



**Ecobank Kenya Limited v Bob Morgan Services Limited (Commercial Appeal E058 of 2020)
[2025] KEHC 5281 (KLR) (Commercial and Tax) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E058 OF 2020**

RC RUTTO, J

APRIL 25, 2025

BETWEEN

ECOBANK KENYA LIMITED APPELLANT

AND

BOB MORGAN SERVICES LIMITED RESPONDENT

JUDGMENT

1. By Chamber Summons dated 13th December 2023, the appellant has filed a reference under sections 1A, 1B & 3A of the *Civil Procedure Act* and rule 11 of the Advocates (Remuneration) Order seeking the following:
 1. The finding of the Taxing Master as contained in the ruling dated 30th November 2023 that item no. 1 on instruction fees be assessed on the value of Kshs.15,592,506.00 be set aside;
 2. The order of the Taxing Master that the appellant do pay the respondent Kshs.412,000.00 as costs for item no. 1 on instruction fees be set aside;
 3. Item no. 1 of the respondent's Bill of Costs dated 23rd June 2023 on instruction fees be assessed based on what the trial court determined it would have awarded the appellant in its judgment dated 15th September 2020 of Kshs.10,000.00;
 4. In the alternative, the respondent's Bill of Costs dated 23rd June 2023 be remitted for re-taxation before any other Taxing Officer with directions that the costs be taxed based on what the trial court determined it would have awarded the appellant in its judgment dated 15th September 2020 of Kshs.10,000.00;



5. A declaration that the applicable schedule in taxing instruction fees where costs of the appeal are awarded only is schedule 6 of the 2014 Advocates Remuneration Order on “other matters” and not paragraph 1 (b) of schedule 6 of the 2014 Advocates Remuneration Order;
6. Costs of the application be provided for.
2. The reference is supported by the grounds on its face as well as the affidavit of Caxstone P. Kigata, a partner in the appellants’ firm of advocates as follows: the appellant filed a plaint dated 19th February 2015 in CMCC No. 194 of 2015 seeking inter alia a sum of Kshs.15,592,506.00 against the respondent. The respondent pleaded privity of contract arguing that its liability was only limited to Kshs.10,000.00 for loss of the motor vehicle. In its judgment dated 15th September 2020, the trial magistrate dismissed the suit with no orders as to costs. The appellant further noted that the trial court stated that had the respondent been found liable, the damages that would have been awarded would have been limited to a sum of Kshs.10,000.00 as per clause 11 of the agreement.
3. Dissatisfied, the appellant filed an appeal seeking to overturn the decision of the trial court. However, the appellant did not succeed in its bid as the appeal was dismissed with costs.
4. It was the appellants’ contention that since it would only have been entitled to an amount of Kshs.10,000.00, had the claim succeeded, that amount ought to have been the basis for the award on instruction fees and not the amount sought in its pleadings. It further pointed out that the suit at trial was dismissed with no orders as to costs. In view of these observations, the appellant urged that it was improper for the respondent to lodge its bill of costs on the basis of the proceedings at the magistrate’s court. Its costs in the circumstances, only ought to be limited to that which was in the appeal.
5. The appellant urged that the respondent was only entitled to costs for opposing the appeal out of which it only filed written submissions. For those reasons, the taxing master ought to have applied the scale in schedule 6 of the Advocates Remuneration Order under the “other matters” section. That it should not have been treated as a suit but an appeal. In view of this, it opined that the respondent was only entitled to instruction fees in the sum of Kshs.25,200.00.
6. The respondent opposed the reference. It filed its grounds of opposition dated 21st October 2024. It also filed its replying affidavit sworn on 23rd October 2024 by Ezra Makori, a partner in the respondent’s firm of advocates. It prayed that the reference be dismissed as the taxing master’s assessment properly applied the correct principles and as such, the awarded sum was not manifestly excessive as to justify an interference.
7. It was the Respondent’s submission that the value of the subject matter could be discerned from the applicant’s pleadings. Furthermore, the sum of Kshs.10,000.00 could not formulate a basis for the calculations as it was not an award of the trial court.
8. The reference was canvassed by way of written submissions. The applicant’s written submissions dated 8th November 2024 reproduced the contents of its application to urge this court to allow its reference. The respondent on its party relied on its written submissions dated 17th October 2024. It prayed that the reference be dismissed with costs.
9. The circumstances under which this court will interfere with the award of the taxing master have been settled in the Court of Appeal decision of Joreth Limited v Kigano and Associates [2002] 1 E.A 92 as follows:



- i. “That the Court cannot interfere with the Taxing Master’s discretion 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 interference that it was based on an error of principle;
 - ii. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the 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;
 - iii. If the Court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
 - iv. It is within the discretion of the Taxing Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”
10. The facts as undisputed are by plaint dated 19th February 2015, the appellant sued the respondent seeking Kshs.15,592,586.00 together with interest at court rates from 16th January 2013 until payment in full together with costs and interest in Nairobi CMCC No. 194 of 2015. In its judgment dated 15th September 2020, the trial court found that the suit lacked merit and was dismissed but with no orders as to costs. The appellant was dissatisfied with those findings. It filed its memorandum of appeal dated 14th October 2020. Upon considering the appeal, my brother Mugambi, J. found that the appeal was unmerited and dismissed it with costs to the respondent.
 11. On the basis of those orders, the respondent filed its Bill of Costs dated 23rd June 2023. It sought the sum of Kshs.607,240.00. On instruction fees at item 1, the respondent sought a sum of Kshs.520,000.00. In her ruling dated 30th November 2023, the taxing master considered the position of the parties. On instruction fees, the taxing master stated that from prayer (c) of the memorandum of appeal, the value of the subject matter could be discerned from the pleadings. She applied the value from the appellant’s plaint as Kshs.15,592,506.00. She then applied paragraph 1 (b) of schedule 6 of the order to award instruction fees at Kshs. 411,851.72 as follows:

1st Kshs. 1,000,000.00 = Kshs. 120,000.00

Balance of Kshs.14,592,586.00 × 2/100 = Kshs. 291,851.72
 12. On copies, the taxing master taxed off items 13, 15, 16, 19, 34, 36, 42 and 45 as service of documents was done electronically. She allowed the number of folios as computed stating that items 3, 10 and 11 were taxed at Kshs.10,050.00, Kshs.2,850.00 and Kshs.10,400.00 respectively under perusals. On drawings item 12 was taxed at Kshs.2,300.00. Consequently, the respondent’s bill of cost was taxed at Kshs.467,150.00.
 13. The appellant is only dissatisfied with the award on instruction fees. It argued that not only did the taxing master apply the wrong scale, but also ought to have considered that the trial court would have awarded Kshs.10,000.00 as damages. In that respect, Ksh.10,000.00 and not Kshs.15,592,506.00 ought to have been used as the basis for calculating instruction fees.
 14. Schedule 1 (b) of the Advocates Remuneration Order provides as follows:

“To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other



proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—

That value exceeds but does not exceed

Kshs. Kshs. Kshs.

- 500,000 75,000

500,000 750,000 90,000

750,000 1,000,000 120,000

1,000,000 20,000,000 fees as for Kshs.1,000,000 plus an additional 2%.

Over 20,000,000 Fees as for 20,000,000 plus an additional 1.5%”

15. The appellant is of the opinion that the proper scale to be applied is on other matters under appeals which states:

“(a) To present or oppose an appeal in any case not provided for above; such sum as may be reasonable but not less than Kshs.25,200.00”

16. Looking at the above wordings, it is very clear that this part is only applicable to matters not provided for in schedule 1 paragraph 6. Schedule 1 provides for various scales on matters in which the subject matter can be determined from the pleadings, judgment or settlement. In this case, the appellant in its plaint dated 19th February 2015, sought for judgment in the sum of Kshs.15,592,506.00. While the appellant argued that the judgment sum ought to be discerned from the trial magistrate’s opinion, had the claim succeeded, that argument cannot stand. This is because the suit was dismissed in its entirety. That was an opinion of the trial magistrate that did not alter the substance and value of the claim as set out in the appellant’s plaint as it was not awarded. It cannot formulate the basis for award on instruction fees. In any event, the trial magistrate considered the sum sought in its judgment.

17. It is also critical to note that the said sum on instruction fees at paragraph 1 (b) indeed states that it covers instances of an appeal. I therefore find that the taxing master applied the correct scale in determining the instruction fees.

18. As set out in its ruling, the taxing master awarded the sum of Kshs.411,851.72 by awarding the first Kshs.120,000.00 and Kshs.291,851.72 arrived from calculating $Kshs.14,592,586.00 \times 2/100$. I find that the same was drawn to scale. I also find that the taxing master correctly taxed off items 13, 15, 16, 19, 34, 36, 42 and 45 and properly re-assessed items 3, 10, 11 and 12 at Kshs.10,050, Kshs.2,850.00, Kshs.10,400.00 and Kshs.2,300.00 respectively. In the circumstances, the taxing master properly arrived at the figure of Kshs.467,150.00.

19. For those reasons, I find that the present reference lacks merit. It is therefore dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 25TH DAY OF APRIL, 2025.

RHODA RUTTO

JUDGE

In the presence of;



.....for Appellant
.....for Respondent
Sam Court Assistant

