



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: M.K. Ibrahim, SCJ in Chambers)

**PETITION (APPLICATION) NO. E024 OF 2023
TOGETHER WITH
APPLICATIONS NO. E030, E034 & E038 OF 2023**

-BETWEEN-

NAIROBI BOTTLERS LIMITED.....APPELLANT/RESPONDENT

-AND-

MARK NDUMIA NDUNGU.....1ST RESPONDENT/APPLICANT

**COCA COLA CENTRAL, EAST & WEST AFRICA
LIMITED.....2ND RESPONDENT**

(Being a Reference seeking to set aside or vary the taxation decision of Hon. Kasavuli, Deputy Registrar, dated and delivered 30th August, 2024)

Representation:

Mr. Kiragu Wathuta for the appellant/respondent
(Kiragu Wathuta & Company Advocates)

Mr. Kariuki for the 1st respondent/applicant
(Mawira & Ndungu LLP)

RULING OF THE COURT

[1] Before the Court are four Motions all filed by Mark Ndumia Ndungu, the 1st respondent/applicant, seeking similar orders arising from the decision of this Court in a Taxation decision delivered on 30th August, 2024. I will therefore dispose of them together in this Ruling to save on precious judicial time; and

[2] UPON PERUSING the Motions dated 5th September, 2024 filed in Petition No. E024 of 2023 and Applications Nos. E030, E034 and E038 of 2023 by the 1st respondent/applicant pursuant to Rules 60 and 62(1) of the Supreme Court Rules, 2020 in which the 1st respondent/applicant seeks to set aside and/or review upward of the decision of the Taxing Officer delivered on 30th August, 2024 as relates to instruction fees and other items concerning the definition and application of *'folios'*. More specifically, the 1st respondent/applicant challenges the findings of the Taxing Officer as follows:

- A) Petition No. E024 of 2023** – In regards to item no. 1 on instruction fees for the Appeal which was taxed at Ksh. 1,000,000/= and other taxed items numbers 2, 3, 4, 5, 6, 7, 10 and 11 of the bill of costs dated 29th November, 2023;
- B) Application No. E030 of 2023** – In regards to item no. 1 on instruction fees for the application that sought stay of execution of the Judgment of the Court of Appeal delivered on 7th July, 2023, which was taxed at Ksh. 50,000/= and other taxed items numbers 2, 3, 4, 5, 6, 7, 10 and 11 of the bill of costs dated 29th November, 2023;
- C) Application No. Petition E034 of 2023** - In regards to item no. 1 on instruction fees for the application that sought to strike out the Petition of Appeal for being filed out of time, which was taxed at Ksh. 50,000/= and other taxed items numbers 2, 3, 4, 5, 6, 7, 10, 11, 13, 14, 15, 17 and 18 of the bill of costs dated 29th November, 2023;
- D) Application No. E038 of 2023** – In regards to item no. 1 on instruction fees for the application that sought extension of time within which the appellant/respondent should have filed his Petition of Appeal, which was taxed at Ksh.50 ,000/= and other taxed items numbers 2, 3, 4, 5, 6, 7, 10 and 11 of the bill of costs dated 29th November, 2023; and

[3] UPON PERUSING the grounds on the face of the applications, the supporting affidavits by Mark Ndumia Ndung'u, the 1st respondent/applicant,

sworn on 5th September, 2024 and submissions of even date wherein he contends as follows; in Petition E024 of 2023, from his bill of costs with a cumulative total of Ksh.90,009,290/-, the Taxing Officer in his Ruling of 30th August, 2024 taxed his bill of costs at a cumulative total of Ksh.1,006,350/= of which Ksh.1,000,000/- was the instruction fees; on the assessment of item no. 1 being the instruction fees, the 1st respondent/applicant argues that the Taxing Officer failed to consider all the key factors outlined in Paragraph 9(2) of the Third Schedule to the Supreme Court Rules, 2020 including the high compliance costs of Ksh. 8.8 billion that the appellant/respondent cited; the effect on the appellant/respondent's competitive advantage among other bottlers in Kenya; the appellant/respondent's ability to pay wages to its workforce of over 3,000 workers; the rigorous and lengthy process of approval of a new bottle design by Coca Cola Company based in Atlanta, United States of America; the likely effect on other bottlers operating under the 2nd respondent's license in Kenya as well as the complexity of the case coupled with the novel constitutional issues raised such as the obligations under Article 46 of the Constitution; and

[4] UPON CONSIDERING the 1st respondent/applicant's contention that in Applications E030, E034 and E038 of 2023, from his Bill of Costs dated 29th November, 2023 in all three applications, his instruction fees of Ksh.500,000/- was taxed at Ksh.50,000/-; that the instructions fees awarded was so manifestly low as to cause an injustice, especially due to the fact that, as at the time of the appeal being dismissed, the 1st respondent/applicant had conducted all the necessary research that he needed to defend the appeal, come up with a case strategy and filed his Reply to the Petition; that the Taxing Officer erroneously relied on precedents that were distinguishable, particularly in cases where the value of the subject matter or the nature of the proceedings was materially different. Furthermore, the interpretation of "*folio*" on the other items was challenged for departing from its defined meaning under Paragraph 1 of the Third Schedule of the Supreme Court Rules, 2020, extremely prejudicing the 1st

respondent/applicant as his Advocate spent several hours counting the number of words; and

[5] UPON PERUSING the response by the appellant/respondent by way of replying affidavit sworn by Joe Mutisya, the respondent's Finance Director, on 17th September, 2024 and submissions of even date contending that the 1st respondent/applicant was at all material times from the High Court to the Supreme Court acting not on his behalf but rather in his capacity as a public interest litigant fighting for the rights of the low-income consumers of the appellant/respondent; that the Taxing Officer's decision was fair and within his discretion, given that the proceedings were dismissed at a preliminary stage for being time-barred and lacked significant complexity or legal advancement that would warrant costs such as those prayed for by the 1st respondent/applicant; the costs awarded were made in full cognizance of the nature of the proceedings that had been before this Court and the practicability of time taken by the 1st respondent/applicant in defending the same. The appellant/respondent further urged that the decision of the Taxing Officer, particularly as to the unascertainable value of the subject matter, was sound and justified as well as being sufficient and further emphasized that costs in public interest litigation should be reasonable reimbursements and not avenues for enrichment; and

[6] UPON PERUSING the 1st respondent's supplementary affidavit sworn by Mark Ndumia on 27th September, 2024 in rejoinder wherein the 1st respondent/applicant reiterated the contents of his Application, supporting affidavit and submissions and further maintained that the Taxing Officer overlooked substantial work, the prolonged litigation period of nine years, and the distinct circumstances of the matter. It was also argued that summary dismissal should not affect instruction fees, as these are static and should reflect the nature of the appeal and the necessary preparatory work.

HAVING considered the totality of the application, response and rival arguments by the parties, **I NOW OPINE** as follows:

[7] **GUIDED** by the provisions of Rule 60 of the Supreme Court Rules, 2020, the Registrar and by extension, courtesy of Section 2 of the Supreme Court Act, the Deputy Registrars, have the power to tax costs arising out of any proceedings between the parties. In the taxation exercise, the Registrar must adhere to the scale set out in the Third Schedule of the Supreme Court Rules on party and party costs and in particular, Paragraph 9 on quantum of costs; while the jurisdiction of a single Judge is to entertain a reference made within seven days by a person who is dissatisfied with a decision of the Registrar in the taxing of costs.

[8] This Court, in the case of ***Fredrick Otieno Outa v Jared Otieno Odoto & 3 Others SC Petition No 6 of 2014; [2023] KESC 75 (KLR)*** highlighted the following principles to be considered in an application for setting aside a taxation decision:

“(11) A certificate of taxation will be set aside, and a single Judge can only interfere with the taxing officer’s decision on taxation if;

- a. there is an error of principle committed by the taxing officer;*
- b. the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy;(and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).*
- c. the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and*
- d. the award proposed is so far as practicable, consistent with previous awards in similar cases.*

To these general principles, I may add that;

- i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,*

- ii. *Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,*
- iii. *The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes."*

[9] Bearing these principles in mind, I turn to the reference. Starting with the value of the subject matter. The Taxing Officer handled the issue as follows:

"[9] The last issue for determination is on what really constitutes the value of the subject matter in this case. Counsel for the 1st respondent has submitted at length on this issue and posited that the value of the subject matter is Ksh.8,888,367,426.00. This figure, they submit, was the petitioner's own calculation hence they ought to be bound by it. In rebuttal, the petitioner has argued that, this was merely an approximation of what the petitioner would have incurred in compliance with the final orders of the High Court had the Supreme Court not granted the conservatory orders. According to the Petitioner, the claim before the High Court, Court of Appeal and Supreme Court was on the issue of breach and or violation of consumer rights as enshrined under Article 46 of the Constitution and nothing turned on the value of the subject matter.

[10] I have perused the entire court record and I must agree with the petitioner that the petition before the High Court did not have any quantifiable value. The foot prints of Kshs.8,888,367,426.00 found their way in these proceedings at stage of seeking conservatory orders."

[10] It has to be restated that the genesis of this Reference is a constitutional petition that originated from the High Court through the Court of Appeal up to this Court and concerned the appellant/respondent's omission in displaying the nutritional value, storage directions, customer care email address and phone number on the *Coca Cola, Fanta, Krest, Stoney* and *Sprite* glass bottles as it does on its plastic bottles and how this constituted a violation of consumer rights under Article 46(1)(a), (b) and (c) of the Constitution. The High Court

and the Court of Appeal decided in favour of the 1st respondent and issued declarations that the appellant/respondent's omission constituted a violation of the consumer rights under Article 46(1)(a), (b) and (c) of the Constitution and that the omission amounted to discrimination and unequal treatment of consumers contrary to Article 27(2), (4) and (5) of the Constitution. The Court issued a mandatory injunction directing the appellant/respondent to provide the nutritional information storage directions and customer care mobile number and email address on all of their *Coca Cola, Fanta, Krest, Stoney* and *Sprite* brands glass bottles within six (6) months of the date of delivery of the High Court judgment.

[11] Therefore, I agree with the Taxing Officer that the subject matter is not discernable either from the Judgment or settled consent and the figure put forward of Kshs.8.8 billion emanated from the conservatory proceedings. It is thus my finding that the Taxing Officer was well guided by the Court's decision in *Kenya Airports Authority v Otieno Ragot and Company Advocates* (Petition E011 of 2023) [2024] KESC 44 (KLR) where the Court held as follows:

“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.

.....

*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.” [Emphasis added]

[12] Now turning to item No. 1 being the instruction fees, I am guided by Paragraph 9 (2) of the Third Schedule to the effect that the fees allowed for instructions to appeal or to oppose an appeal is the discretion of the taxing officer and shall be such sum as he shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the person to bear the costs and all other relevant circumstances; and shall include all the work done in connection with the appeal, including attendances, correspondence, perusals, and consulting authorities. The absolute least is that fees must be commensurate to work done, and it will amount to unjust enrichment if it is not awarded for this purpose.

[13] After examination of various matters previously taxed, the Taxing Officer arrived at the following decision:

“[13] I have already found that there is no known value of the subject matter.

*In **SC Petition No. 16 of 2019 Non-Governmental Organisations Coordination Board Vs. Eric Gitari & 5 Others** that dealt with the rights of the LGBTIQ community, the petitioner had sought instruction fee of Kshs.25,000,000/= but I taxed it at Kshs.5,000,000/= having considered the complexity of the matter, the industry involved and other relevant factors. In **SC Application No. E042 of 2023 Symbion Kenya Limited Vs. Goodison Sixty One Schools Limited**, a matter involving arbitration, Kshs.36,367,945.33 had been sought under instruction fee but I taxed instruction fee at Kshs.1,000,000/=. In **SC Petition No. 6 of 2017 Fredrick Outa Vs. Jared O. Okello & Others** that sought for instruction fee of Kshs.10,000,000/=:, I taxed it at Ksh.6,000,000/= but on review, it was reviewed to Kshs.1,000,000/=.*

[14] Having sufficiently alluded to my previous decisions, I hereby tax item 1 at Ksh.1,000,000/= (One Million Shillings) considering that the petition’s

life was cut short at its infancy stage vide the Ruling delivered on 10th November, 2023. Ksh.89,000,000/= is taxed off.”

[14] It is acknowledged that the subject matter revolved around constitutional issues on consumer protection. However, the appeal was struck out at a preliminary stage and, therefore, was not heard. I am further guided by the principles set out earlier in this Ruling, including the fact that taxation is not a mathematical exercise, but a discretionary process and a single Judge will not normally interfere with the decision of the Taxing Officer just because they would have awarded a different figure. Additionally, taking into account that the novelty and complexity of the matter were not determined and further considering the range of costs awarded in other matters, I am of the view that the sum awarded by the Taxing Officer was reasonable in the circumstances, and I therefore decline to interfere with the Taxing Officer’s decision.

[15] On the instruction fees for Applications Nos. E030, E034 and E038 of 2023 the Taxing Officer reasoned as follows:

“[18] On items 1, the 1st respondent seeks Ksh.500,000/- as instruction fee. This has been opposed by the petitioner on the basis that the same is exaggerated and contrary to the Third Schedule which provides as Kshs.1000/- as instruction fee to oppose an application. I have read Paragraph 9(1) of the Supreme Court Third Schedule and I agree with the petition that the fee to be allowed for instruction to make, support or oppose any application shall be such sum as the taxing master shall consider reasonable by shall not be less than one thousand shillings.

...

[19] *However, considering the nature of the dispute and the industry involved in opposing the same, awarding Ksh. 1,000/- will not be fair representation of the work done by counsel*

.....

[20] *In view of my previous decisions referred to herein and bearing in mind that the three applications herein were dealt with simultaneously and the appeal struck out for having been filed out of time, I am of the*

*view that this taxation ought not to appear as a punishment to the Petitioner for failure to file the appeal in time but rather appease the victor with a reasonable order of cost. In **SC Petition (Application) No. 6 of 2016 Manchester Outfitters Suiting Division Limited now called King Woollen Mills Limited & Another Vs. Standard Chartered Financial Services Limited & Another**, the Supreme Court awarded costs of a nominal amount of Kshs.20,000/=. Furthermore, the 1st respondent is equally being compensated with other costs in the main petition.”*

[16] I find that it is evident the Taxing Officer, in arriving at the instructions fees for the three applications, took into account Paragraph 9(1) of the Third Schedule of the Supreme Court Rules, 2020 alongside the relevant principles of taxation. Paragraph 9(1) of the Third Schedule of the Supreme Court Rules, 2020 provides as follows:

“The fee to be allowed for instruction to make, support or oppose any application shall be such sum as the taxing officer shall consider reasonable but shall not be less than one thousand shillings.”

[17] By awarding a sum reflective of the work involved while ensuring that the outcome neither penalized the appellant/respondent nor unduly favoured the 1st respondent/applicant, it is my considered finding that the Taxing Officer adhered to the principles of fairness and proportionality. This measured approach underscores the critical balance between compensating legal efforts and discouraging excessive claims.

[18] Having evaluated the matter holistically, I find no justification to interfere with the decision of the Taxing Officer. The sums awarded were both reasonable and fair compensation, aligning with the legal framework and the underlying objective of cost taxation. Consequently, the award on instruction fees for Applications Nos. E030, E034 and E038 of 2023 is upheld.

[19] As regards the other contested items as enumerated above, paragraph 1 of the Third Schedule provides as follows regarding how a *folio* is defined:

1. Interpretation

(1) In this Schedule, a folio means one hundred words.

(2) A single figure or a group of figures up to seven shall count as one word.

[20] The Taxing Officer interpreted *folio* according to the dictionary to mean one leaf of paper or one page. While I may also agree with the Taxing Officer that it is time to update the definition of *folio* to reflect current practice, this departure was a misrepresentation of the definition of a 'folio' above and, therefore, an error in principle.

[21] In light of the foregoing, I order that the bill of costs be remitted to the Taxing Officer, Hon. B. Kasavuli, for the purpose of taxing the other items with respect to folios. I further direct that the Taxing Officer be guided by the Third Schedule under the Supreme Court Rules, in particular, paragraph 12, on his overriding discretion, to ensure the sums arrived at are reasonable and not an impediment to the right to access justice.

[22] ACCORDINGLY, and for the reasons aforesaid, the References are partially successful, and I make the following orders:

(i) The four Motions dated 5th September, 2024 filed in Petition No. E024 2023 together with Applications Nos. E030, E034 and E038 of 2023 be and are hereby allowed in the following terms;

i. Item 1 on the instructions fees is upheld.

ii. The other contested items, enumerated in paragraph 2 hereinabove concerning how a folio is defined and accounted for, be and are hereby remitted to the Deputy Registrar, Hon. B. Kasavuli, for taxation.

(ii) As costs are awarded at the discretion of the Court, parties shall bear their own costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 6th day of December, 2024.

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**M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT**

**I certify that this is a
true copy of the original**

**REGISTRAR
SUPREME COURT OF KENYA**

