



## THE SUPREME COURT OF KENYA

### KENYA AIRPORTS AUTHORITY VS. OTIENO RAGOT & COMPANY ADVOCATES

SC PETITION NO. E011 OF 2023

DATE OF JUDGMENT: 2<sup>ND</sup> AUGUST, 2024

#### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.*

**Orders: The Court allows the appeal.**

#### **Background**

Kenya Airports Authority (the appellant) was sued by 54 individuals (original plaintiffs) in the High Court at Kisumu (primary suit), for allegedly compulsorily acquiring their parcels of land which bordered the Kisumu International Airport. The original plaintiffs sought Kshs.13,932,000,000 as compensation. Subsequently, the appellant instructed Otieno Ragot & Company Advocates (the respondent) to represent it in the primary suit. However, the primary suit was struck out on account of being incompetent, and did not proceed to trial. In addition, the original plaintiffs were condemned to pay the costs of the appellant. As a result, a Party-Party Bill of Costs was filed seeking the assessment of the costs awarded to the appellant by a Taxing Officer. Cumulatively, the bill sought costs of Kshs.151,658,583 out of which Kshs.130,704,900 was instruction fees for instructing an advocate. The instruction fees sought were based on the compensation claimed by the original plaintiffs of Kshs. 13,932,000,000. Eventually, the said Party-Party Bill of Costs was taxed by a Taxing Officer on 15<sup>th</sup> July, 2010 at Kshs.151,650,000 and a certificate of costs issued.

Thereafter, the appellant and respondent were unable to agree on the fees due to the respondent for the services rendered to the appellant. This led to the respondent filing an Advocate-Client Bill of Costs at the High Court seeking the assessment of the fees due to it. The Respondent sought instruction fees of Kshs.130,696,500 based on the sum of Kshs.13,932,000,000 which was taken as the value of the subject matter of the suit in the taxed Party-Party costs. Nonetheless, the Taxing Officer declined to grant the instruction fees sought on the grounds that firstly, the original plaintiffs had not given any particulars of the parcels which were allegedly compulsorily acquired by the appellant; secondly, there was nothing to demonstrate the value of the alleged parcels; thirdly, Kshs. 13,932,000,000 which was claimed by the original plaintiffs had not been established; and fourthly, that the value of the subject matter of the original suit could not be verified as the suit was dismissed summarily without going to trial. Instead, the Taxing Officer by a ruling dated 15<sup>th</sup> October, 2015 exercised her discretion and assessed the instruction fees at Kshs. 5,000,000 and the total Advocate-Client costs at Kshs. 8,759,022.74.

Aggrieved with the 's decision, the respondent filed a reference before the High Court (*Majanja, J.*) which was dismissed by a ruling dated 20<sup>th</sup> February, 2017.

Unrelenting, the respondent filed an appeal in the Court of Appeal challenging the High Court's decision principally on the instruction fees. The Court of Appeal by a majority decision (*Ouko (P)*, (as he then was) & *Murgor, JJ. A*) with *Gatembu, J.A* dissenting allowed the respondent's appeal. The majority decision of the Court of Appeal held that once instruction fees are ascertained in Party-Party costs, a Taxing Officer in assessing instruction fees in Advocate-Client Bill of Costs in the same matter, is only required to apply the formula stipulated in Schedule VIB of the Advocates Remuneration Order by increasing the ascertained instruction fees by one-half. Accordingly, the Court of Appeal set aside the High Court decision and assessed the instruction fees at Kshs. 196,044,750.50. Subsequently, the appellant obtained leave from the Court of Appeal to file its appeal before the Supreme Court.

The following issues arose for consideration by the Supreme Court:

- i. *The interpretation of the provisions of Schedule VI of the Advocates Remuneration Order.*
- ii. *What orders should issue?*

Upon consideration, the Supreme Court allowed the appellant's appeal for the reasons that:

- i. Schedule VI of the Advocates Remuneration Order which prescribes the procedure of assessment of costs in proceedings before the High Court is divided into two parts namely, Part A and B. Schedule VIA provides for the manner in which Party-Party costs, that is, costs awarded to a successful party as against another party should be assessed/computed/taxed.
- ii. Assessment of instruction fees under Schedule VIA may be based on the value of the subject matter of the suit where the same can be determined from the pleadings or judgment or settlement of the parties. However, where the value cannot be ascertained, a Taxing Officer is entitled to exercise his/her discretion in assessing reasonable instruction fees which are commensurate to the work done by the advocate.
- iii. Schedule VIB relates to Advocate-Client costs, that is, it provides for the manner in which advocates costs/fees should be assessed/taxed. In assessing Advocate-Client costs under Part B, including instruction fees, a Taxing Officer is required to exercise his/her discretion, even where the Party-Party costs have been taxed, to determine/assess reasonable instruction fees that should be a true representation of the work done by an advocate.
- iv. An amount or claim pleaded in a suit which is struck out at the preliminary stage does not by itself render the claim or amount pleaded therein as the value of the subject matter.

Accordingly, the Court issued the following orders:

- a) *The appeal dated 17<sup>th</sup> April, 2023 and filed on 25<sup>th</sup> April, 2023 is hereby allowed.***
  - b) *The majority judgment of the Court of Appeal dated 19<sup>th</sup> May, 2021 in Civil Appeal No. 39 of 2017 is hereby set aside.***
  - c) *The ruling of the High Court dated 20<sup>th</sup> 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.***
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