REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. E011 OF 2023

–BETWEEN–

KENYA AIRPORTS AUTHORITY ..... APPELLANT

–AND–

OTIENO RAGOT & COMPANY ADVOCATES ..... RESPONDENT

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (**Ouko (P), Gatembu & Murgor, JJ. A**) delivered on 19th May, 2021 in Civil Appeal No. 39 of 2017)*

Representation:

Mr. Martin Munyu & Ms. Tabitha Weru for the appellant
(*Iseme Kamau & Maema Advocates*)

Mr. David Otieno for the respondent
(*Owiti, Otieno Ragot & Co. Advocates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This is an appeal from the judgment and decree of the Court of Appeal at Nairobi (*Ouko (P) (as he then was), Gatembu & Murgor, JJ. A*) dated 19th May,

2021. Being dissatisfied with the said judgment, Kenya Airports Authority (the appellant) successfully sought an order before the same court certifying the matter as one that raises matters of general public importance. Pursuant to the leave granted on 17th March 2023, the appellant filed the present appeal before this Court on 25th April, 2023.

[2] The appeal is predicated on the provisions of Article 163(4)(b) of the Constitution. Principally, the issue(s) of general public importance raised in the appeal revolve around the question of assessment or taxation of instruction fees due to an advocate from a client on account of proceedings before the High Court pursuant to Schedule VI of the Advocates Remuneration Order. In particular, it entails a determination of firstly, how instruction fees of an advocate in an Advocate-Client Bill of Costs should be assessed/taxed where the Party-Party Costs relating to the same matter have been assessed, and a certificate of costs issued. Secondly, whether the Taxing Officer has room to exercise judicial discretion in the assessment of costs depending on the circumstances of each case.

B. BACKGROUND

(i) Factual History

[3] Some 54 individuals (original plaintiffs) instituted a suit in the High Court at Kisumu, **HCCC No. 56 of 2009** (primary suit), against the appellant. The crux of their claim was that the appellant had compulsorily acquired their parcels of land which bordered the Kisumu International Airport for expansion of the said airport. They alleged that the appellant had failed to either compensate and/or adequately compensate them for the parcels, the developments thereon, the inconvenience caused as well as the current and future loss of profits. As a result, through an Amended Plaint dated 26th February 2010, the original plaintiffs averred that they were entitled to an average of Kshs.258 million each aggregating to Kshs.13,932,000,000 which they sought as compensation.

[4] In turn, the appellant instructed the firm of Otieno, Ragot & Co Advocates, (the respondent) to act for it in the primary suit. Pursuant to the appellant's instructions, the respondent filed an Amended Defence dated 3rd March, 2010 denying all the allegations by the original plaintiffs and challenging the competency of the primary suit. Subsequently, the appellant vide a Notice of Motion dated 30th March, 2010 applied for the primary suit to be struck out on two fronts. Firstly, the appellant claimed that contrary to Section 34 of the Kenya Airports Authority Act (Cap 395 Laws of Kenya), the original plaintiffs had not served the appellant's Managing Director with one month's written notice of their intention to commence legal proceedings and the particulars of their claim prior to instituting the primary suit. Secondly, that by dint of Section 29 of the repealed Land Acquisition Act (Cap 295 Laws of Kenya) and Section 75(2) of the former Constitution, the Land Acquisition Compensation Tribunal ought to have been the first port of call for the original plaintiffs, and only then could the High Court be rightly seized of an appeal against the Tribunal's decision.

[5] By a ruling dated 24th June 2010, *Karanja, J.* agreed with the appellant and struck out the primary suit with costs. Thereafter, with the intention of having the costs of the suit for the appellant assessed by a Taxing Officer, the respondent lodged a Party-Party Bill of Costs dated 28th June, 2010 in the primary suit pursuant to Schedule VI Part A of the Advocates Remuneration (Amendment) Order, 2006. However, the appellant alleges that the respondent filed the said bill without its instructions. Be that as it may, the Party-Party Bill of Costs sought cumulative costs of Kshs.151,658,583. Of significance, is that out of the aggregate costs, the bill sought Kshs.130,704,900 as instruction fees on the basis that the respondent was engaged to defend the primary suit.

[6] The instruction fees sought were based on the compensation of Kshs.13,932,000,000 claimed by the original plaintiffs. Eventually, the said bill was taxed by a Taxing Officer on 15th July, 2010 at Kshs.151,650,000 and a certificate of costs issued thereto. The respondent did not seek to recover the taxed

amount from the original plaintiffs, instead by a letter dated 1st January, 2011 it informed the appellant of the option of levying execution against the original plaintiffs for the taxed Party-Party costs. However, in the same breath, the respondent also advised the appellant that due to the impecuniosity of the original plaintiffs, there was a high possibility that the appellant would have to meet the auctioneers' fees, which would run into millions, even if the execution proved unsuccessful. As at the hearing of this appeal, the taxed Party-Party costs had not been recovered.

[7] It would appear that the respondent by a letter dated 19th July, 2010 asked the appellant to settle a fee note of Kshs.227,476,921.38 attached thereto for the services the law firm had rendered. On the appellant's part, it expressed its dissatisfaction with the amount stated in the fee note which it termed as excessive. This was duly communicated to the respondent and it resulted in a back and forth between the parties without any consensus as evinced by correspondence exchanged from 19th July, 2010 to 29th December, 2010. Ultimately, the respondent filed an Advocate-Client Bill of Costs dated 24th February, 2011 pursuant to Schedule VI Part B of the Advocates Remuneration (Amendment) Order, 2006.

(ii) Litigation History

(a) At the High Court

[8] The Advocate-Client Bill of Costs was filed in the High Court vide **HC Misc. Civil Cause No. 95 of 2011**, and the bone of contention was the instruction fees of Kshs.130,696,500 which the respondent indicated was premised on the sum of Kshs.13,932,000,000 sought as compensation by the original plaintiffs. Before the said bill could be taxed, the appellant on 13th May, 2011 lodged a suit in the High Court, **HCCC No. 68 of 2011**, against the respondent. In that suit, the appellant claimed that the respondent's Advocate-Client Bill of Costs was anchored on an unsubstantiated compensation sought by the original plaintiffs, and as such, the

respondent should not be allowed to benefit from an erroneous computation of fees. Towards that end, the appellant sought a declaration that the respondent's claim for remuneration based on a subject value of Kshs. 13,932,000,000 was invalid and unenforceable. Contemporaneously, the appellant also filed a Notice of Motion seeking stay of the taxation of the respondent's Advocate-Client Bill of Costs pending the determination of the suit, which prayer was granted by *Ali-Aroni, J.* (as she then was) in a ruling dated 30th June, 2011. Aggrieved by the order granting stay, the respondent filed an appeal, **Civil Appeal No. 35 of 2012**, in the Court of Appeal. The Court of Appeal (*Maraga, J.A* (as he then was), *Gatembu & Murgor, JJ. A*) by a judgment dated 18th June, 2015 found that the learned Judge had usurped the power of the Taxing Officer by halting the taxation, and set aside the stay orders.

[9] The foregoing cleared the way for the taxation of the respondent's Advocate-Client Bill of Costs, which was placed before a different Taxing Officer (*Hon. Mbulikah*, Deputy Registrar of the High Court). In considering the bill, the Taxing Officer framed four issues as arising for her consideration, *to wit*, *was the advocate retained? Is the Advocate-Client Bill of Costs independent from the Party-Party Bill of Costs? What is the value of the subject matter, If any? What are the main principles of taxation?* On the first issue, she found that the respondent had been retained by the appellant to represent it in the primary suit, and therefore the Party-Party Bill of Costs must have been filed with the authority of the appellant. On the second issue, the Taxing Officer held that a Party-Party Bill of Costs and an Advocate-Client Bill of Costs are independent from one another. Therefore, she could not blindly rely on the taxed Party-Party costs while taxing the Advocate-Client Bill of Costs.

[10] With respect to the value of the subject matter, the Taxing Officer took note of the compensation, which was in the nature of special damages, claimed by the original plaintiffs; the averment by the original plaintiffs that they would tender evidence to prove the said damages; the taxed Party-Party costs; and the fact that

the primary suit had been struck out before it could proceed to trial. In addition, she observed that the original plaintiffs had not given particulars of the parcels which were allegedly compulsorily acquired, and that there was no valuation report on the said parcels. Consequently, relying on the Court of Appeal's decision in ***Moronge & Company Advocates vs. Kenya Airports Authority***, Civil Appeal No. 262 of 2012; [2014] eKLR (***Moronge Case***) she held that the value of the subject matter in the primary suit could not be ascertained.

[11] In the circumstances, the Taxing Officer held that she was clothed with discretion by virtue of Rule 16 of the Advocates Remuneration Order to determine reasonable compensation for the work done by the respondent. In that regard, she took into account the fact that the respondent had informed the appellant that the original plaintiffs would not be able to meet the taxed Party-Party costs; the fact that the primary suit was struck out as being a non-starter and the offer made by the appellant to pay the respondent Kshs.2,500,000 as instruction fees. In the end, by a ruling dated 15th October, 2015 the Taxing Officer assessed the instruction fees at Kshs.5,000,000 and taxed the total Advocate-Client costs at Kshs.8,759,022.74.

[12] Aggrieved by the taxed Advocates-Client costs and more particularly, with the instruction fees, the respondent filed a reference under Rule 11 of the Advocates Remuneration Order. The respondent sought *inter alia* that the instruction fees as taxed by the Taxing Officer be set aside; an order directing that the instruction fees be taxed as drawn in the Advocate-Client Bill of Costs or as prescribed under Schedule VI Part B of the Remuneration Order, and interest on the taxed costs as stipulated by Rule 7 of the Remuneration Order. *Majanja, J.* who was seized of the reference found that it turned on a single issue namely, *whether the Advocate-Client Bill of Costs is dependent or independent of the Party-Party Bill of Costs*. In that regard, the learned Judge found that whereas the formula set out in Schedule VI Part B of the Advocates Remuneration Order ought to be adhered to in determining instruction fees and other items in an Advocate-Client Bill of Costs, an Advocate-Client Bill of Costs is not wholly pegged on the Party-Party costs. He

held that Party-Party costs should not simply be taken globally and increased by one-half. Rather, that a Taxing Officer must consider each item independently bearing in mind the principles of taxation. Therefore, the learned Judge found that there was nothing to warrant interfering with the Taxing Officer's decision on instruction fees. Additionally, the learned Judge directed that interest at the rate of 14% per annum would accrue on the taxed costs from the date the respondent's Advocate-Client Bill of Costs was taxed until payment in full. He also granted the respondent costs of the reference, which he assessed at Kshs.20,000.

(b) At the Court of Appeal

[13] Unrelenting, the respondent with leave of the High Court filed an appeal in the Court of Appeal, **Civil Appeal No. 39 of 2017**, challenging the High Court's decision. Likewise, the appeal mainly revolved around the instruction fees. In particular, the respondent contended that the High Court had erred by firstly, failing to find that the Taxing Officer was wrong for not taking into account the Party-Party certificate of costs in determining the costs due to the respondent. Secondly, for holding that interest on the taxed Advocate-Client costs accrued from the date the bill was taxed as opposed to the date that the fee note was presented to the appellant for payment.

[14] By a majority judgment (*Ouko (P)*, (as he then was) & *Murgor, JJ. A*) dated 19th May, 2021 with *Gatembu, J.A* dissenting, the Court of Appeal allowed the respondent's appeal on the issue of the instruction fees. *Murgor, J.A* found that the crux of the appeal was whether the instruction fees determined in the taxed Party-Party costs ought to have been applied to the Advocate-Client Bill of Costs, or whether the Taxing Officer was entitled to exercise her discretion to determine the instruction fees afresh in a matter that concerned the same suit. In determining that issue, she found that Schedule VI of the Remuneration Order is clear that in assessing instruction fees in a Party-Party Bill of Costs under Part A thereof, the starting point is to ascertain the value of the subject matter of the suit from either

the pleadings, the judgment or the settlement by the parties, and then apply the amount of fees prescribed thereunder. The learned Judge of Appeal went on to hold that thereafter, the Taxing Officer is at liberty to exercise his/her discretion by either increasing or reducing the said instruction fees if he/she deems it as necessary to arrive at a just decision.

[15] On the other hand, *Murgor, J.A* held that Part B of Schedule VI also makes it patently clear that Advocate-Client costs is computed by increasing the prescribed Party-Party costs in Part A, or the fees as ordered by a court or agreed upon by the parties by one-half. Moreover, she found that under Part B, unlike Part A, there is no provision for any further exercise of discretion on the part of the Taxing Officer to either increase or reduce the advocate's fees once the one-half formula is applied to the instruction fees ascertained in Part A. Therefore, she held that Part B which relates to Advocate-Client costs cannot be ascertained independently unless and until Part A relating to Party-Party costs is determined, since the instruction fees in Part B is an arithmetical computation derived from the instruction fees determined in the Party-Party costs in Part A.

[16] Accordingly, the learned Judge of Appeal found that the value of the subject matter, in the matter at hand, had been determined when the Party-Party costs were taxed and a certificate of costs issued on 15th July, 2010. As a result, she held that as long as the said certificate of costs had not been set aside, then the instruction fees determined therein was binding upon the parties and the Taxing Officer by virtue of Section 51(2) of the Advocates Act (Cap 16, Laws of Kenya). To that end, she found that it was not within the Taxing Officer's mandate to reopen the issue of instruction fees, and that she was simply required to apply the instruction fees determined in the taxed Party-Party costs. She emphasised that there was no requirement for the Taxing Officer to exercise her discretion in determining the instruction fees at that point, and if Parliament had intended otherwise, it would have expressly provided the same in the Advocates Remuneration Order.

[17] *Murgor, J.A* distinguished the ***Moronge Case*** on the ground that when the Advocate-Client Bill of Costs therein was placed before a Taxing Officer, the Party-Party costs had not been determined, unlike in the matter at hand. Therefore, the Taxing Officer in the ***Moronge Case*** was required to look into and determine the instruction fees. Pertaining to the matter at hand, the learned Judge of Appeal held that save for the instruction fees determined in the taxed Party-Party costs, the Taxing Officer was only entitled to exercise her discretion under Rule 16 of the Advocates Remuneration in scrutinizing the other items in the Advocate-Client Bill of Costs to determine costs that are due to the advocate. Thereafter, she held that the sum of the instruction fees and other costs increased by one-half would result in the taxed Advocate-Client costs. Lastly, she found that the respondent had not included the issue of interest in its Advocate-Bill of Costs, which in effect negated the application of Rule 7 of the Advocates Remuneration Order. Therefore, she found that there was no basis for the interest granted by the High Court.

[18] On his part, *Ouko (P)*, as he then was, entirely agreed with *Murgor, J.A*. He added that in determining instruction fees in an Advocate-Client Bill of Costs, the value of the subject matter must be ascertained a *priori*. Further, that where the value of the subject matter of a suit is known or can be determined from the pleadings, judgment or settlement, the Taxing Officer has no discretion in assessing instruction fees. In the matter at hand, the then learned Judge of Appeal found that since the primary suit had been terminated before it was heard on merit, the value of the subject matter could only be ascertained from the pleadings. Besides, he stated that by dint of the provisions of Order 4 Rule 2 of the Civil Procedure Rules, the original plaintiffs were not expected to plead more than they did. Therefore, he held that the amount expressly claimed and specifically pleaded in the Amended Plaint of Kshs.13,932,000,000 was the value of the subject matter.

[19] As to the relationship between Part A and B of Schedule VI, he found that the words employed by the Legislature therein are clear. In that, Part B is a formula for computing Advocate-Client costs, which requires applying the said formula on

the costs ascertained in Part A. In other words, he held that the outcome of Part B inevitably depends on what has been ascertained under Part A. Consequently, he also found that it was not open for the Taxing Officer to ignore/review the instruction fees determined in the taxed Party-Party costs without an application for setting aside the same. On the issue of interest, the then learned Judge of Appeal declined to award any interest on the taxed Advocate-Client costs as it would escalate the costs to disproportionate levels.

[20] In his dissent, *Gatembu, J.A* concurred with the findings of the Taxing Officer and the High Court on the issue of instruction fees. He begun by observing that neither were the particulars of the parcels of land, their sizes or their value pleaded, nor were the alleged developments thereon identified by the original plaintiffs. It followed, that the compensation sought, which was in the nature of special damages, had not been established. Therefore, he found that the figure of Kshs.13,932,000,000 urged to be the value of the subject matter is a '*figure from nowhere*'. In that regard, he also found that there was a striking resemblance between the matter at hand and the ***Moronge Case***. He went on to state that the mere mention, without more, of a figure in a pleading cannot, *per se*, determine the value of the subject matter for purposes of taxation. Likewise, he expressed that the formula provided in Part B of Schedule VI cannot fetter the judicial discretion of a Taxing Officer. Especially, where the Party-Party Bill of Costs is taxed by a different Taxing Officer, and the reasons for arriving at the costs are not apparent. In his view, Section 51(2) of the Advocates Act simply stipulates that a certificate of costs is final in respect of the costs covered therein.

[21] In the end, the court issued the following orders:

> *(i) The ruling and orders of the High Court on instruction fees and interest are set aside;*

(ii) The respondent's instruction fees are taxed in terms of Schedule VI Part A and B of the Advocates Remuneration Order in the sum of Kshs.196,044,750.50; and

(iii) As the appeal has succeeded in part, each party to bear their own costs in this Court and in the lower courts.

[22] Perturbed by the Court of Appeal's judgment, the appellant filed an application, **Civil Applic. No. E001 of 2021,** anchored on Article 163 (4)(b) of the Constitution before the same court seeking leave to lodge an appeal in this Court. The appellant argued that the intended appeal raises substantial questions of law, and by a ruling dated 17th March, 2023 the Court of Appeal (*Kiage, M'Inoti & Mumbi Ngugi, JJ. A*) granted the leave sought.

(c) At the Supreme Court

[23] Pursuant to the leave granted, the appellant filed this appeal seeking this Court's pronouncement on the following issues:

i. *What is the proper interpretation of the provisions of Schedule VI Part A and B of the Advocates Remuneration Order? In particular, whether the phrase "fees prescribed in A above increased by one-half" effectively takes away the Taxing Officer's judicial discretion in the taxation of an Advocate-Client Bill of Costs.*

ii. *What is the proper judicial interpretation of the term "subject value" in instances where the subject matter of a dispute although pleaded is fictitious and unsubstantiated hence unascertainable from the pleadings?*

iii. *Whether a certificate of taxation of Party-Party costs is binding per se on the Taxing Officer in the taxation of the Advocate-Client Bill*

of Costs, and whether such certificate completely fetters discretion in assessing instruction fees in Advocate-Client costs.

iv. *Whether costs awarded to an advocate should be allowed to be so punitive (in this case being an increment of instruction fees by the majority of the Court of Appeal from Kshs. 5,000,000 to Kshs. 196,044.750,50) with the effect of impeding access to justice as guaranteed under Article 48 of the Constitution.*

[24] Ultimately, the appellant sought the following reliefs: -

(a) *An order setting aside the impugned judgment of the Court of Appeal delivered on 19th May, 2021 and substituting it with an order dismissing the appeal.*

(b) *A permanent injunction restraining the enforcement of the impugned decision of the Court of Appeal delivered on 19th May, 2021 and the certificate of costs issued on 21st June, 2021.*

(c) *Costs of this appeal and the proceedings in the Court of Appeal.*

[25] It is important to point out that on the premise of a Notice of Motion dated 19th April, 2023 at the instance of the appellant, this Court by a ruling dated 16th June, 2023 issued orders of stay of execution of the impugned judgment as well as the enforcement proceedings thereof before the High Court, **HCCC No. Misc. Cause No. 95 of 2011**, pending the determination of this appeal.

[26] In opposing the appeal, the respondent filed a replying affidavit sworn by one of its partners, David Otieno, on 31st July, 2023 mainly challenging the propriety of the appeal on the ground that it does not involve issues of general public importance. In response, the appellant filed a further affidavit sworn by its Acting Company Secretary, Margaret Munene, on 4th August, 2023.

C. PARTIES SUBMISSIONS

(i) Appellant's Submissions

[27] The appellant relied on its written submissions dated 22nd September, 2023 and filed on 25th September, 2023 as well as the further affidavit mentioned herein above. It was posited that the contention that the appeal does not raise any issues of general public importance by the respondent is moot by dint of this Court's ruling dated 16th June, 2023 in ***Otieno Ragot & Co. Advocates vs. Kenya Airports Authority***, SC Applic. No. E015 of 2023; [2023] KESC 55 (KLR). In that, the appellant argued, the said ruling upheld the certification by the Court of Appeal that the appeal raises issues of general public importance bringing that issue to rest and there is no justification to re-open it again in this main appeal.

[28] The appellant took issue with the interpretation of Part B of Schedule VI of the Advocates Remuneration Order by the majority judgment. In its view, the said interpretation is restrictive and led the majority of the Court of Appeal to erroneously hold that instruction fees under Part B are exclusively an arithmetical computation derived from the instruction fees determined under Part A. Therefore, the appellant contended that it was a misdirection on the part of the majority to find that Part B of Schedule VI places a mandatory obligation upon a Taxing Officer to merely increase the instruction fees determined in Party-Party costs by one-half in assessing instruction fees in Advocate-Client costs.

[29] Equally, the appellant argued that the majority judgment was wrong in finding that the phrase "*fees prescribed in A above increased by one-half*" in Part B of Schedule VI takes away the 's discretion when it comes to an Advocate-Client Bill of Costs. To begin with, it was asserted that the said interpretation is contrary to Paragraph 16 of the Advocates Remuneration Order, which grants Taxing Officers discretion to determine the actual costs due. Further, the appellant claimed that the said phrase does not fetter the judicial discretion of a to consider every item in an Advocate-Client Bill of Costs. Especially, the appellant

emphasized, where the Party-Party Bill of Costs was taxed by a different Taxing Officer other than the Taxing Officer seized with the Advocate-Client Bill of Costs, and the reasons for such taxation are not apparent. Moreover, the appellant submitted that the respondent had filed the Party-Party Bill of Costs without its instructions; the Party-Party Bill of Costs was taxed as drawn; and the Taxing Officer therein did not interrogate the value of the subject matter.

[30] Likewise, it was maintained by counsel for the appellant that a certificate of taxation of Party-Party costs does not take away the Taxing Officer's discretion when it comes to consideration of an Advocate-Client Bill of Costs. This is because, in the appellant's view, there is a distinction between Party-Party costs and Advocate-Client costs. In that, the former aims to compensate successful litigants for unnecessary litigation expenses incurred while the latter aims to remunerate advocates for work done based on their client's instructions. Towards that end, the case of ***Coetzee vs. Taxing Master, South Gauteng High Court and Another*** (2010/14197) [2012] ZAGPJHC 175 was cited.

[31] According to the appellant, the Court of Appeal disregarded the principle that where the value of the subject matter cannot be ascertained, a Taxing Officer is required to exercise his/her discretion based on relevant considerations to determine the instruction fees. Therefore, the appellant claimed that the majority Judges of the Court of Appeal erred in holding that the instruction fees in the Advocate-Client costs should be based on the Party-Party costs which had been taxed on the premise of a fictitious and unsubstantiated figure pleaded in the Amended Plaint. What was more, it was contended that the majority decision went against the doctrine of judicial precedent by failing to adhere to the court's own decision in the ***Moronge Case*** which was similar to the matter in issue.

[32] It was postulated that the impugned decision portends the impediment of the right of access to justice not only to the parties herein but also to the general public, and in particular, litigants of humble means. More so, claimed the appellant, where

advocates move to tax Party-Party Bill of Costs based on fictitious figures with the sole aim of anchoring their claim for costs from their clients on the taxed Party-Party costs. Further, the appellant asserted that the impugned decision will allow advocates to charge unsubstantiated exorbitant fees which are not commensurate to the work done. To buttress that proposition, this Court's decisions in ***Westmont Holdings SDN BHD vs. Central Bank of Kenya & 2 Others***, SC Petition No. 16 (E023) of 2021; [2023] KESC 11(KLR) and ***Evans Odhiambo Kidero & 4 Others vs. Ferdinand Ndungu Waititu & 4 Others***, SC Petition No. 18 of 2014; [2014] eKLR were cited.

[33] Last but not least, we could not help but note that the appellant's counsel in his oral submissions delved into the issue of interest on taxed costs, which issue was neither certified as a matter of general public importance nor canvassed in the written submissions. He alleged that the Court of Appeal had not conclusively dealt with this issue and invited this Court to determine when interest on taxed costs should commence running.

(ii) Respondent's Submissions

[34] The respondent relied on its written submissions dated 22nd September, 2023 and filed on 26th September 2023, further submissions dated 22nd December, 2023 and filed on 10th January, 2024 as well as the replying affidavit stated herein above. The respondent submitted that an advocate has ostensible instructions to act for his/her client at all stages of the suit, and it would be outrageous to suggest that such an advocate would be required to obtain the express authorisation of the client to file a Party-Party Bill of Costs where costs have been awarded to the client. Rather, it was urged that the converse would be a serious dereliction of duty on the part of an advocate to fail to file a Party-Party Bill of Costs in such circumstances. Nonetheless, the respondent submitted that this issue had been determined during the taxation of the Advocate-Client Bill of Costs wherein the Taxing Officer found that the respondent had instructions to file the Party-Party Bill of Costs. Further,

that since the appellant had not challenged the said finding through a reference it could not turn around and allege otherwise.

[35] On the competency of the appeal, the respondent stated that the appellant had invited this Court to pronounce itself on whether costs should be allowed to be so punitive as to impede the right of access to justice under Article 48 of the Constitution. Consequently, the respondent claimed that the effect of the said prayer placed the appeal within the realm of Article 163(4)(a) of the Constitution, that is, an appeal involving the interpretation of the Constitution. Even so, it was urged that there was absolutely no litigation in the superior courts below touching on or around Article 48 or any other provision of the Constitution. It was also submitted that the issues of general public importance set out in this appeal were never raised or the subject of litigation in any of the superior courts below. Further, the respondent believed that the said issues do not transcend the circumstances of the dispute between the parties.

[36] In other words, the respondent claimed that the appellant was simply seeking this Court to rectify what it thought was an error by the Court of Appeal with regard to the interpretation of Schedule VI of the Advocates Remuneration Order, which is well settled through numerous precedents. Towards that end, this Court's decision in ***Malcom Bell vs. Hon. Daniel Torotich Arap Moi & Another***, SC Applic. No. 1 of 2013; [2013] eKLR was cited. In the circumstances, it was submitted that this Court's jurisdiction had not been properly invoked, and the Court was asked not to entertain the appeal. The respondent maintained that despite this Court's ruling on review of the Court of Appeal's certification, this Court should be open to reconsider the issue of jurisdiction at any stage of the proceedings where doubt continues to linger.

[37] It was submitted that the ***Moronge Case*** was distinguishable to the matter at hand, as rightly appreciated by *Murgor, J.A*. According to the respondent, the majority decision correctly found that once instruction fees and other fees are

determined in the Party-Party costs, a Taxing Officer who is tasked with determining the Advocate-Client costs in the same matter is strictly required to increase the same by one-half. Furthermore, that the only exceptions to such computation is where for instance an advocate did not render all the services due to a change of advocates, and where there is proof of part payment of such fees.

[38] Turning to the value of the subject matter, the respondent reiterated the finding by the majority of the Court of Appeal that the same was discernible from the pleadings. Besides, the respondent argued that the primary suit was filed before the 2010 amendment of the Civil Procedure Rules which introduced the requirement of filing witness statements and documents with the pleadings. Be that as it may, it was posited that the question of whether or not the claim was fictitious could only have been proved at the trial but the primary suit was struck out before going to trial. In that case, the respondent stated that there was no basis for the appellant to claim that the amount sought in damages was fictitious yet no declaration to that effect had been made by any court. Consequently, it was the respondent's submission that this Court could not at this stage make a finding that the figure was fictitious. The respondent also asserted that even assuming the matter went to trial and the amount claimed was found to be fictitious, the advocate's fees would still be based on the amount claimed.

[39] In the respondent's view, the value of the subject matter had already been determined when the Party-Party costs were taxed. Therefore, the appellant submitted that if the appellant deemed the said value was fictitious it should have sought to set aside the taxed Party-Party costs. Furthermore, it was urged that the interpretation advanced by the appellant, that is, that there can be two different values of a subject matter with one applying to Party-Party costs while the other Advocate-Client costs, will lead to absurdity. The respondent went on to contend that the right of an advocate to recover his/her fees is not pegged on the ability of the client's adversary to pay the taxed Party-Party costs. The respondent added that as long as the taxed Party-Party costs in this matter remains in force, any

decision reversing the majority decision of the Court of Appeal would amount to undercutting which is contrary to Section 36 of the Advocates Act. This is because, urged the respondent, the costs awarded by the majority of the Court of Appeal is the minimum prescribed fees under Part B of Schedule VI of the Advocates Remuneration Order.

[40] It was the respondent's contention that the only grouse the appellant had with the Advocate-Client Bill of Costs is that it was allegedly excessive. In the respondent's view, the same was evident from the fact that the appellant did not raise any objection to the taxed Party-Party costs, and only cried foul when the said costs were applied to the Advocate-Client costs. Nevertheless, the respondent argued that should this Court allow this appeal, it would be tantamount to opening the taxed Party-Party costs and re-taxing the same in the absence of the original plaintiffs in the primary suit contrary to the right to fair trial under Article 50 of the Constitution.

[41] On the issue of interest, the respondent asserted that the High Court decision on that issue was never challenged on appeal. Nonetheless, it claimed that the Court of Appeal delved into the issue despite the same not being properly before it. The respondent explained that it did not challenge the Court of Appeal's finding on this issue simply because it did not deem that such an issue fell within the parameters of this Court's jurisdiction. Nevertheless, the respondent stated that it had left it to this Court to determine the issue. In the end, the respondent asked this Court to dismiss the appeal with costs.

D. ANALYSIS

[42] Having considered the pleadings, the impugned judgment, and the parties' respective submissions, it is apposite to first address preliminary issues concerning this Court's jurisdiction on whether the appeal raises a matter of general public importance, and the award of interest which was set aside by the Court of Appeal.

[43] The respondent made heavy weather of this Court's jurisdiction or lack thereof, for that matter, to entertain the appeal on two aspects. First, we understood the respondent to contend that the appeal does not raise issues of general public importance. Rather, that it revolves around the interpretation and application of the Constitution, which falls within our appellate jurisdiction under Article 163(4) (a) of the Constitution. Second, that in any event, neither the issues of interpretation and application of the Constitution nor the delineated issues of general public importance arose and/or were determined in the superior courts below.

[44] It is common ground that the appeal is anchored on our appellate jurisdiction under Article 163(4)(b) of the Constitution. To put it differently, the appeal is before us following the certification by the Court of Appeal that it raises issues of general public importance that warrant our consideration. It is instructive to note that the respondent sought review of the said certification before this Court vide **SC Applic. No. E015 of 2023**. Equally, it is not lost to us that the respondent raised more or less similar grounds in support of its motion for review.

[45] This Court considered the said motion, the arguments advanced thereto and declined to review the certification by the Court of Appeal. By a ruling dated 16th June 2023, this Court found the appeal does indeed raise issues of general public importance. Consequently, the respondent cannot at this stage be heard to claim that the appeal does not raise issues of general public importance. See this Court's decision in ***Muriithi (Suing as the Legal Representative of the Estate of Mwangi Stephen Muriithi) vs. Janmohamed SC, (Suing as the Executrix of the Estate of Hon. Daniel Toroitich Arap Moi) & Another***, SC Petition No. 41 of 2018; [2023] KESC 61 (KLR).

[46] The other issue relates to the question of interest on taxed costs. It is clear, right from the appellant's motion for certification at the Court of Appeal to the respondent's motion for review of the certification before this Court, that the issue

of when interest on taxed costs accrues was never raised or delineated as a matter of general public importance. The parameters of this Court's jurisdiction with respect to an appeal under Article 163(4)(b) are well settled. As this Court appreciated in the aforementioned ***Muriithi Case***, a litigant cannot expand such an appeal or introduce new issues beyond the parameters pursuant to which it was certified or admitted. On that basis, we decline the appellant's invitation to pronounce ourselves on the said issue.

[47] Turning to the crux of the appeal we will deal with the issues that were certified as being of general public importance; firstly, the interpretation of the provisions of Schedule VI of the Advocates Remuneration Order; secondly, how instruction fees of an advocate in an Advocate-Client Bill of Costs should be assessed/taxed where the Party-Party costs relating to the same matter has been assessed, and certificate of costs issued; thirdly, whether a Taxing Officer has room to exercise judicial discretion in the assessment of costs depending on the circumstances of each case; and lastly what orders should issue.

i. Interpretation of Schedule VI of the Advocates Remuneration Order

[48] We are cognisant that the purpose of interpretation of statutes or documents, in this case Schedule VI of the Advocates Remuneration Order, is to discern the intention of the framers thereof. In doing so, such intention can be derived from the words used therein, as appreciated in ***Law Society of Kenya vs. Attorney General & Another***, SC Petition No. 4 of 2019, [2019] KESC 16 (KLR). Further, regard has to be given to the context thereof as the Supreme Court of India in the often-cited case of ***Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and Others*** (1987) 1 SCC 424 expressed –

> *"**Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither***

can be ignored. Both are important… A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word…"

[49] The Advocates Remuneration Order is anchored on Section 44 of the Advocates Act which reads in part as follows:

"***44. Chief Justice may make orders prescribing remuneration***

(1) ***The Council of the Society*** (Law Society of Kenya) ***may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious…"*** [Emphasis added]

[50] Therefore, in light of the above provision, the Advocates Remuneration Order, just as its name suggests, relates to the remuneration of advocates. As evinced by Rule 2 thereof, it relates to assessment of costs incurred in a contentious matter which can be reimbursed to a successful party/litigant by the other party. More specifically, it prescribes and regulates the remuneration of advocates in respect of professional business undertaken, and the recompense of costs/expenses incurred by a successful party in a suit. The overall objective is to prevent exploitation of parties to a suit/transaction with regard to remuneration of advocates and compensation of costs or expenses incurred by a successful party as well as maintain the standards of the legal profession. Differently put, it is to ensure that fees/costs paid to an advocate and a successful party are reasonable. Of importance, is that what amounts to reasonable costs can only be determined

on a case-by-case basis. In that regard, the Court of Appeal in the *locus classicus* case of ***Premchand Raichand Ltd vs. Quarry Services of East Africa Ltd***. (No. 3) [1972] EA 162 captured the rationale best by formulating the following guiding principles in assessing costs under the Advocates Remuneration Order:

> "
>
> ***a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy;***
>
> ***b) That a successful litigant ought to be fairly reimbursed for the cost 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 award made…"***

[51] Equally, Section 36 of the Advocates Act and Rule 3 of the Advocates Remuneration Order proscribe an advocate from charging or accepting, otherwise than in part payment, any fee or other consideration in respect of professional business which is less than the remuneration prescribed in the Remuneration Order. It sets out standards to regulate the profession from being undermined by what is known as undercutting. To ensure the objective of the aforementioned regulation is met, a Taxing Officer, who may be the Registrar or Deputy Registrar of the High Court, is tasked with the role of assessing/taxing costs or fees under the Advocates Remuneration Order. See Rule 10 of the Advocates Remuneration Order.

[52] By dint of Rule 50 of the Advocates Remuneration Order, Schedule VI relates to the assessment/taxation of costs in proceedings before the High Court. Schedule VI of the Advocates Remuneration Order is divided into two parts, that is, Part A which deals with Party-Party costs, and Part B with Advocate-Client

costs. Of concern to this appeal, as we stated in the preceding paragraphs of this judgment, is the assessment/taxation of instruction fees of an advocate retained to act for a party in the High Court. Therefore, in interpreting Schedule VI we shall address the following sub-issues:

a. *How should instruction fees under Schedule VIA of the Advocates Remuneration Order be assessed and/or taxed?*

b. *How should instruction fees under Schedule VIB of the Advocates Remuneration Order be assessed and/or taxed?*

a. Assessment/Taxation of instructions fees under Schedule VIA of the Advocates Remuneration Order

[53] Schedule VIA provides for Party-Party costs, that is, the manner in which costs awarded to a successful party as against another party therein should be assessed/computed/taxed. The essence of such costs is to ensure a successful litigant/party receives a fair reimbursement/recompense for the costs/expenses he/she has had to incur on account of a suit. See ***Outa vs. Odoyo & 3 Others***, SC Petition No 6 of 2014; [2023] KESC 75 (KLR).

[54] With regard to Schedule VIA, Paragraph 1 thereof commences with the assessment of instruction fees based on the value of the subject matter, the said paragraph provides in part as follows:

> *"*
>
> ***1. Instruction fees***
>
> ***Subject as hereinafter provided, the fees for instructions shall be as follows—***
>
> **...**

The fees for instructions in suits shall be as follows, unless the Taxing Officer in his discretion shall increase or (unless otherwise provided) reduce it:

(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, <u>where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties</u> and –

…

(b) 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 <u>where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties</u> and – …" [Emphasis added]

[55] It is common ground that the subject matter of the suit in issue should be identified first, and then the value thereof determined. How is the value of the subject matter to be determined? Paragraph 1 of Schedule VIA is clear on this issue, and in point of fact stipulates that, ***"… where the value of the subject matter can be determined from the pleading, judgment or settlement of the parties***". This means that the value of the subject matter can be determined from the pleadings or judgment or settlement of the parties. In that regard, the Court of Appeal in the case of ***Joreth Ltd. vs. Kigano & Associates*** [2002] 1 E.A. 92 expressed 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) …"***

[56] Equally, the Court of Appeal in considering the issue of how the value of a subject matter can be determined in ***Peter Muthoka & Another vs. Ochieng & 3 Others***, Civil Appeal No. 328 of 2017; [2019] eKLR, stated as follows:

> ***"It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent 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 subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the 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 the pleadings where there is a settlement."***

We concur and approve of the foregoing findings by the Court of Appeal on the factors to take into consideration when determining the value of the subject matter.

[57] Whilst the determination of the value of subject matter from a judgment and settlement of the parties is quite straight forward, 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 vs. 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 18th October 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 judgement 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] The facts of the instant appeal were not so dissimilar with the above case as the value of the subject matter was disputed by the appellant and the issue was not determinable from the pleadings which were struck out. It is evident that the original plaintiffs did not provide any particulars or the value of the parcels that were allegedly compulsorily acquired by the appellant. This information in our view was necessary as a guide to the Taxing Officer in the assessment of reasonable

costs. The original plaintiffs simply pleaded or claimed a sum of Kshs.13,932,000,000 as special damages and indicated that the particulars thereto would be availed during the hearing. Therefore, the value of the subject matter could only be determined upon the conclusion of the trial which never happened.

[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.

[60] Be that as it may, 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 a matter as stipulated in Paragraph 1, for instance like, bankruptcy proceedings or matrimonial causes she/he 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. See ***First American Bank of Kenya vs. Shah and Others*** [2002] 1 EA 64. In exercising such unfettered discretion, the Taxing Officer is required to do so judiciously and not whimsically. *Ojwang, J.*, (as he then was) aptly set out the manner in which such discretion should be exercised by a Taxing Officer in ***Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'njuguna & 6 Others***, HC Misc 621 of 2000; [2006] eKLR, in the following terms:

"Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the Taxing Officer's discretion, must be specified cogently and with conviction.

...

It was necessary 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 originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs."

[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 Ofifcer 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; …"

See ***Joreth Ltd. vs. Kigano & Associates*** (***supra***).

[62] The Court of Appeal in the ***Peter Muthoka Case*** found and rightly so, when the aforementioned 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 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 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."*** [Emphasis added]

b. Assessment/Taxation of instructions fees under Schedule VIB of the Advocates Remuneration Order

[63] Schedule VI Part B relates to Advocate-Client costs, that is, it provides for the manner in which advocates costs/fees should be assessed/taxed. Part B stipulates that –

"B-ADVOCATE AND CLIENT COSTS

As between advocate and client the minimum fee shall be –

(a) the fees prescribed in A above, increased by one-half; or
(b) the fees ordered by the court, increased by one-half; or
(c) the fees agreed by the parties under paragraph 57 of this order increased by one-half; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences."

[64] Equally, our consideration of the interpretation of Part B of Schedule VI will be confined to the issue of assessment of instruction fees thereunder. More specifically, how such instruction fees should be computed where the Party-Party costs have been taxed/assessed under Part A and a certificate of costs/taxation issued thereto. Majority of the decisions of the superior courts below have interpreted Part B as a mathematical formula which should be applied to the taxed Party-Party costs under Part A of Schedule VI. Indeed, the impugned majority judgment of the Court of Appeal is categorical that once instruction fees in Party-Party costs in a particular suit are assessed/taxed under Part A, and a certificate of costs to that effect is issued, the assessment of instruction fees in Advocate-Client costs in the same suit simply requires the application of the formula stipulated under Part B, that is, the fees, in this case the instruction fees, taxed or ascertained under Part A increased by one-half. Besides, the impugned majority judgment found that where Party-Party costs are taxed under Part A, the Taxing Officer is devoid of any discretionary power when it comes to the assessment of instruction fees in Advocate-Client Bill of Costs.

[65] Similarly, the Court of Appeal in ***Central Bank of Kenya vs. Makhecha & Co. Advocates***, Civil Appeal (Application) No. 48 of 2014; [2019] eKLR, held that-

"It seems to us quite clear that where the party and party costs have been taxed and agreed, then, unless there be an agreement as to fees between the client and the advocate, the advocate is entitled, as of right, by dint of Schedule VIB of the Remuneration Order, to the party and party costs plus half of the same. It is a matter of arithmetic, requiring no exercise of discretion on the part of the Taxing Officer, …".

[66] Looking at Part B, which provides in part that the minimum fees as between an advocate and client shall be the fees prescribed in Part A increased by one-half, it is clear that in assessing Advocate-Client costs/fees under Part B, including instruction fees therein, the Taxing Officer is required to take into account Part A. As to whether this means that such a Taxing Officer is simply to increase the instruction fees determined/ascertained in Part A by one-half or 50%, we are not persuaded in the least. This is because Rule 16 of the Advocates Remuneration Order provides as follows:

"***16. Discretion of a Taxing Officer***

Notwithstanding anything contained in this Order, on every taxation the Taxing Officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the to have been incurred or increased through over caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses."
[Emphasis added]

[67] Rule 16 herein above should be read together with Section 2 of the Advocates Act, which interprets the word costs as follows:

> ***"'Costs' includes fees, charges, disbursements, expenses and remuneration; …"***

It follows that contrary to the impugned majority judgment, a Taxing Officer is clothed with discretion when determining/assessing instruction fees even where the Party-Party costs have been taxed. This is evident in the phrase "***on every taxation the Taxing Officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party…"*** The said position is further buttressed by the marginal note to the Rule 11 which makes reference to, "***Discretion of a Taxing Officer"***.

[68] The Black's Law Dictionary, 8th Ed. (2004) p. 1406 defines judicial discretion as:

> "***The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."***

Bearing the above in mind, we find that the proper interpretation of Schedule VI Part B is that in assessing fees thereunder, including instruction fees, a Taxing Officer is required to exercise his/her discretion guided by the prescribed scale of fees in Part A. To our minds, that does not mean, as the impugned majority judgment found, that a Taxing Officer is simply to apply the mathematical formula to the instruction fees ascertained in the taxed Party-Party costs. Failure to evaluate a disputed item under taxation and determine it judiciously is contrary to

the clear provisions of Rule 16 of the Advocates Remuneration Order. Besides, a Taxing Officer being a judicial officer exercising a judicial mandate cannot be said to be performing such mandate mechanically or merely as a formality.

[69] What is more, *Gould, J.A*. in ***Thomas James Arthur vs. Nyeri Electricity Undertaking*** [1961] E.A. 492 at p. 494, stated that a Taxing Officer does not arrive at a figure by multiplying the scale fee, but ***"places what he considers a fair value upon the work and responsibility involved***." In any event, the essence of the assessment of instruction fees as appreciated by the Court of Appeal in ***Ratemo Oira & Co Advocates vs. Magereza Sacco Society Ltd***., Civil Appeal No. 75 of 2018; [2019] eKLR is that -

> "***Indeed, it is trite that an advocate is entitled to his fees once he is instructed, retained or employed by a client… However, it must be noted that an Advocate will be entitled to payment of a reasonable fee which is commensurate with the work done. The business of taxation of costs must ensure a delicate balance between the guiding principles aptly pronounced by the Premchand case which include: the "Court owes a duty to the general public to see that costs are not allowed to rise to such a level as to deprive of access to Courts but the worthy" and "the general level of the remuneration must be such as to attract worthy recruits to the profession". What is a reasonable fee in the circumstance can only be adjudicated by a taxing master by application of his discretion***. [Emphasis added]

[70] We also agree with the above proposition and hasten to add that if the instruction fee in a certificate of Party-Party costs is disputed when it comes to the assessment of the same in Advocate-Client costs under Part B of Schedule VI, the Taxing Officer should subject the disputed items to evaluation and judicial

determination according to the circumstances of each case. The instruction fees in the Party-Party certificate of costs once disputed must be ascertained and the certificate cannot be applied hook, line and sinker in the assessment of instruction fees under Part B.

[71] We are also acutely aware of the provisions of Section 51(2) of the Advocates Act which stipulate as follows:

> "***The certificate of the Taxing Officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."*** [Emphasis added]

The words employed in the above provision are clear and demonstrate that the intention of the Legislature is that the costs ascertained by the certificate of taxation or costs, are final with respect to costs covered therein. In other words, a certificate of taxed Party-Party costs is final on the costs/fees ascertained in the Party-Party costs. While instruction fees ascertained thereunder are not *per se* binding, when it comes to the assessment of Advocate-Client costs, a Taxing Officer is required to consider the matter and where he/she is satisfied that it is a true representation of the work done by the advocate, it can be applied in the assessment of instruction fees under Schedule VI Part B. Similarly, the Taxing Officer may exercise her/his discretion and depart from the ascertained instruction fees and give reasons for such departure.

[72] This is what happened in the instant matter, as the Taxing Officer and the learned Judge of the High Court found the value of the subject matter was not ascertainable from the Amended Plaint that was struck out for being incompetent. The Amended Plaint had indicated a sum of Kshs.13,932,000,0000 as a specific

claim and the particulars of the claim were to be provided during the hearing, which did not take place. Furthermore, it was noted that the particulars of the suit parcels of land that were allegedly compulsorily acquired, and the developments thereon were not provided by the original plaintiffs. Therefore, that the value of the subject matter was unascertainable.

ii. What orders should issue?

[73] Based on our finding herein above, it follows that the impugned majority judgment is erroneous as it is predicated on the finding that the assessment of instruction fees under Part B of Schedule VI of the Remuneration Order was simply arithmetical devoid of any exercise of discretion by the Taxing Officer. It was imperative in the circumstances of this matter for the Taxing Officer, as indeed it was done, to interrogate the reasonableness of the Advocate-Client Bill of Costs especially the instruction fees and not to automatically apply the certificate of the Party-Party costs and to increase the sum taxed by one-half.

[74] We therefore agree with the reasoning of *Gatembu, J.A*, the High Court Judge and the Taxing Officer that despite the original plaintiffs claiming compensation of Kshs.13,932,000,000, which was in the nature of special damages, they never proved the same. It is trite that special damages are required to not only be pleaded but also specifically particularized and proved. The primary suit having been struck out at the preliminary stage for being a non-starter, how were the special damages sought established or ascertained? Therefore, the basis of the special damages sought remained a mirage. In the circumstances, the application of the compensation sought as the value of the subject matter was tantamount to basing the instruction fees on an unsubstantiated and indeterminate figure.

[75] Consequently, the circumstances of the ***Moronge Case*** (supra) is on all fours with this appeal and it was not at all distinguishable. We find the following findings by the Court of Appeal in the aforementioned case very apt:

"... A plain reading of the above paragraph shows, without doubt, that it was not possible to determine the value of the subject matter of the suit from the pleading. We say so, because the subject parcels of land were not identified. Their respective valuations were not given. The alleged developments were not particularized. The figure of Kshs.25,542,000,000/= given in the paragraph was also said to represent loss to the plaintiffs, their children, their representatives, future grandchildren and great grandchildren without disclosing how the figure was arrived at.

...

In our view, there is no way the value of the subject matter of the suit could be determined from the pleading in paragraph 12. The figure given therein was, in our view, plucked from the air. Like the learned Judge, we find and hold that the figure had absolutely no basis.

...

As the value of the subject matter could not be determined from the pleadings, judgment or settlement, the Taxing Officer should have used his discretion to determine such instructions fees as he considered just, taking into account, amongst other matters, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances."

Accordingly, we are not particularly persuaded by *Murgor, J.A.'s* finding that the ***Moronge Case*** was distinguishable from the matter at hand.

[76] We believe we have said enough to demonstrate that there were no justifiable reason(s) to warrant the majority decision of the Court of Appeal to interfere with

the taxation of the instruction fees by the Taxing Officer. The Taxing Officer as well as the High Court Judge did not in any way err in law or principle, in the assessment of Advocate-Client instruction fees. Moreover, an increase of the instruction fees from Kshs.5,000,000 to Kshs.196,044.750,50 amounted to an impediment to access to justice. As emphasized in the many authorities and submissions made to us, instruction fees ought to take into account the amount of work done by an advocate, the prevailing economic times and should be reasonable to a level where the charges should not impede access to justice. *Odunga, J.,* (as he then was) in ***Nyangito & Co. Advocates vs. Doinyo Lessos Creameries Ltd***., HC Misc No. 843 of 2013; [2014] eKLR expressed as follows:

> ***"... the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants."***

Equally, the finding by *Ojwang, J*. (as he then was) in ***Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'njuguna & 6 Others***, HC Misc 621 of 2000 [2006] eKLR, resonates with the matter at hand. He stated as follows:

"Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the Taxing Officer is to provide only for reasonable compensation for work done; the should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious;…"

[77] Accordingly, we find this appeal has merit and hereby set aside the impugned majority judgment of the Court of Appeal and uphold, the High Court's ruling dated 20th February, 2017.

E. COSTS

[78] Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai Estate of & 4 Others***; SC Petition 4 of 2012; [2013] eKLR, we find that due to the public interest nature of this matter each party should bear their own costs.

F. ORDERS

[79] In the premise, we issue the following orders:

a) The appeal dated 17th April, 2023 and filed on 25th April, 2023 is hereby allowed.

b) The majority judgment of the Court of Appeal dated 19th May, 2021 in Civil Appeal No. 39 of 2017 is hereby set aside.

c) The ruling of the High Court dated 20th February, 2017 in HC Misc. Applic. No. 95 of 2011 is hereby confirmed.

d) Each party will bear their own costs of the appeal and cross appeal before this Court.

e) We hereby direct that the sum of Kshs.6,000 deposited as security for costs upon lodging of this appeal be refunded to the appellant.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **2nd** day of **August**, 2024.

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT

.....	.....
M. K. IBRAHIM **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU **JUSTICE OF THE SUPREME COURT**	**I. LENAOLA** **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
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REGISTRAR
SUPREME COURT OF KENYA