



**Presbyterian Foundation, Trustees of P.C.E.A Kitengela Township Church
v Export Processing Zones Authority; Export Processing Zones Authority
& 4 others (Defendant to the Counterclaim) (Environment and Land Case
Civil Suit 209 of 2017) [2025] KEELC 2998 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT 209 OF 2017**

MD MWANGI, J

MARCH 27, 2025

BETWEEN

**PRESBYTERIAN FOUNDATION, TRUSTEES OF P.C.E.A KITENGELA
TOWNSHIP CHURCH PLAINTIFF**

AND

EXPORT PROCESSING ZONES AUTHORITY DEFENDANT

AND

**EXPORT PROCESSING ZONES AUTHORITY DEFENDANT TO THE
COUNTERCLAIM**

**P.C.E.A. KITENGELA TOWNSHIP CHURCH DEFENDANT TO THE
COUNTERCLAIM**

DIRECTOR OF SURVEY DEFENDANT TO THE COUNTERCLAIM

CHIEF LAND REGISTRAR DEFENDANT TO THE COUNTERCLAIM

NATIONAL LAND COMMISSION ... DEFENDANT TO THE COUNTERCLAIM

*(In respect of the chamber summons dated 8th November 2024 seeking to set side,
vacate or vary the ruling of the Taxing Officer delivered on 28th October 2024)*

RULING

Background.

1. The application under consideration is the chambers summons dated 8th November 2024 brought under the provisions of Section 44 of the Advocates Act and paragraph 11 of the Advocates



- Remuneration Order seeking to set aside, vacate and or vary the ruling of the Taxing Officer delivered on 28th October 2024 in respect to items 1, 2 and 3 in the bill of costs dated 20th November 2023.
2. Judgment in this matter was delivered on 21st September 2023 dismissing the Plaintiff's suit against the Defendant with costs. At the same time, judgment was entered in favour of the Defendant (Plaintiff in the counter-claim) against the Plaintiff (who was the 1st Defendant in the counter-claim in terms of prayers (b), (c), (d), (h), (i), (k) and (m) in the counter-claim.
 3. The Defendant subsequently filed a bill of costs dated 20th November 2023 seeking a total sum of Kshs. 27,218,054/- as the costs for the suit and the counter-claim.
 4. The Taxing Officer proceeded to tax the party and party bill of costs awarding the Defendant a sum of Kshs. 3,291, 864 after taxing off Kshs. 23,926,187/=.
 5. Aggrieved by the ruling of the Taxing Officer, the Defendant filed the chamber summons application dated 8th November 2024. The application is premised on the grounds on the face of it and on the supporting affidavit of Winnie Sang sworn at Nairobi on the 8th November 2024.
 6. The Defendant/Applicant asserts that the ruling of the Taxing Officer in relation to items 1, 2 and 3 in the party and party bill of costs dated 20th November 2023, is imprinted with errors of principle which justify interference with by this court. It insists that the finding on instruction fees on the suit and counter-claim and getting up fees, are predicated on gross errors of principle by misrepresentation and misapplication of the law to the complex factors to derive the correct outcomes based on the factual framework of the case and the judgment of the court of 21st September 2023.
 7. The Defendant/Applicant claims that the Taxing Officer erroneously stated the value of the subject matter as Kshs. 135,000,000/- yet the valuation report produced by the Plaintiff on 6th October 2024, which she purportedly relied upon stated the value of the subject matter as at 6th October 2014, to be Kshs. 245,000,000/-. It is further submitted that the Plaintiffs in their submissions before the trial court stated that the value of the subject matter had appreciated to Kshs. 450,000,000/-.
 8. The Defendant further alleges that the Taxing Officer fell into error of principle by failing to include other monetary reliefs sought by the Plaintiff in assessing the value of the land and developments thereon to determine the value of the subject matter for the purpose of determining the instructions fees thereby arriving at an erroneous figure as the value of the subject matter.
 9. The Applicant states that the Taxing Officer failed to appreciate that the value of the land, the subject matter of the suit had appreciated with time from the year 2014 when the valuation was done, to the year 2023 when the court rendered its judgment.
 10. It is the Defendant's case that the Taxing Officer committed an error of principle, by failing to increase the basic instructions fees after taking into account the industry, complexity, nature, and importance of the subject matter and public interest attendant thereto leaving the instruction fees to the bare minimum which in any case was premised on an erroneous value of the subject matter.
 11. It is further posited that the Taxing Officer committed an error of principle by abdicating her obligation to act impartially, judiciously and evaluate and apply the relevant Advocates Remuneration Order and judicial authorities and the legal principles applicable.

Response by the Plaintiff/Respondent

12. The Plaintiff's response to the chamber summons dated 8th November 2024 was by way of a replying affidavit sworn by one Henry Mandania Muchiri at Nairobi on 12th February 2025. The deponent



deposes that the suit was about ownership of land as confirmed by the orders issued by Hon. Justice Maxwell Gicheru. The deponent asserts that the Taxing Officer in her ruling on the bill of costs the subject matter of this reference correctly applied, appreciated and confined herself within the parameters of the dispute which was on land ownership.

13. The deponent affirms that the sale agreement dated 20th March 2002 between Vegji Varsani and PCEA Kitengela Church was the genesis and the basis of the occupation by the church/Plaintiff of the land. The valuation report of Accurate Valuers Limited gave the value of the 0.94 ha of land at Kshs. 135,000,000/-. It was therefore tangible evidence and the proper basis for the assessment of instruction fees. Since the subject matter of the main suit was ownership of the land, the Taxing Officer was right to exclude the value of the developments on the land to avoid a misconstrued outcome. The value of Kshs. 135,000,000/- was of the unimproved site value of the land.
14. The deponent further avers that it is trite 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 (as the case may be) but if the same is not ascertainable, the Taxing Officer is entitled to use his/her discretion to assess the fees as he/she 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 and any direction by the Trial Judge and all other relevant circumstances. He reiterated that since the value of the subject matter is known as per the valuation report presented, the Taxing Officer was not bound to make consideration of other prevailing factors.
15. On the issue of instruction fees for the counter-claim, the deponent states that since the suit and counter-claim are generally treated as one item, it cannot be effectively and convincingly argued that the items so prayed under the counter-claim are different from those litigated in the main suit. The Taxing Officer therefore pronounced herself correctly to the principles based on the materials presented before her. The application by the Defendant is therefore unwarranted and should be dismissed with costs.

Direction by the court.

16. The directions by the court were that the chamber summons be canvassed by way of written submissions. Both parties complied and filed their respective submissions which the court has had occasion to read and consider in writing this ruling. They now form part of the record of the court in any event.

Issues for determination.

17. A challenge to the decision of a Taxing Officer is in the form of a reference under Rule 11 of the Advocates Remuneration Order. An Applicant in such a reference has the burden to demonstrate that his/her case meets the settled principles for interference with the exercise of discretion by the Taxing Officer. The principles were pronounced by Ringera J (as he then was) in the case of First American Bank of Kenya –vs- Shah & others (2002), in the following words;

“...this court cannot interfere with the Taxing Officers 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...it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors...some of the relevant factors 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 proceedings and any direction by the trial judge...not all the



above factors may exist in any given case and it is therefore open to the Taxing Officer to consider any such factors as may exist in the actual case before him...”

18. In *Republic vs. Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & others* [2006] eKLR, the court too stated as follows:

“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, particularly where he is an officer of great experience, merely because it thinks the award is somewhat 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.... 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.”

18. The issue then for this court to consider in this matter is whether the Applicant has established that the impugned ruling was based on an error(s) of principle in as far as the taxation of items 1, 2 and 3 in the bill of costs was concerned, to justify its setting aside and or interference by this court.

Analysis and determination.

19. The Defendant/Applicant challenges the decision of the Taxing Officer concerning items 1, 2 and 3 in the bill of costs. The items are instructions fees in respect to the main suit, instruction fees on the counter-claim and getting up fees.
20. In respect to the instruction fees to the main suit, the Taxing Officer in her ruling of 28th October 2024 noted that the Applicant had sought a sum of Kshs. 13,450,000/- based on the current value of the suit property which was stated as Kshs. 560,000,000 million. However, and as she noted, the same was opposed by the Respondent who contended that the value of the property in question was discussed in a valuation report by Accurate Valuers to be Kshs. 135 million instead.
21. The Taxing Officer concluded that upon perusal of the pleadings, she agreed with the Respondent that the value of the subject matter was as presented in the valuation report by Accurate Valuers Limited. She therefore proceeded to tax the instruction fees based on the figure of Kshs. 135 million under schedule VI paragraph 1(b) of the Advocates Remuneration Order, arriving at the figure of Kshs. 2,245,000/-
22. The Respondent agrees with the Taxing Officer. The Applicant differs with the Taxing Officer first and foremost stating that the value of the subject property according to the valuation report by Accurate Valuers Limited of 6th October 2014 was Kshs. 245 million as at the date of that report. The Applicant pointed out that the Respondent in its submissions before the court had explicitly submitted and urged the court to be guided by the report of Accurate Valuers Limited who projected the value of land and developments to be Kshs. 245,000,000/- as at October 2014.
23. The Applicant submits that it was erroneous and a grave error of principle for the Taxing Officer to allege that the value of the subject matter was Kshs. 135 million while the valuation report was clear



that the value was Kshs. 245,000,000/- as at October 2014. Relying on the Court of Appeal decision in the case of Kamunyori & Company Advocates –vs- Development Bank of Kenya Limited (2015) eKLR, the Applicant submitted that failure to ascertain the correct value of the subject matter in a suit for purpose of taxation is an error of principle. So too is failure to ascribe the correct value of the subject matter.

24. The Applicant further faulted the Taxing Officer for failing to consider that the value of the land and developments had appreciated over the years since the valuation of 2014, thereby arriving at an erroneous value of the subject matter. The Applicant pointed out that the value of the land had increased from Kshs. 245 million to Kshs. 450 million in 2023. The Applicant opines that the Taxing Officer should have at least taken the figure of Kshs. 450 million submitted by the Respondent in their main submissions before the trial court.
25. The Applicant further faulted the Taxing Officer for failing to take into consideration other monetary reliefs sought by the Plaintiff/Respondent in the main suit including mesne profits in assessing the value of the subject matter and further failing to take into account the nature of the matter, the interests of the parties, and the complexity of the matter amongst other relevant factors.
26. In determining whether the Taxing Officer applied the right principles in taxing the Applicant’s bill of costs, I am guided by the Supreme Court of Kenya decision in Petition No. E011 of 2023, Kenya Airports Authority –vs- Otieno Ragot & Company Advocates, where the Court spelt out in great details the principles applicable in taxation of instructions fees.
27. The Supreme Court noted that schedule VI of the Advocates Remuneration Order relates to the assessment/taxation of costs in proceedings before the High Court. Part A thereof deals with party and party costs whereas part B deals with advocate-client remuneration costs. Paragraph 1 of the schedule VIA commences with assessment of instruction fees based on the value of the subject matter.
28. The procedure then should be that the subject matter of the suit in issue should be identified first and then the value thereof determined.
29. The answer to the question as to how the value of the subject matter is to be ascertained is to be found at paragraph 1 of schedule VIA which is clear on the issue. It stipulates that;

“...where the value of the subject matter can be determined from the pleading, judgment or settlement of the parties...”
30. The Supreme Court of Kenya concurred with the reasoning of the Court of Appeal in Joreth Limited –vs- Kigano Associates (2002) IEA 92, where the court stated that the value of the subject matter for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case).
31. The same position was taken in Peter Muthoka and another –vs- Ochieng & 3 others (2019) eKLR, where the Court of Appeal stated that,

“It seems to us quite plain that the basis for matter value for purposes of instruction fees is wholly dependence on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining the subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.



Where however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with pleadings where there is a settlement.”

32. The Supreme Court of Kenya held that where the value of the subject matter can be determined, the Taxing Officer is required to set out the basic fees prescribed under schedule VI part A. Similarly where the Taxing Officer assesses instruction fees based on the nature of the matter as stipulated in paragraph 1, for instance in bankruptcy proceedings or matrimonial causes, he/she is required to set out the basic fees prescribed thereunder. It is after setting out the basic fees that the Taxing Officer can exercise his/her discretion to increase or (unless otherwise provided, like in matrimonial causes) reduce the said basic fees.

33. In exercising such unfettered discretion, the Taxing Officer is required to do so judiciously and not whimsically. Again the court cited with approval the holding by Ojwang’ J (as he then was) in Republic –vs- Ministry of Agriculture & 2 others, Ex parte Muchiri W Njuguna & 6 others (2006) eKLR, where he stated that,

“It was necessary (for the Taxing Officer) to specify clearly and candidly how she had exercised her discretion. Discretion as an aspect of judicial decision making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion, and therefore merely cite wanted rubrics under which that discretion may be exercised.....”

34. In the event that the value of the subject matter of a suit cannot be determined from either the pleadings, judgment or settlement by 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 taking into consideration other fees and allowances due to the advocate (if any) in respect 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, any direction by the trial court and all other relevant circumstances.

35. For emphasis, the Supreme Court of Kenya quoted the decision of the Court of Appeal in the Peter Muthoka case (supra) as to when discretion comes into play as follows;

“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 instruction fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does not have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as 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 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.”

36. In this case, judgment has already been delivered. The court as I noted earlier on dismissed the Plaintiff’s suit against the Defendant with costs. On the counterclaim, the court entered judgment against the 1st Defendant in the counter-claim (Plaintiff in the main suit) with costs and interest at court rates.



37. For purposes of taxation of the party and party costs, it is not in dispute that Schedule VIA of the Advocate Remuneration Order is the applicable schedule.
38. The next question that the Taxing Officer was supposed to consider, as determined in the Otieno Ragot case (*supra*), is what the subject matter was and whether the value of the subject matter was ascertainable from the judgment. As elaborated in the Peter Muthoka case, once judgment has been entered, as in this case, recourse will not be heard to the pleadings since the judgment conclusively determines the value of the subject matter.
39. I think the subject matter is easily identifiable from the judgment. At paragraph 2 and 3 of the judgment, the judge described the Plaintiff's claim as 'ownership of the suit land and developments over the years'. This is the claim that was dismissed. It was also the claim of the Defendant in its counterclaim that was upheld by the court.
40. No monetary award was granted to the Defendant. The judge did not assign any value to the suit land and the developments thereon other than declaring that it belongs to the Defendant and issuing an order of eviction against the Plaintiff (the Respondent in this case). The value of the subject matter was not addressed in the judgement and is therefore not ascertainable from the said judgment.
41. At his juncture, I must state that the Taxing Officer erred in principle by basing the value of the subject matter on the pleadings yet judgment had already been entered in this matter. It was contrary to the holding in the Muthoka case that was upheld by the Supreme Court to the effect that;
- “Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to pleadings since the judgment does determine conclusively the value of the subject matter...”
42. Since the nature of this case is not provided for in paragraph 1 of schedule VIA of the Advocates Remuneration Order, the matter would fall under proviso (i) as provided in the Otieno Ragot case. This is the proviso that empowers the Taxing Officer to exercise his or her discretion in assessing instructions fees for such a suit taking 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, any direction by the trial judge and all other relevant circumstances. The Taxing Officer in this matter was permitted to use her discretion in accordance with what she considers just bearing in mind the elements enumerated above.
43. For the above reasons, I set aside the decision of the Taxing Officer in regard to the taxation of item 1 in the Defendant/Applicant's bill of costs dated 20th November 2003 and order that it be taxed afresh before another Taxing Officer other than Hon. Jane Kamau. That will off course affect item 3 (getting up fees) which as the Taxing Officer rightly observed in her ruling shall not be less than 1/3 of the instruction fees.
44. The Applicant has also challenged the decision by the Taxing Officer on item 2 (being instruction fees on the counter-claim). The Taxing Officer in her ruling held that awarding instruction fees on the counter-claim would amount to double taxation. She did not therefore award any amount under this item.
45. The decision of the Taxing Officer went against settled law. It is trite that a counter-claim is a separate and distinct suit on its own. A counter claim breathes its own life and can bring forth a judgment or a decision of a court independent of the suit.



46. The Court of Appeal in Kenya Commercial bank Limited –vs- James Karanja (1981) eKLR, stated that,

“a counterclaim is a fresh suit and the Defendant instituting it becomes a Plaintiff for all intents and purposes. The counter-claim is (only) combined in the Plaintiff’s proceedings for convenience to enable the court pronounce a final judgment in one set of proceedings, both on the original and the cross-claim.”

47. In Beatrice Mumbi Wamahiu–vs- Mobil Oil Kenya Limited (2011) eKLR, the court too pronounced that;

“A counter-claim is treated as a separate suit...its survival cannot be pegged on the pendency of the primary suit.”

48. That said, even for purposes of assessment of instruction fees, a counter-claim is a separate suit. The Defendant was actually awarded costs in the primary suit and in the counter-claim. The Defendant was entitled to instruction fees on the counter-claim too.

49. The Taxing Officer committed an error of principle in taxing off the entire amount claimed under instruction fees on the counter-claim in the bill of costs dated 20th November 2023 and holding that it would amount to double taxation. I set aside the decision of the Taxing Officer in respect to the claim for instruction fees for prosecuting the counter-claim and order that it be taxed afresh before any other Taxing Officer other than Hon. Jane Kamau.

50. The upshot is that the Defendants chamber summons application dated 8th November 2024 is hereby allowed with costs to the Applicant.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 27TH DAY OF MARCH 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Musyoka for the Plaintiff/Respondent

Mr. Wesonga h/b for the Mr. Wekesa for the Applicant

Court Assistant: Mpoye

