 1, and getting up fee Item 2 taxed off in its entirety as here under.

> " Instruction fees
>
> ...As already noted, the subject matter involves breach of contract and negligence. The Court proceedings show the general conduct of the matter which was instituted in 2020 and having been withdrawn in 2023 before being set down for pre-trial. In between only an application and a preliminary objection was dealt with by the Court. Taking the foregoing into consideration, I find that the amount tabulated as instruction fees is inordinately high in the circumstance. Having taken the factors stated in the referred case, I find that the instruction fees of Kshs. 200,000/- is reasonable. I proceed to tax Item 1 accordingly.
>
> Getting up fees
>
> ...Though the matter was defendant, the Court proceedings show that the matter was never confirmed for hearing. As such, getting up fees is not chargeable in this case. I thus proceed to tax off the amount under Item 2."

14. As a priori, it warrants setting out the history of this matter in order to contextualize the disputation. It is not in dispute that the Respondent filed suit as against the Applicant premised on negligence seeking general damages, and special damages to the tune of Kshs. 1,269,708,000/-, consequential loss to the tune of Kshs. 1,041,961,200/-, and interest on the above.

15. It is not in dispute that the Respondent entered appearance in the matter on 01/12/2020 and filed a preliminary objection and statement of defence on 11/12/2020. The Respondent first lodged a request

for judgment on 14/12/2020 and later filed a motion on 12/02/2021 seeking among other orders that the Court grant interlocutory judgment as against the Respondent.

16. On 06/07/2021, the Respondent's motion was withdrawn with no order as to costs. Thus, what was left for determination was the Applicant's preliminary objection. However on 03/03/2023 the Respondent filed a notice of withdrawal of the suit which was endorsed by the Court on 18/04/2023 with directions that parties agree on costs, failure to which the Applicant would be at liberty to apply.

17. It is on the premise of the forestated proceedings that the Applicant filed a Party and Party Bill of Costs that quantified the subject matter in question as being Kshs. 9,800,000,000/- and thus seeking instruction fees to the tune of Kshs. 35,195,045.50 in the impugned Bill of Costs.

18. The question of assessing instruction fees has been an intricate issue and has resulted in litigation on the question before the Supreme Court. The Court of Appeal in Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR, emphasized that a judge ought not interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs.

19. On the issue of instruction fees, the court of Appeal in the decision of Joreth Limited v Kigano and Associates [2002] 1 E.A 92 pithily stated 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) 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."

20. The Applicant has submitted that the value of the subject matter was easily discernible from the pleadings. As earlier noted, the suit herein did not proceed to full hearing and was withdrawn by Respondent. The learned taxing officer was alive to the fact in her ruling and proceeded to apply herself and exercise her discretion with respect to Paragraph titled "Other Matters" in assessing instruction fees. It is apparent that the suit herein was preliminarily withdrawn before the subject matter of the suit was determined by way of judgment or settlement therefore instruction fees could only be determined by way of pleadings.

21. The Supreme Court in Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR) succinctly addressed itself to the issue by stating that; -

> 57. Whilst the determination of the value of subject matter from a judgment and settlement of the parties is quite straightforward, the determination from pleadings is not. The determination of the value of the subject matter, may be difficult, for instance, where the pleadings/suit is struck out at a preliminary stage, such as in this case, and the value can only be determined/ascertained upon the conclusion of a trial. In considering this pertinent issue, we make reference to D. Njogu and Co Advocates v Kenya National Capital Authority, HC Misc Applic No 21 of 2003; [2005] eKLR, wherein the advocate therein acted for the respondent (who was the plaintiff) in a suit whose claim was for Kshs 82,706,408.60, together with interest at 30% per annum from October 18, 2000. On whether the value of the subject matter could be determined from the pleadings, Ochieng, J, as he then was, held that-

> "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 judgment 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." [Emphasis added]

58 ......

59. We are of a considered opinion that a claim in a suit which is struck out at the preliminary stage does not ipso facto render that claim or amount pleaded therein without more the value of the subject matter. The position still remains that the amount therein has not been ascertained or determined, and as such, it cannot be applied as the value of a subject matter in a disputed taxation. The application of such a claim or amount as the value of the subject matter would go against the rationale that the fees/costs paid to an advocate and a successful party should be reasonable. Consequently, we are not persuaded by the respondent's contention that even where the amount claimed in a pleading which is struck out by a court, as in the instant appeal, the said amount would still act as the value of the subject matter when it comes to taxation of instruction fees.

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61. In the event that value of the subject matter of a suit can not be determined from either the pleadings, judgment or settlement by the parties, and the nature of the said suit is not provided for in Paragraph 1 of Schedule VIA, proviso (i) thereunder empowers a Taxing Officer to exercise his/her discretion in assessing instruction fees for such a suit. The proviso in question reads as follows:

> "... the Taxing Officer may take into consideration other fees and allowances due to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances; ..."

22. Applying my mind to the above observations, in Kenya Airports Authority (supra) and Kipkorir, Titoo & Kiara Advocates (supra), the taxing officer was right in holding that the subject matter was not discernible from the pleadings and aptly exercised her discretion by applying herself to the paragraph titled "Other Matters" as read with Paragraph 1 of Schedule 6A, proviso (i) to arrive at the figure of Kshs. 200,000/- as instruction fees under Item 1. Though the taxing officer took a different approach in arriving at her assessment, the culmination of her discretion was rational within the principles of taxation and as such cannot be faulted. Consequently, this Court will not interfere with the award under Item 1, to wit, the Applicant's challenge on the said Item cannot be sustained.

23. On getting up fees, the Court need not belabor much on the same as the taxing officer properly applied herself to Paragraph 2(ii) of Schedule 6 of the Advocates Remuneration Order to arrive at the conclusion that the matter was never confirmed for hearing as such getting up fees was not chargeable in the circumstance. The other items in the bill of costs are sustained as taxed given there was no challenge presented on the same. For the avoidance of doubt, the decision of the taxing officer dated 26/04/2024 is upheld.

24. For the foregoing the Applicant's Chamber Summons dated 7/5/2024 is dismissed with costs assessed at Kshs. 10,000/=.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 27TH DAY OF MARCH 2025.**

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**JANET MULWA.**

**JUDGE**