



**Maina v Registrar of Trademarks & 3 others; Pevans East Africa
Limited (Nominal Defendant) (Commercial Case E162 of 2022)
[2025] KEHC 12479 (KLR) (Commercial and Tax) (1 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E162 OF 2022
JWW MONG'ARE, J
SEPTEMBER 1, 2025**

BETWEEN

ASENATH WACHERA MAINA PLAINTIFF

AND

REGISTRAR OF TRADEMARKS 1ST DEFENDANT

RONALD KAMWIKO KARAURI 2ND DEFENDANT

MILESTONE GAMES LIMITED 3RD DEFENDANT

SPORTPESA GLOBAL HOLDINGS LIMITED 4TH DEFENDANT

AND

PEVANS EAST AFRICA LIMITED NOMINAL DEFENDANT

RULING

Introduction and Background

1. Before the Court for determination is a reference filed by the Plaintiff by way of Chamber Summons dated 28th August 2023 (“the Reference”) seeking to set aside the decision of the Taxing Officer/Deputy Registrar dated 26th July 2023 (“the Rulings”) in respect of the 4th Defendant’s Party and Party Bill of Costs dated 20th December 2022 (“the Bill of Costs”). The Deputy Registrar taxed the Bill of Costs at Kshs.397,965,120.33/=. The Bill of Costs arose after the Court (Chepkwony J.) struck out the Plaintiff’s application and suit with costs to the Defendants.
2. The Plaintiff supports the Reference through his affidavit sworn on 28th August 2023 whereas the 4th Defendant opposes it through the Grounds of Opposition dated 19th October 2023. The Reference



was canvassed by way of written submissions which together with the pleadings, I have considered and I will be making relevant references to them in my analysis and determination below.

Analysis and Determination

3. The Plaintiff urges the Court to determine whether the Ruling was based on an error of principle and whether the fee awarded by the Deputy Registrar was so manifestly excessive that as to justify an inference that it was based on an error of principle. The Plaintiff submits that the Deputy Registrar erred by using schedule 6(1)(b) of the *Advocates Remuneration Order*, which applies to liquidated claims, instead of the correct schedule for a derivative action, which is Schedule 6, subparagraph 1(f) (iii). The Plaintiff contends that since the suit was struck out at a preliminary stage, the value of the subject matter was never ascertained and that a claim struck out at a preliminary stage does not, by itself, make the pleaded amount the value of the subject matter. The Plaintiff also asserts that the 4th Defendant is not entitled to getting-up fees because the suit was neither confirmed for trial nor set down for a hearing.
4. The Plaintiff submits that the awarded costs are "extravagant and frankly incapable of payment by an individual" and that they are also disproportionate to the work undertaken, as the case was determined at a preliminary stage within five months of commencement. The Plaintiff highlights that the objective of costs is to reimburse a successful party for reasonable expenses, not to allow them to make a profit from litigation. The Plaintiff contends that he issued a Notice to Produce Documents, including the 4th Defendant's letter of engagement, fee agreements, and invoices, to prove that the claimed costs were not actually incurred or paid but since the 4th Defendant failed to provide these documents, the Plaintiff asks the Court to draw a negative inference, concluding that the costs were not, in fact, incurred.
5. In opposition, the 4th Defendant submits that the Deputy Registrar did not err and that the taxed amount of Kshs.397,965,120.33/= is justified. That the Deputy Registrar was correct in deriving the value of the subject matter from the Plaintiff's own supporting affidavit and the 4th Defendant argues that the affidavit is a pleading and therefore a legitimate source for determining the subject matter's value. Citing the case of *Joreth Limited v Kigano & Associates* [2002] KECA 153 (KLR), the 4th Defendant submits that if the value isn't ascertainable from the pleadings, a taxing officer has the discretion to assess the instruction fee as they consider just, using sworn statements like the Plaintiff's affidavit. The 4th Defendant contends the Deputy Registrar did not act arbitrarily by referring to the Plaintiff's own sworn statements.
6. The 4th Defendant further asserts that the Bill of Costs was correctly drawn under Schedule 6(1)b of the Order, which is for claims based on the value of the subject matter. It counters the Plaintiff's argument that Schedule 6(1)(f)(iii), which pertains to proceedings under the *Companies Act*, should have been used and it distinguishes the Plaintiff's case from the precedent cited, that is, *Nilkunj Ratilal Dodhia v Shashikant Mepa Shah & 5 others* [2021] KEHC 12974 (KLR) by noting that the Plaintiff filed a full suit, not merely an application for leave to file a derivative suit, which was then struck out. The 4th Defendant also argues that the suit against it, as it is not a director, does not qualify as a derivative suit under section 238(3) of the *Companies Act*.
7. The 4th Defendant dismisses the Plaintiff's claim that the costs are so excessive they impede access to justice. It contends that the Plaintiff, as a significant shareholder in a company with gross revenues of over Kshs. 20 billion, cannot credibly make such a claim. The 4th Defendant states that instruction fees are earned as soon as a defense is filed, regardless of the suit's subsequent progress. On the Notice to Produce Documents, the 4th Defendant argues that the same is improper because the requested documents related to advocate-client engagement and fees and are not relevant to a party-and-party bill



- of costs. The 4th Defendant presents that a judge hearing a reference should only consider documents that the taxing master had access to when making the decision. As such, it states that the Court should disregard the request for a negative inference against them for not producing the documents.
8. For these reasons, the 4th Defendant urges the Court to dismiss the Reference, stating that the Deputy Registrar did not err in principle and was guided by the correct legal principles. It adds that if the Court finds an error, it should not reassess the Bill of Costs itself but instead refer it back to a taxing officer with appropriate directions. The 4th Defendant believes the Deputy Registrar's decision was correct and should not be interfered with.
 9. I do not think it is in dispute that the Court will only interfere with the decision of a taxing officer in cases where there has been shown to be an error of principle. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] KECA 325 (KLR) the Court of Appeal asserted this position 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”.
 10. This principle was reiterated in *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others* [2006] KEHC 3504 (KLR) where Ojwang’ J., (as he was then) held 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.”
 11. The parties agree that in arriving at the instruction fees, the value of the subject matter ought to be ascertained and the same can be deduced either from the pleadings, judgment or settlement, if such be the case, but if the same is not ascertainable, a taxing officer is entitled to use their discretion and the parties have rightly cited the decision in *Joreth*(supra) which supports this position. From the Ruling, the Deputy Registrar was aware of this position as well and made a determination that the subject matter can be determined from the pleadings, more so, para. 14 of the Plaintiff’s supporting affidavit where he highlights the gross revenue of the Nominal Defendant as Kshs.19,880,788,000.00/=. The Plaintiff also submitted that she mentions this sum in her witness statement.
 12. The Plaintiff has contended that the witness statement and supporting affidavit are not pleadings by dint of section 2 of the *Civil Procedure Act* which provides that "pleading" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant. That the only pleading filed by the Plaintiff according to this definition was the Plaint. I find that the



use of the word “includes” connotes that the list of what entails a “pleading” is not exhaustive but that anything else included in this definition must be of the same genus or class as, and be analogous to, those in the definition. In *Gladys Betty Odera v Balazi Housing Co-Operative Society Ltd* [2008] KEHC 2372 (KLR), the Court held that an affidavit is clearly not of the same genus or class, nor is it analogous to a claim or demand, or to a defence or reply to such defence. This position was affirmed by the Court of Appeal in *Eastland Hotel Limited v Wafula Simiyu & Co. Advocates* [2014] KECA 296 (KLR) which stated as follows regarding affidavits in taxation:

“Was the taxing officer able to determine the value of the subject matter from the “pleadings” on record? What are “pleadings”? Under Section 2 of the *Civil Procedure Act*, pleading includes:

“A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

An affidavit is not a pleading, it is evidence. The taxing officer stated in her ruling that the pleadings indicated that the value of the subject matter was over Kshs.1,000,000,000/= and used that figure to calculate the instruction fees payable to the respondent. She must have misconstrued the contents of paragraph 9 of the plaintiff’s affidavit in support of the originating summons.”

13. With the above authorities, I am in agreement with the Plaintiff that an affidavit is not a pleading and the Deputy Registrar could not rely on the same to determine the value of the subject matter. What of a witness statement? The Court of Appeal in *Vishva Stones Supplies Company Limited v RSR Stone (2006) Limited* [2024] KECA 978 (KLR) stated as follows:

“...there is a wide difference in law between a pleading and a witness statement. Pleadings are formal written statements filed by the parties to a lawsuit, outlining their respective claims, defences, and responses to each other’s claims. A pleading includes claims and counterclaims but not the evidence which the litigant intends to prove his case.

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The attempt [...] to equate a witness statement with a pleading has no basis in law. Evidence is led to prove the averments in the pleadings, but no evidence can be led beyond pleadings. Therefore, a witness statement cannot supplement a pleading nor can the function of the two be confused.

14. From the above, it also follows that a witness statement is not a pleading and does not fit into the genus of such a definition. At this point, it is now clear that the Deputy Registrar clearly misconstrued the definition of a “pleading. The value of the subject matter could not be determined from the pleadings and while the sum of Kshs.19,880,788,000.00/= is referred to in the deposition and witness statement, the same could not formulate a basis for determining the value of the subject matter as they were not captured in the pleadings. Therefore, the instruction fees awarded cannot stand and the same is set aside forthwith.
15. As a consequence, the getting-up fees can also not stand and I must add that I am in agreement with the Plaintiff that the same is only awardable once a matter is set down for hearing necessitating a party to make preparations for hearing e.g. taking witnesses through pre trials, preparing exhibits and all other activities that would be required for proper preparedness for trial (see *Ramesh Naran Patel c Attorney General & Another* [2012] KEHC 2033 (KLR)]. In the Court’s ruling of 14th October 2022, the Court



expressly stated that the subject Preliminary Objections were raised “before the suit was set down for hearing”. As such, getting up fee ought not to have been applicable in this case. I therefore find that the getting up fees awarded had no basis and the same is equally set aside.

16. Having found that the instruction fees and the getting up fees that were awarded by the Deputy Registrar had no basis, the next issue is determining whether to re-assess the Bill of Costs or refer the same for fresh taxation before a different taxing officer. Considering that the only item in the Bill of Costs that would be in contention in the circumstances is that on instruction fees, I find that it would be a waste of judicial time to refer this one item for taxation before another taxing officer as this will just saddle the parties with further unnecessary costs (see *Dari Limited & another v East African Development Bank & 3 others* (Commercial Case E191 of 2021) [2025] KEHC 8721 (KLR)). I will therefore determine this item based on my own discretion noting that the value of the subject matter is not discernible from the pleadings. In making this determination, I have considered the prayers sought by the Plaintiff in the suit, among other things, the rescission of a Deed of Assignment for the "Sportpesa" trademark, an order to expunge the trademark from the register, a declaration that the Defendants hold the trademark on a constructive trust for the Nominal Defendant, an account of secret profits and General damages. The Defendants filed preliminary objections, and the Court upheld them, striking out the Plaintiff's application and plaint and declining leave to continue the derivative suit.
17. I have further considered what was at stake for the parties. This matter was cross cutting and did not only involve the *Companies Act* as advanced by the Plaintiff. Indeed, going by the copious arguments by the parties before the Court, it was evident that the "Sportpesa" trademark carried a lot of weight for the Nominal Defendants' operations and affairs and the Plaintiff was well aware of this fact. I have also considered the fact that this matter was dismissed at a preliminary stage and thus hold that an award of Kshs.2,000,000.00/= would be sufficient as instruction fees under the Bill of Costs.

Conclusion and Disposition

18. In the upshot, I allow the Reference to the extent that I tax item No. 1 on the Bill of Costs at Kshs. 2,000,000.00/= and I tax off the entire amount on Item No. 2 on getting up fees. The rest of the items in the Bill of Costs remain the same. The Plaintiff is also awarded the costs of this Reference assessed at Kshs.100,000.00/=.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2025

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J.W.W. MONGARE

JUDGE

In the presence of

Mr. Gitau Waiyaki, Justus Omollo and Ms. Gatwiri for the Plaintiff.

Mr. Ade for the 4th Defendant.

Amos- Court Assistant

