IN THE COURT OF APPEAL

NAIROBI

(CORAM: OUKO (P), GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 39 OF 2017

BETWEEN

OTIENO, RAGOT & COMPANY ADVOCATES.....APPELLANT

AND

KENYA AIRPORTS AUTHORITY.....RESPONDENT

(Appeal from High Court of Kenya at Nairobi against the Ruling and Orders of (D.S Majanja, J,) dated 20th February, 201

in

Miscellaneous Application No. 95 of 2011))

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JUDGMENT OF MURGOR, JA

The appellant, Otieno, Ragot & Company Advocates has brought this appeal being aggrieved by the decision of the High Court *(D.S. Majanja, J.)* dated 20th February 2017 which upheld the ruling of the taxing officer, *(Hon. P. Mbulikah, D.R)*, that had taxed off Kshs.125,702,436 from the instruction fees at item 1 of the appellant's Advocate and client Bill of Costs. The bill was taxed at Kshs. 8,759,022.74.

Briefly the facts are that, on 24th February 2011, the appellant filed an Advocates and clients Bill of Costs against ***the respondent, Kenya Airports Authority*** in respect of *HCCC No. 156 of 2009*. The appellant had been instructed by the respondent to defend the suit filed by 54 plaintiffs whose land was compulsorily acquired for expansion of the Kisumu. They claimed that the respondent had compulsorily acquired their land and had refused to compensate them. As a consequence, of which they had suffered loss and inconvenience, and therefore claimed compensation of Kshs.13, 932,000,000, damages for loss of profits, and breach of agreement, interest and costs.

The appellant filed a defence on the respondent's behalf denying that the plaintiffs had sustained any loss totaling Kshs. 13,932,000,000 arising from the acquisition of their land.

In the course of the proceedings, by an application dated 30th March 2010, the appellant sought orders for the plaintiffs'

amended plaint to be struck out for reasons that the provisions of the Kenya Airports Authority Act (Cap 395), the Land Acquisition Act (Cap 295) and the Constitution had not been complied with.

After finding that the plaintiffs' suit claiming compensation of Kshs. 13,932,000,000 for loss of land, loss of profits, damages and inconvenience suffered following the compulsory acquisition of their land ought to have been filed by way of an appeal to the High Court, the learned judge (*J.R. Karanja, J*) allowed the application and struck it out with costs to the respondent, upon finding that the High Court lacked jurisdiction to hear the suit.

On 28th June 2010 the appellant filed a party and party Bill of Costs on behalf of the respondent, and based on Kshs. 13,932,000,000 claimed, the Deputy Registrar taxed and allowed costs of Kshs. 151,650,000 to be paid by the plaintiffs to the respondent.

Thereafter it filed its Advocate and client Bill of Costs against the respondent claiming Kshs. 227,476,921.38 being advocates fees based on instructions to defend the plaintiffs' suit that was determined in a summary manner under *"…Schedule VI (1) (ii)* of the *Advocates Remuneration Amendment Order, 2006"*.

Upon considering the Bill of Costs, the taxing officer declined to grant the sums claimed, taxed off Kshs. 125,702,436 and awarded the appellant Kshs. 7,549,601.50 instead. Aggrieved by the taxing officer's award, the appellant appealed to the High Court which upheld that decision and dismissed the appeal in its entirety.

It is that decision which is the subject of this appeal, on grounds that the High Court wrongly concluded that the taxing officer had not fallen into error in failing to take into account the Certificate of Costs in respect of the taxed party and party costs to determine the instruction fees that were due to the appellant; in failing to find that the taxing officer had taken into account irrelevant considerations in the assessment of the costs due to the appellant, and in so doing arrived at the wrong conclusion; in misinterpreting the legal precedents cited to support the respondent's case and in holding that interest on the appellant's costs were payable from the date when the bill of costs was taxed and not from the date when the bill was presented to the respondent for payment.

Both the appellant and the respondent filed written submissions which were highlighted on a virtual platform owing to the Covid -19 pandemic. Learned senior counsel, ***Mr. Otiende Amolo***, appeared together with Mr. D. Otieno for the appellant, and learned counsel ***Mr. Martin Munyu*** appeared with Ms. Rosemary Wahinya for the respondent.

Submitting on behalf of the appellant, Mr. Otiende stated that three issues were for determination in the appeal, firstly whether the value of the subject matter of the dispute was ascertainable, secondly, whether party and party costs provided the basis upon which to ascertain the advocate's instruction fees, and thirdly, whether the interest on costs was payable from the date of demand or from the date the bill of costs was taxed.

It was contended that it was not in doubt that the subject matter of the dispute was clearly stated in the plaint, and that the respondent had confirmed that it instructed the appellant to defend the suit in which it had been sued for the recovery of Kshs. 13,932,000,000; that therefore the respondent's assertion that the pleadings did not have details of the amount claimed, since no documentary evidence of the value of the land in question was produced, did not hold. Counsel faulted the taxing officer and the High Court for wrongly concluding that the subject matter of the suit could not be ascertained from the pleadings, a valuation report of the properties, or a judgment of the court confirming the value of the subject matter, particularly since the suit was not heard on its merits, but was struck out.

Next, the appellant faulted the High Court for failing to find that the taxing officer committed an error of principle when the taxing court held that it was not bound to apply the already ascertained party and party costs to arrive at the Advocate and client costs due to the appellant. It was argued that ***Schedule VI A*** and ***B*** of the ***Advocates Remuneration Order 2009,*** which is stipulated in mandatory terms specifies that, determination of the advocates and client bill under ***Part B*** was dependent upon determination of the party and party costs under ***Part A***; that at the time of determination of the Advocates and client bill of costs, the party and party costs for *HCCC No. 156 of 2009* had already been ascertained and were never at any time challenged; that no basis for declining to apply the formula set out in ***Schedule VI B*** was provided.

It was further submitted that notwithstanding that the party and party costs made under ***Schedule VI Part A***, had been ascertained for no viable reason, the taxing officer declined to apply the formula specified in ***Schedule VI Part B*** to the party and party costs and award the appellant its rightful costs; that by failing to apply the already ascertained party and party costs, and instead exercise her discretion to award the appellant Kshs. 5,000,000, the learned judge should have found that the taxing officer had fallen into error. Counsel cited the case of ***George Arunga Sino vs Patrick J.O & Geoffrey D.O. Yogo T/A Otieno Yogo & Co. Advocates [2012] eKLR*** to support the proposition that once there has been a determination under schedule VIA, the minimum fee chargeable is that fee increased by one-half, and that there is no discretion in applying the increment as Schedule VIB is framed in mandatory terms.

By so doing, it was argued, the learned judge should have found that the taxing officer had taken into account irrelevant matters and had arrived at an erroneous decision, and therefore the determination in the public's interest that Kshs. 5,000,000 was sufficient instruction fees was contrary to the express requirements of the Advocates Remuneration Order.

On the final issue of interest, counsel argued that the clear stipulations of ***rule 7*** of the ***Advocates Remuneration Order*** required that interest be computed one month from the date of delivery of the feenote or bill, and that both the taxing officer and the High Court had declined to abide by the requirements of ***rule 7***. The Court was urged to award interest one month from the date of demand for payment of fees, and to remedy the wrongful computation of instruction fees payable to the appellant, instead of returning it to the taxing officer for determination.

Mr. Munyu opposed the appeal on behalf of the respondent. It was submitted that this was not a case that warranted reliance on the award of party and party costs since the certificate of costs produced was based on fictitious amounts that were not in any way been proved; that though the plaint indicated Kshs.13,932,000,000, the amount concerned average amounts that could not be relied upon. As a consequence, the taxing officer rightly considered them to be unreliable, and the High Court was right in upholding that decision.

Citing the ***Moronge and Company Advocates vs Kenya Airports Authority [2014] eKLR,*** counsel asserted that the facts was on all fours with the instant case, as the suit there was also struck out, and the claim found to be unjustified. Counsel urged us to rely on the ***Moronge case (supra)*** to find that the Advocates and client costs demanded were unwarranted.

With respect to interest chargeable, counsel relied on the case of ***D. Njogu & Company Advocates vs Kenya National Capital Corporation [2006] eKLR*** to support the contention that where costs are yet to be determined before assessment by the court, interest will accrue from the date of determination of such costs.

In a brief reply, Mr. Otiende stated that the respondent having based the party and party costs on the subject matter of Kshs. 13,932,000,000, it cannot now turn around and claim otherwise; that ***Schedule VI Part B*** of the ***Advocates Remuneration Order*** provided a clear basis for computing Advocate and client costs, and given that the party and party cost were already ascertained, the taxing officer ought to have applied the award in accordance with the mandatory requirements of the Order.

I have considered the pleadings, and the parties submissions, and guided by the principles espoused in the established case of ***Mbogo & Another vs Shah [1968] EA*, p.15** that**;**

"An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

More particularly, in the case of ***Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR*** this Court observed;

"On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs."

With these principles in mind, the issues for determination are whether, the taxing officer rightly exercised her discretion to determine the appellant's instruction fees in the Advocate and client bill notwithstanding the existence of a taxed party and party bill of costs; whether in determining the appellant's instruction fees, the taxing officer's decision as upheld by the High Court took into account the right considerations in arriving at the Advocate and client costs and whether interest on the Advocate and client bill was payable from the date of demand or from the date the Bill of Costs was taxed.

The beginning point is whether the taxing officer properly exercised her discretion to determine the Advocate and client bill of costs.

In the case of ***Joreth Ltd vs Kigano & Associates [2002] 1 E.A. 92,*** this Court addressed the issue thus;

"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) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

As to whether the subject matter was ascertained, the record shows that in their claim against the respondent, the plaintiffs at *paragraph 12* under *"Particulars of Special Damages"* claim that;

"i (a) Each plaintiff claims an average of Kshs. 258 million for loss of land, development, inconveniences, current and future loss of profits to be earned from their respective parcels of land which aggregates to Kshs.13,932,000,000".

Ultimately, they prayed for judgment against the respondent for;

"aa. An order that the Defendant do compensate the plaintiff as the sum of Kshs. 13,932,000,000;

b) Damages for loss and profits breach of agreement.

c) Interest on (a) and (b) above at court rate from the date of illegal acquisition.

d) Any other relief the Honourable court may deem fit to grant."

On 26th February 2009 the appellant filed a defence and on 3rd March 2010, it filed an amended defence. Subsequently, it filed an application seeking to strike out the plaintiffs' suit. The High Court struck the suit out after determining that it had no jurisdiction to hear the suit as filed. The decree as drawn specified that the suit comprised a claim for Kshs. 13,932,000,000.

Thereafter, the record discloses that, once the suit was struck out, on 28th June 2010, the appellant, on behalf of the respondent, filed a party and party Bill of Costs entitled *"Defendant's Bill of Costs"*. Of pertinence, *Item 1* of the Bill of costs stated that;

"Advocates' fee on instructions to defend a suit for a liquidated sum of Kshs.13.932.000,000 and damages at large for loss where the suit was determined summarily without going for full trial – under schedule VI (1) (ii)…"

And based on the subject matter of Kshs. 13,932,000,000, the instruction fees were specified as at Kshs. 130,704,900.

On 15th July 2010 a certificate of costs was issued where, the respondent's party and party bill of costs was taxed at Kshs. 151,650,000. The certificate of costs clearly specified that;

"This is to certify that the Defendant's bill of costs dated 28th June 2010 against the Plaintiffs was taxed and allowed in the sum of Kshs. 151,650,000 (Kenya Shillings One Hundred and Fifty One Million Six Hundred & Fifty Thousand Only) to be paid by the Plaintiffs to the Defendant"

This appears to have remained as the final position on the party and party costs since there is nothing to show that either the taxed instruction fees, or the entire party and party bill was set aside or varied, and neither is there anything to show that it was challenged on appeal in the High Court or this Court.

With the settlement of the respondent's party and party bill, the appellant filed its Advocate and client bill of costs specifying the instruction fees discerned in the party and party costs as the relevant instruction fees upon which to apply ***Schedule VI Part B*** of the ***Advocates Remuneration Order.*** It is at this point that the contestation arose, because, the taxing officer exercised her discretion to determine the instruction fees, and declined to apply the instruction fees specified in the party and party costs.

Clearly therefore, the focal issue in this appeal is whether the instruction fees determined in the taxed party and party bill ought to have been applied to the Advocate and client bill, 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.

After appreciating that party and party bill of costs in the same suit were filed and taxed, the taxing officer in this case had this to say;

"It is trite law that once a party instructs an Advocate, he has given him the authority to represent him until the conclusion of the matter or his services terminated. Therefore I find that the firm of Otieno, Ragot & Company had instructions to tax the party and party bill of cost. Further cost was awarded to the respondent who emerged victory (sic) in the original suit."

From the above, it is apparent that a party and party bill was taxed, and that it's existence was not in any way disputed. The appellant's complaint is that having so found, the taxing court ought to have based the computation of the Advocates and client bill of costs on the instruction fees specified in the party and party bill, and to it, applied the formula set out in ***Schedule VI Part B*** of

the ***Advocates Remuneration Order.*** But instead, after declaring herself to be the gate keeper on ascertaining legal fees, the taxing officer went on to erroneously conclude that the party and party costs were independent from the Advocate and client costs and the court could not blindly rely on the party and party bill of costs to arrive at the Advocate and client costs, notwithstanding the clear provisions of the Advocates Remuneration Order.

The appellant further complained that by upholding the taxing officer's finding, the learned judge also misdirected himself and similarly fell into error.

As to whether the taxing officer was obliged to apply the instruction fees discerned in the party and party bill or to exercise her discretion to arrive at the instructions fees for the bill before her, requires that I turn to the ***Advocates Remuneration Order 2009,*** which is the relevant version of the Order, for guidance**.** The Order was later amended in 2014, although the contents of Schedule 6 largely remained the same. ***Schedule VI*** of the Order**,** which is the applicable provision is divided into two sections; ***Part A*** which provides for party and party costs, while ***Part B*** deals with Advocate and client costs.

Under ***Part A*** it is provided that;

"Subject as hereinafter provided, the fees for instructions shall be as follows—

(i) To sue in an ordinary suit in which no appearances is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a) where the value of the subject matter is in excess of Kshs. 3,000,000.

(ii) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b) where the value of the subject matter is in excess of Kshs. 3,000,000.

(iii) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule.

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, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and— "

What is chargeable between the Advocate and client is aptly expressed in ***Part B***, of ***Schedule VI***, which specifies that;

"As between advocate and client the minimum fee shall be—

(a) the fees prescribed in A above, increased by 50%; or

(b) the fees ordered by the court, increased by 50%; or

(c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences".

As such, ***Schedule VI***, prescribes how instruction fees for both party and party and advocate and client are to be assessed with ***Part A*** setting out different parameters for arriving at party and party costs.

As pertains to party and party costs, the role of the taxing officer was clearly spelt out by this Court, the case of ***Peter Muthoka & another vs Ochieng & 3 others [2019] eKLR*** thus;

"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 taxing officer 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 ours)

The above makes it clear that the starting point for determining the instruction fees for party and party costs under ***Part A*** is by considering either, the pleadings, the judgment or the settlement, whereafter, the taxing officer is at liberty to exercise his or her discretion to arrive at a just decision.

Schedule VI Part B on the other hand makes it patently clear that instruction fees for advocate and client costs will be one-half of the party and party costs prescribed, or as ordered by a court or agreed upon by the parties. In addition, from a further introspection of ***Schedule VI***, it is instructive that whereas ***Part A*** allows for the exercise of discretion to increase or reduce the instruction fees, under ***Part B*** no provision was made for any further exercise of discretion to increase or reduce the advocate's fees once the one-half formula is applied to the instruction fees ascertained in ***Part A***. It therefore stands to reason that ***Part B***, being Advocate and client costs cannot be ascertained independently unless and until ***Part A*** is determined, since the instruction fees in ***Part B*** is an arithmetical computation derived from the instruction fees in the party and party costs determined in ***Part A***.

In this case, the taxing officer was of the view that the appellant's instruction fees had yet to be ascertained. And after reasoning that they could not be ascertained from the subject matter and concluding that Advocate and client costs were independent of party and party costs, the taxing officer found it necessary to exercise her discretion to determine the appellant's instruction fees, and in turn the Advocate and client costs.

Yet, whether the subject matter was ascertained or not at this point was not an issue for the taxing officer to determine. I say this because, by the time of taxing the Advocate and client bill, the instruction fees were deemed to have already been determined when the respondent's party and party costs were taxed and a certificate issued on 15th July 2010.

Section 51 (2) of the ***Advocates Act*** provides that;

"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."

And in the case of ***Lubulellah & Associates Advocates vs N. K. Brothers Limited [2014] eKLR*** the court observed that;

"The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs.

See also ***Musyoka & Wambua Advocates vs Rustam Hira Advocate [2006] eKLR.***

In other words, unless set aside or altered, the party and party bill in respect of the same suit having already undergone the scrutiny of a taxing officer who had exercised discretion to arrive at a determination of the just party and party fees, and with it the instruction fees, the issue of the quantum of the advocates' instruction fees was effectively disposed of at that time. As such, that decision was final and binding on the concerned parties. It was therefore not a matter that was capable of being reopened by another taxing court with concurrent jurisdiction. And if Parliament had intended it to be otherwise, nothing would have been easier than for this to have been spelt out in express terms in the Order.

Since I have not been shown that either the subject matter or the instruction fees were ever challenged following that taxation and the subsequent issuance of a Certificate, the only conclusion that can be reached is that, the instruction fees discerned in the party and party proceedings for *HCCC No. 156 of 2009* remained the basic instruction fees that were applicable to the Advocate and client bill of costs.

With the instruction fees, that being ***Part A*** having been discerned, what the taxing officer was then required to do so as to determine the Advocate and client costs was to apply the formula set out in ***Part B***. This is clear from the mandatory terms spelt out in ***Schedule VI Part B*** which provides that, *"…the minimum fee shall be the fees prescribed in A above, increased by 50%; or the fees ordered by the court, increased by 50%; or the fees agreed by the parties … increased by 50%..."*

In ***Civil Appeal (application) No. 48 of 2014, Central Bank of Kenya vs Makhecha & Co. Advocates [2019] eKLR***, this Court observed 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, …". (Our emphasis).

And in ***Miscellaneous Application No. 21 of 2003 D. Njogu and Co. Advocates vs Kenya National Capital Authority (supra)*** Ochieng, J. clarified the position thus;

"a) Advocate/Client costs can never be less than the Party and Party Costs. I say so because, it has been expressly provided that the minimum fee shall be either prescribed fees, the fee ordered by the court or the fee agreed between the parties, increased by one half. Furthermore, the rule expressly state that the increment is to include all proper attendances.

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d) That though Taxing officers do have the discretion to either decrease or increase the instruction fees awarded in a Party and Party Bill of Costs, once he has exercised that discretion by fixing the Party and Party Bill of Costs, the Advocate/Client costs cannot be taxed at a lesser sum". (Our emphasis)

Again, the mechanics of this formula were explained by H. Waweru, J in the case of ***Kenya Tea Development Agency vs J.M. Njenga & Co Advocates [2011] eKLR*** when he expressed himself thus;

"…the taxing master did not look at each item in the party and party bill in order to know what was properly due to the Respondent. Had he done so, he would have noted that the instruction fee awarded in the party and party bill of costs was Kshs. 4,540,000/=. He would then have increased this sum by one-half in order to arrive at the correct award for instruction fee for the Respondent."

What comes to the fore from these authorities, and with which I am in agreement is that, once the instruction fee in the party and party costs are ascertained, they become the basis of the computation of the instruction fees in the Advocates and client bill. The instruction fees in the party and party bill is then increased by one-half to arrive at the instruction fees for the Advocate and client bill. No further exercise of discretion is required at this point.

By declining to comply with ***Schedule VI Part B*** of the ***Advocates Remuneration Order*** and increase the already determined fees by one-half to arrive at the Advocate and client instruction fees for the reason that the party and party costs were independent of Advocate and client costs, and to instead exercise her discretion citing public interest to ascertain the instruction fees, which was not a consideration or what the Advocates Remuneration Order called upon her to do in the prevailing circumstances, I find that the taxing officer misdirected herself by failing to take into account matters that should have been taken into account, and in so doing she arrived at an erroneous decision.

Turning to what the learned judge said with respect of application of the formula in ***Schedule VI Part B***. The learned judge concluded that;

"whereas the formula in Schedule 6 Part B has to be adhered to as a basis for determining the basic instruction fee and other items, the Advocates/Client costs are not wholly pegged (sic) party and party costs as certified. The party and party costs should not be taken globally and increased by one-half. The taxing officer must consider each item independently bearing in mind the principles of taxation. I therefore find that the taxing officer did not err in failing to take into account the certificate of costs while assessing the value of the subject matter".

What the learned judge was saying was that once party and party costs are determined, the formula in ***Schedule VI Part B*** was to be applied to determine the basic instruction fees for the Advocate and client bill, albeit that, the other party and party costs should be scrutinized to ascertain whether each item is eligible to be increased by one- half. I cannot fault the learned judge for this part of the conclusion. But where the learned judge fell into error was that despite having rightly concluded that application of ***Schedule VI Part B*** was mandatory where party and party costs were already assessed, the learned judge then went on to find that the taxing officer did *"…not err in failing to take into account the certificate of costs while assessing the value of the subject matter"*. This was plainly contradictory in terms and a grave misdirection on his part.

As stated earlier, it was not disputed that the party and party bill was taxed, and accepted by the taxing officer. There was no appeal preferred against that taxation. The taxed bill attached to the certificate specified the basic instruction fees as Kshs. 130,704,900. Similarly, no appeal was preferred against the taxed instruction fees. It therefore followed that the taxed party and party costs, specifying the instruction fees due, was the basis upon which to apply the formula set out in ***Schedule VI Part B*** to determine instruction fees in respect of the Advocate and client costs.

The learned judge's conclusion that the taxing officer was right to disregard the taxed certificate in respect of the party and party bill in its entirety, including the taxed instruction fees, was tantamount to upholding the taxing court's decision to sit on appeal of its own decision. It is therefore clear that despite appreciating the strictures of ***Schedule VI,*** the judge similarly failed to take into account matters that ought to have been taken into account and by so doing, he too arrived at the wrong conclusion, and as such, I am compelled to interfere with that decision.

Having said that, counsel for the respondent urged the application of this Court's decision in the ***Moronge's case*** ***(supra)*** to the instant case for reasons that the facts were on all fours with this case. In that case, as was the case here, the respondent's case was dismissed, and when the advocates demanded their costs, the respondent refused to pay causing the advocates to file a suit for recovery of their fees. As such, the ***Moronge case*** ***(supra)*** can be distinguished from this case for the reason that there, party and

party costs, and therefore instruction fees were not ascertained, whereas in this case the party and party costs comprising the instruction fees were already determined, and all that was required was for the taxing officer to apply the formula set out in ***Schedule VI Part B***.

The instruction fees having been ascertained, what then was to be the fate of the rest of the appellant's Advocate and client bill of costs"

It is at this stage that ***rule 16*** of the same Order comes in. It provides that;

"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 taxing officer 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."

And in the case of ***Vipul Premchand Haria vs Kilonzo & Co Advocates [2020] eKLR***, this Court outlined the nature of the taxing officer's discretion thus;

"Once the client was dissatisfied with the bill, it fell upon the taxing master to tax it. Such taxation, much as it lies in the taxing officer's discretion, is governed by clear principles. In other words, the discretion is a judicial one to be judicially and judiciously exercised. It is not to be exercised whimsically or capriciously in accordance with personal inclination. And the matters the taxing officer takes into consideration should be apparent from the reasons that she gives for her decision. It is those reasons that give an indication whether or not the discretion reposed in the taxing officer was properly exercised."

Once the instruction fees were ascertained by increasing instruction fees in the party and party bill by one-half, the taxing officer is thereafter entitled to scrutinize the remaining items of the bill and determine only those costs that are due to the advocate which are then increased by one-half. It is on the remaining items in the bill that the taxing officer is allowed to exercise his or her discretion to arrive at the correct amount due. Whereupon, the total of the instruction fees, and the costs increase by one-half, would result in the taxed Advocate and client costs.

I have considered the other itemized costs as taxed by the taxing court, and find that for the reasons specified, I have no basis upon which to interfere with those amounts as taxed.

In conclusion, I find that the taxing officer's decision as upheld by the learned judge failed to adhere to the provisions of the Advocates remuneration order and to apply ***Schedule VI Part B*** to the already determined taxed party and party costs, it becomes necessary to interfere with their decisions.

I now turn to the final issue of whether interest on the appellant's costs was payable from the date of the bill of costs or from the date the bill or fee note was presented to the respondent for payment.

In its determination, the taxing court declined to award any interest on the costs to the appellant, while the learned judge awarded interest from the date the bill of costs was taxed.

The appellant argued that not only was the taxing court wrong in failing to award interest on the costs taxed, based on the

reasoning that ***rule 7*** of the ***Remuneration Order*** did not specify the date from which interest was to accrue, the learned judge also wrongly awarded interest on outstanding fees of 14% from the date the bill of costs was taxed instead of one month from the date of the delivery of the feenote or bill.

Relying on the case of ***D. Njogu and Company Advocates vs Kenya National Capital Corporation (supra)***, the respondent's response was that the period from when interest will accrue is a matter to be left to the discretion of the court.

Rule 7 provides;

"An advocate may charge interest at 14% per annum on his disbursements and cost, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest it raised before the amount of the bill has been paid or tendered in full".

As such, the rule deals with interest chargeable by an advocate in respect of its claim for disbursements and costs following submission of a feenote. It is patently clear from the rule that interest begins to accrue from the expiry of one month from the date of delivery of the bill or feenote. The learned judge's reasoning that the rule does not specify the date from which time begins to run was therefore a misdirection.

Additionally, it is distinctive that a review of the applicant's Bill of Costs does not disclose that the applicant included a charge for ***"…interest at 14% per annum on his*** *(her)* ***disbursements and cost…"*** in the Bill of Costs. As the sole basis upon which computations of amounts due to an applicant are determined by the taxing officer, the element of interest defined by ***rule 7*** ought to have been included in the Bill of Costs, but it was not. This omission would thereby negate the application of ***rule 7***, and instead render the bill liable to an exercise by the court of its discretion under ***section 26*** of the ***Civil Procedure***. Though the judge was entitled to exercise his discretion to award interest, there was no basis established for awarding the appellant interest at 14% per annum from the date of the bill of costs until payment in full. For this reason, I consider it necessary to interfere with the award of interest.

All told, having found that I must interfere with the learned judge's decision and by extension the taxing officer's decision, I allow the appeal. The ruling and orders of the High Court on instruction fees and interest are set aside, and instead I make the following orders:

(i) The appellant'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;

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

I have read the dissenting judgment of Gatembu, JA and the concurring opinion of Ouko, P. As Ouko, P. is in agreement, this shall be the majority decision of the Court.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

A.K MURGOR

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF OUKO, (P)

I have had the privilege and advantage of reading in draft the judgment of Murgor, JA. in this appeal, with which I agree, that this appeal should be allowed in the terms she has proposed, only to add that:

The background to this appeal has been ably articulated by both Murgor, JA.in the majority opinion and Gatembu, JA. in his dissent, as follows: The appellant filed an Advocates and clients Bill of Costs against the respondent in respect of legal services rendered in HCCC No. 156 of 2009 in which the appellant had been instructed by the respondent to defend a suit filed by 54 plaintiffs who claimed that their land was compulsorily acquired without compensation for expansion of the Kisumu International Airport. They claimed that as a consequence of this, they had suffered loss and inconvenience, and sought to be compensated in the total sum of Kshs. 13,932,000,000 in damages for loss of profits, and breach of agreement, interest and costs.

The appellant filed a defence on the respondent's behalf denying the claim. But before the suit could be set down for hearing, the appellant applied that the suit be struck out on the grounds that the plaintiffs had not complied with the provisions of the Kenya Airports Authority Act (Cap 395), the Land Acquisition Act (Cap 295) and the Constitution. Agreeing with the appellant that under those provisions the High Court lacked jurisdiction to hear the suit, the court (J.R. Karanja, J.) allowed the application and struck out the suit with costs to the respondent,

Following these developments, the appellant filed, on behalf of the respondent, a party and party Bill of Costs based on Kshs. 13,932,000,000 claimed in the plaint. The Deputy Registrar taxed and allowed costs of Kshs. 151,650,000 to be paid by the plaintiffs to the respondent.

Thereafter the appellant filed their advocate and client Bill of Costs against the respondent claiming Kshs. 227,476,921.38 being their fees.

Upon considering the Bill of Costs, the taxing officer declined to grant the sums claimed, taxed off Kshs. 125,702,436 and instead awarding the appellant Kshs. 7,549,601.50. Aggrieved by this, the appellant moved to the High Court with a reference before Majanja, J. to set aside the decision of Deputy Registrar.

The learned Judge dismissed the reference with costs.

In arriving at that determination, the learned Judge set out to answer the question; whether the Advocate/Client bill of costs is dependent on or independent of the party and party bill of costs" To this he said as follows;

"10. My conclusion is that the whereas the formula in Schedule 6 Part B has to be adhered to as a basis for determining the basic instruction fee and other items, the Advocate/Client costs are not wholly pegged on the party and party costs as certified. The party and party costs should not simply be taken globally and increased by one-half. The taxing officer must consider each item independently bearing in mind the principles of taxation. I therefore find and hold that the Deputy Registrar did not err in failing to take into account the certificate of costs while assessing the value of the subject matter.

……

14. The Moronge Case (Supra) also buttresses my earlier finding that reliance and the use of party and party costs to determine the Advocate/Client costs is contrary to the principle that the Advocate is only compensated for work done and not indemnified on the basis of costs incurred by the client in defending the case. I therefore affirm the decision of the Deputy Registrar". (Emphasis supplied).

The Judge, in arriving at that conclusion, relied on the following decisions: **Moronge and Company Advocates vs. Kenya Airports Authority** KSM CA Civil Appeal No. 262 of 2012 [2014] eKLR, a decision of this Court; **Kenya Tea Development Agency Ltd vs. J.M Njenga & Co. Advocates**, High Court [2008] eKLR; and **Otieno Ragot & Company Advocates vs. National Bank of Kenya** KSM H.C Misc. Appl. No. 61 of 2015.

Regarding interest chargeable under **Rule 7** of the Advocates Remuneration Order, the Judge awarded interest at 14% per annum to be paid from the date the bill of costs was taxed until payment in full.

The result of this determination was that the reference was dismissed while the claim for interest succeeded. The question the learned Judge had asked himself, whether or not the Advocate/Client bill of costs is dependent on the party and party bill of costs, was therefore answered in the negative; that the Advocate/Client bill of costs are "not wholly" pegged on party and party costs.

The rival arguments before us in this appeal on the construction of Parts A and B of Schedule 6 of the Advocates Remuneration Order can be summarized as follows. The appellant contends that the formula under that Order is simply that once the "Party and Party Costs" have been determined under Part A, or alternatively where there are "agreed costs" they must be increased by one-half under Part B; that going by that formula at no time should the Advocate/Client costs be less than the taxed or agreed party and party costs; and that party and party costs having been taxed at Kshs. 151, 650,000, the taxing officer should have awarded that figure plus one-half.

The respondent, on the other hand, argued that in taxing advocate/client costs, the taxing officer has a duty to consider all the relevant facts and cannot be expected to merely adopt and "blindly" apply the party and party costs as the only basis for determining the Advocate/Client costs.

To consider these arguments, the starting point has to be Parts A and B of Schedule 6, whose construction is the gravamen of this appeal. Part A provides for party and party costs, while Part B deals with advocate and client costs.

Part A stipulates that;

"Subject as hereinafter provided, the fees for instructions shall be as follows—

> **(i) To sue in an ordinary suit in which no appearances is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a) where the value of the subject matter is in excess of Kshs. 3,000,000.**

(ii) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b) where the value of the subject matter is in excess of Kshs. 3,000,000.

(iii) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule.

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, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and…"

Costs between an Advocate and a client is expressed in Part B as follows;

"As between advocate and client the minimum fee shall be—

(a) the fees prescribed in A above, increased by 50%; or

(b) the fees ordered by the court, increased by 50%; or

(c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences". (Emphasis supplied).

From the highlighted part above, there can be no doubt that in determining the advocates and client bill of costs under Part B, Part A must be taken into account. That is the consensus in all the decisions cited, and followed by both the taxing officer and the learned Judge. The point of departure is this, whether the taxing officer must apply Part A, as it were, line, hook and sinker, to instruction fees under Part B, or whether the taxing officer has a discretion to depart from it.

The taxing officer and the learned Judge were both in agreement that the taxing officer had a discretion to reconsider and interrogate party and party costs before applying the formula; that he was not expected to "blindly" rely on the party and party bill of costs while taxing the bill under Part B; that party and party costs cannot mechanically be taken globally and increased by one-half; that the taxing officer must consider each item independently; and that the taxing officer, for that reason did not err in not wholly taking into account the certificate of costs while assessing the value of the subject matter.

Our brother, Gatembu, JA. shares that opinion, that a taxing officer, in assessing advocate/client costs must scrutinize and apply an independent judicial mind in the taxation and not "blindly" apply the taxed party and party costs, especially where, like in the case before us, the taxation of the party and party bill of costs and the taxation of the advocate/client bill of costs were done by different taxing officers.

In my estimation, there are two aspects to this appeal; whether the value of the subject matter was ascertainable and, secondly whether party and party bill of costs and advocate client bill of costs are independent of each other.

However, before rendering my opinion on those two issues, it must be emphasized that matters of quantum of taxation are matters purely within the province, competence and judicial discretion of the taxing officer. The High Court or even this Court will not lightly interfere with an awarded of quantum by the taxing officer, unless there was an error in principle or the discretion was

improperly exercised, resulting in mis-justice, to borrow the phrase used in the famous **Mbogo vs. Shah** (1968) EA 93. Specific to taxation the Court in **Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board** [2005] eKLR was categorical that;

"On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs."

The proper exercise of discretion by the taxing officers was restated in **Kamunyori & Company Advocates vs. Development Bank Of Kenya Limited** (2015) Civil Appeal 206 of 2006, which reminds us that;

".. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside"

Was the learned Judge in error, as claimed by the appellant, when he found that the taxing officer committed no error in principle in the manner she exercised her discretion"

The first point to be settled is whether the value of the subject matter was ascertainable. It is now firmly established in a long line of authorities of this Court, beginning with the case of **Joreth Ltd vs. Kigano & Associates** [2002] 1 E.A. 92, that the value of the subject matter can be discerned or determined from the pleadings, the judgment or the settlement, as the case may be. The Court in that case said;

"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) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

(Our emphasis).

The two limbs of this passage which I have highlighted are important. First, in taxing an advocate's Bill of Costs, the value of the subject matter must be ascertained *a priori*. 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 not discretion in assessing instruction. However, where the value of the subject matter is unknown or cannot be ascertained, then the taxing officer is expressly permitted, in exercising his or her discretion to take into account any such matters as he or she may consider to assess instructions fees. The passage also stresses the three levels from which the value of the subject matter may be ascertained. Before the hearing of an action, from the pleadings, or at the end of a trial, from the judgment or where a suit has been compromised, from a settlement.

This statement has repeatedly been made and developed further, for example in **Peter Muthoka & another vs. Ochieng & 3 Others** [2019] eKLR, **Kamunyori &Co Advocates vs. Development Bank of Kenya Limited** [2015] eKLR, **Lucy Waithira & 2 others vs. Edwin Njagi T/A E. K Njagi & Company Advocates** [2017] eKLR, and many others, all decisions of this Court.

It is common factor that the action was terminated by an order striking it out before it was heard on merit. The value of the

subject matter could therefore only be ascertained from the pleadings.

At paragraph 12 of the plaint the plaintiffs had pleaded the particulars of special damages thus;

“i (a) Each plaintiff claims an average of Kshs. 258 million for loss of land, development, inconveniences, current and future loss of profits to be earned from their respective parcels of land which aggregates to Kshs. 13,932,000,000”.

In their prayer for judgment against the respondent, they once more asked for **“an order that the Defendant do compensate the plaintiffs the sum of Kshs. 13,932,000,000”** The decree itself acknowledged that **“the suit comprised a claim for Kshs. 13,932,000,000”.**

It is elementary rule of drafting, elucidated in **Order 2** of the Civil Procedure Rules that a pleading (including a plaint) in civil proceedings must contain only **“information as to the circumstances in which it is alleged that the liability has arisen”.** But if the other side considers that the pleading does not contain sufficient information, they are at liberty, by notice in writing to the plaintiff, to request for further information and better particulars.

Order 2, rule 2 and **3**, further demands that every pleading be divided into paragraphs numbered consecutively, each allegation being so far as appropriate contained in a separate paragraph.

“3. (1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits”. (Emphasis).

Further, by **Order 4, rule 2,** in suits seeking recovery of money, the plaint must **“state the precise amount claimed”**. Going by the foregoing command, the plaintiffs in the original suit were not expected to plead more than they did. In compliance with the rule, they stated the precise amount that they were claiming from the respondent. It is impermissible to plead evidence, for example, of how the amount claimed was arrived at or such other details.

No doubt the claim was one for special damages, which must be specifically pleaded and strictly proved. There are two stages to be satisfied before damages can be awarded for special damages. Apart from listing the alleged loss and damage in the plaint, evidence must be led at the trial in support of the alleged loss and damage. See **Capital Fish Kenya Limited vs. The Kenya Power and Lighting Company Limited** [2016] eKLR.

In the instant case, the amount claimed was expressly and specifically pleaded in the plaint as Kshs. 13,932,000,000. The success or failure of the claim and the proof of loss and damage could only be determined by the kind of evidence those plaintiffs would have presented to prove the sizes and values of their respective parcels of land, as well as the nature and values of the developments on the parcels of land in question.

With that, I answer the first issue in the affirmative, that the value of the subject matter was ascertainable from the pleading.

Next and last is whether party and party bill of costs and advocate client bill of costs are independent of each other. Again, it is common ground that both costs are provided for, respectively under Parts A and B of Schedule VI. The latter (Part B) is specific that, as between advocate and client the minimum fee is the fees prescribed in “Part A above, increased by 50%”. As a rule of statutory interpretation, when the language is plain and clear, then it must ordinarily be taken as conclusive of what it conveys. The language in Part A is plain. It has variously been described as “a formula”. The learned Judge described it as such saying that “the formula in Schedule 6 Part B has to be adhered to as a basis for determining the basic instruction fee and other items”. Likewise,

both my brother Gatembu, and sister, Murgor, JJA have in their separate opinions called the relationship between the two Parts, a formula. Indeed, this Court too in **Kipkorir, Tito & Ikiara Advocates vs. Deposit Protection Fund Board** (supra) talked of a formula, as did Waweru, J. in **Kenya Tea Development Agency vs. J.M. Njenga & Co Advocates** [2011] eKLR.

From my blurred memory of school learning, a formula is a mathematical or chemical equation or rule that shows how one quantity depends on the other quantity. It is logical with a definitive outcome. That being the case, the outcome of Part B inevitably depends on what has been ascertained under Part A.

It is a fact that at the time the advocates and client bill of costs was being considered by the taxing officer, party and party costs under Part A in HCCC No. 156 of 2009 had already been ascertained and a certificate issued by the taxing officer on 15th July, 2010. In it, the respondent's party and party bill of costs was taxed at Kshs. 151,650,000, constituting a final position of party and party costs since, as I have observed, it has not been set aside or varied, with the effect that;

"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 supplied).

See **section 51(2)** of the Advocates Act.

This Court has been of a near unanimity that once a determination has been made under Part A, the minimum fee chargeable is that fee increased by one-half, and that there is no discretion reserved for the taxing officer. I say near unanimity because I cannot claim to have read all the decisions of this Court on the subject or even those of the High Court. See **George Arunga Sino vs. Patrick J.O & Geoffrey D.O. Yogo T/A Otieno Yogo & Co. Advocates** [2012] eKLR, **Kipkorir, Tito & Ikiara Advocates vs. Deposit Protection Fund Board** (supra), **Central Bank of Kenya vs. Makhecha & Co. Advocates** [2019] eKLR, among a host of others enumerated in the judgment of Murgor, JA. The High Court too has followed this course as demonstrated by the following cases. Odunga, J. in **B Mbai & Associates Advocates vs. Clerk, Kiambu County Assembly & Another** [2017] eKLR stated:

"It is therefore clear that as between advocate and client, the party and party costs, whether as prescribed, ordered by the Court or agreed by the parties to be increased by 50%. It follows that the Taxing Officer ought to have increased the fees by 50%."

In **M/S Nyaundi Tuiyott & Co. Advocates vs. Tarita Development Ltd.** [2016] eKLR, Githua J held that;

"The law is that the value of the subject matter remains the same since under Schedule VI, the only difference between an advocate/Client costs and party and party costs is that the former comprises the party and party costs calculated under Part A increased by a minimum of one half under part B. It is therefore legally untenable to ascribe different values to the subject matter in the assessment of party and party and advocate/client's costs".

Likewise, Rawal, J (as she then was) in **J M Njenga & Co. Advocates vs. Kenya Tea Development Agency Limited** [2011] eKLR said;

"Be that as it may be, in my considered view, I am unable to find any support to the Ruling made by Hon. Mrs. Ougo, when she embarked upon changing the value of the subject matter shown and taken while taxing the Party and Party Bill of

Costs. She went beyond the guidelines and directions made both by Hon. Waweru J. and Hon. Nambuye J. and also departed from the principle of taxing Advocate/Client Bill after Party and Party Bill of Costs is taxed. The Party and Party Bill of Costs after Certificate of Costs is an order of the court as regards the Instruction fees and becomes an order of the court as stipulated in Schedule V Part B.

…

There is no justifiable reason proffered by the Respondent to deviate from the position taken earlier by the Respondent in respect of the Instruction fees. The Respondent cannot be now permitted to renege or relent from accepting the Instructions fees allowed in Party and Party Bill of Costs. I do further consider that even this court cannot interfere in its award so as to decrease the same. The Hon. Taxing Master, as stated hereinbefore, has definitely misdirected herself and erred in making a fresh evaluation of the value of the subject matter and overlooking the Party and Party Bill of Costs which was taxed."

Being a formula, as I have explained, it was not open to the taxing officer to look the other way. She was bound to apply it, regardless of the outcome or the amount involved, being a formula. It was erroneous, therefore, for both the taxing officer and the learned Judge of the High Court to imagine that the former could re-open the decision of the taxing officer on party and party costs without an application for setting aside. Doing so, while the certificate of taxation was still *in situ*, was tantamount to sitting on an appeal of a taxing officer of coordinate jurisdiction as herself. She had no powers whatsoever to review items confirmed in the certificate. It must be stressed, as this Court did in the case of **Peter Muthoka & another vs. Ochieng & 3 others** (supra), that it is only where the value of the subject matter is unknown, or cannot be established that the taxing officer is permitted to use his or her discretion to assess instructions fees.

One can understand the sense of justice and fairness that may have informed the course adopted by taxing officer and the learned Judge. Given the clear intention in the application of Parts A and B, it is not the role of the court to impose its view over the drafters'. If the effect of applying that formula is onerous, then the proper course is to take it back to them to review the two provisions. Perhaps, it was in realization that situations like this may arise that, for instance this Court in **Central Bank of Kenya vs. Makhecha & Co. Advocates** (supra) observed in the highlighted part 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, …"

In the absence of any agreement between the parties, both the taxing officer and the Judge of the High Court had no option but to obey the intention of the framers of Parts A and B of Schedule VI. By failing to find that the taxing officer was bound to apply Part A to Part B; and that the taxing officer had taken into account irrelevant matters, thereby arriving at an erroneous decision, and awarding an inordinately low fees, the learned Judge was clearly in error.

There was an error in principle and the discretion was improperly exercised, for which the decision of the taxing officer ought to have been set aside. The answer therefore to the second question is that the two parts (A & B) are dependent of each other.

Finally, regarding computation of interest, while I agree with Murgor, JA's conclusion, that the award of interest is a discretionary matter, I wish only to emphasize, as Onguto, J. did in **Mercy Nduta Mwangi t/a Mwangi Keng'ara** & **Company Advocates vs. Invesco Assurance Company Limited** [2017] eKLR, that, that discretion comes with the power to reduce the period for which interest is payable. It extends to altering the rate at which interest is payable and even to withholding the entire interest payable in the interest of justice. Considering the amount involved in this claim, it is my belief that the award of interest would escalate this amount to disproportionate levels. For that reason, I would not award any interest.

For all the foregoing reasons, I would allow the appeal to the extent proposed by Murgor, JA. in her judgment.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

W. OUKO, (P)

……

JUDGE OF APPEAL

JUDGMENT OF GATEMBU, JA

1. In this appeal, the appellant, Otieno, Ragot & Company Advocates (the Advocates) is challenging a ruling delivered on 20th February 2017 in which the High Court (D.S. Majanja) declined to interfere with a decision of the Deputy Registrar of the High Court, as taxing officer, taxing off an amount of Kshs.125,702,436.00 from their advocate/client Bill of Costs dated 24th February 2011 in which they had quantified and claimed costs as against Kenya Airports Authority (the Client) in the amount of Kshs.227,476,921.38. The taxing officer taxed and allowed costs in favour of the advocates in the amount of Kshs.7,549,601.00.

2. The Advocates complain that the learned Judge should have set aside the taxing officers decision for, among other reasons, taking into account irrelevant considerations in assessing the advocate/client costs; for failing to take into account the certificate of costs in respect of party and party costs that had been issued in the same matter; and for holding that interest on the taxed costs was payable from the date of taxation of the Bill of Costs as opposed to the date the bill was presented for payment to the client.

3. I do not need to iterate the rival arguments by learned counsel in relation to the appeal as they are fully set out in the judgment of ***Murgor, JA***. However, the pertinent background will provide context to my perspective of the matter.

4. In 2009, the Client instructed the Advocates to defend it in a suit, namely Kisumu High Court Civil Suit No. 156 of 2009, in which 57 plaintiffs sued the Client for acquiring "*their respective parcels of land*" without compensation. In their amended plaint dated 26th February 2010, under the heading, ***"particulars of special damages"***, the plaintiffs averred as follows:

"i)a. Each Plaintiff claims an average of Kshs.258 million for loss of land, development, inconveniences, current and future loss of profits to be earned from their respective parcels of land which aggregates Kshs.13,932,000,000.00. This represents loss for their children, personal representatives' etc.

ii) Each Plaintiff will tender evidence of loss of land, loss of profits, damage and in concurrencies (sic) suffered at the hearing hereof."

5. It is noteworthy that the claim was for special damages; that the parcels of land allegedly acquired by the Client were not identified or specified; that the sizes or values of those parcels were not pleaded; and that the developments allegedly made on each of those parcels were not identified. I will return to this later. Nonetheless, the plaintiffs prayed for judgment against the Client for

the amount of Kshs.13,932,000,000.00 amongst other reliefs.

6. The Advocates filed an amended defence dated 3rd March 2010 on behalf of the Client denying the claims and stating in the alternative that if the "*unspecified parcels of land*" (to use the language used by the Advocates in the defence) were compulsorily acquired, then the plaintiffs should have applied for relief to the Land Acquisition Compensation Tribunal and that the suit did not therefore lie. Notice was given in the defence that an application to strike out the suit would be made. In reference to the plaintiffs claim for special damages, it was specifically denied that each of the plaintiffs had "*sustained a loss of Kshs.258,000,000.00 for loss of land, development, inconveniences and future profits to be earned from their respective lands which aggregates to Kshs.13,932,000,000.00 as further claimed…*"

7. True to the notice given in the statement of defence, the Advocates on behalf of the Client soon thereafter applied to have the suit struck out and, in a ruling, delivered by ***J.R. Karanja, J.*** on 24th June 2010, the suit was struck out with costs to the Client. Hot on the heels of that ruling, on 28th June 2010, the Advocates, on behalf of the Client, (though the Client claims it did not instruct the advocates to do so) filed a party and party Bill of Costs claiming an amount of Kshs.151,658,582.00. Party and party costs were certified by the Deputy Registrar of the High Court at Kisumu and a Certificate of Costs dated 15th July 2010 issued certifying that the Bill of Costs dated 28th June 2010 "*was taxed and allowed in the sum of Kshs.151,650,000.00…to be paid by the Plaintiffs to the Defendant*." In effect the party and party Bill of Costs was practically allowed as drawn save for an amount of Kshs.3,583.00 that was taxed off.

8. Shortly thereafter, without making any attempts to recover the certified party and party costs from the plaintiffs, the Advocates wrote a letter to the Client on 19th July 2010 informing the Client that party and party costs had been taxed and forwarding a final fee note and clarifying to the Client that "*item 1 in the attached fee note is fees on advocate/client scale (i.e. Party/Party costs increased by one half…*"

9. The Client took the view that the fees demanded by the Advocates were "*excessive in the circumstances*". Attempts to amicably resolve the matter were not successful. Ultimately the Advocates to filed advocate/client Bill of Costs dated 24th February 2011 seeking an amount of Kshs.227,476,921.38. The largest, and perhaps most contentious item in that Bill was the instruction fee demanded in the amount of Kshs.130,696,500 under which particulars were given as follows:

"Advocates' fees on instruction to defend a suit for Kshs. 13,932,000,000 which was determined in a summary manner without a full hearing (Under Schedule VI(1)(ii) of the Advocates Remuneration Amendment Order, 2006)"

10. In a ruling delivered on 15th October 2015, P. W. Mbulika, Deputy Registrar, as taxing officer rejected the contention by the Advocates that the value of subject matter for purposes of taxation was the amount of Kshs.13,932,000,000 that was claimed in the amended plaint and concluded that "*the value of the subject matter cannot be ascertained*." The taxing officer was also not persuaded that the certificate of costs in respect of the party and party costs was binding with respect to taxation of advocate client costs expressing that "*party and party bill of costs and Advocate and client bill of costs are independent from one another and I cannot blindly relies (sic) on the party and party bill of costs while taxing the bill before me*." With that, an amount of Kshs.125,702,436.00 was taxed off from the advocate/client Bill of Costs. The same was taxed and allowed in the amount of Kshs.7,549,601.50

11. Dissatisfied, the Advocates filed a reference which was heard and dismissed on 20th February 2017 by the High Court in the impugned ruling the subject of this appeal. In effect, the High Court upheld the decision of the taxing officer. The main complaints by the Advocates, as already mentioned are that the Judge should have allowed the reference because the taxing officer: failed to take into account, which he should have, the certificate of costs in respect of party and party; took into account irrelevant

considerations in assessing the advocate/client costs.

12. As I have already indicated, the arguments in support and in opposition to the appeal that were canvassed before us are fully set out in the judgment of my sister Judge. I echo the words of this Court in ***Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board [2005] eKLR*** that, "*the learned judge like the taxing officer was exercising judicial discretion when…*[dealing with]*… the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned judge acted on the wrong principles of law*."

13. The majority in this appeal hold that there is a basis for interfering with the decision of the learned Judge and that the appeal should be allowed. I hold a different opinion. Given the circumstances of this case, I think learned Judge of the High Court was right in concluding, as he did that, that there was no basis at all for interfering with the exercise of discretion the taxing officer. What then are those circumstances"

14. Firstly, it is argued in support of the appeal that contrary to the conclusions by the lower courts, the value of the subject matter is ascertainable from the pleadings. But is it" Secondly, it is argued that the taxing officer had no discretion to exercise in this matter and his task was merely to take the party and party certificate of costs, the same not having been challenged, add one half, and arrive at the figure to be awarded. I will address the matter of value of subject matter first.

15. As indicated, the taxing officer held that the subject matter cannot be ascertained. The learned Judge concurred in the approach and the conclusion reached by the taxing officer and found no basis for interfering with the exercise of discretion by the taxing officer expressing that:

"In assessing the instruction fee, the Deputy Registrar considered the fact that the purpose of advocate/client costs is to compensate the advocate for actual work done. In assessing the instruction fee, …she took the position that she could not determine the value of the subject matter as a starting point due to the nature of the pleading, the indeterminate nature of the land claimed and the lack of valuation for the said the. In the circumstances, she took into account other factors including the interest of the parties, the fact that the advocates were aware that they were unlikely to recover tax costs from the 54 *(sic)* ***plaintiffs on the ground that it was hefty, that the respondent was a public body, the work done by the Advocates given that the suit was struck out at a preliminary stage and the fact that the respondent had made an offer to pay the advocates Kshs. 2.5 million. She therefore concluded that Kshs. 5 million reasonable compensation to the Advocates."***

The Judge went on to conclude:

"I have reviewed the reasoning of the deputy registrar and do not find any fault within the parameters necessary for this court to intervene in her discretion."

16. The circumstances in which the High Court may interfere with the exercise of discretion by a taxing officer in a reference are limited. The principles are captured in many decisions of this Court going back many years. See for instance ***Arthur Vs Nyeri Electricity Undertaking [1961] E.A 492*** and ***Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited and another*** **[1972] E.A 162**. In the latter case, the Court stated that:

"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an

injustice to one party or the other". [Emphasis]

17. In subsequent cases, for instance, ***Joreth Limited vs. Kigano & Associates [2002] 1EA 92***, and in ***First American Bank of Kenya vs. Shah and others [2002] EA 64*** the Court has consistently held that in assessing costs to be paid to an advocate in an advocate client Bill of Costs, a taxing officer exercises judicial discretion which can only be interfered with if it is established that the discretion was exercised capriciously and in abuse of the proper application of the correct principles of law; that the decision of the taxing officer is based on an error of principle, or the fee awarded is manifestly excessive or excessively low as to amount to an injustice to one party or other. Thus, unless the amount awarded by the taxing officer is *manifestly* high or low as to lead to an injustice or unless there is a clear error of principle, the High Court should not interfere.

18. Given those principles was the learned Judge in error in upholding the finding by the taxing officer that the value of the subject was not ascertainable from the pleadings" As stated, the claim in the amended plaint for Kshs.13,932,000,000, which the Advocates contend is the value of the subject matter, was a claim by 57 plaintiffs for special damages. The plaintiffs complained that their respective parcels of land were acquired by the Client without compensation. The alleged parcels, I restate, were not identified or specified; the sizes or values of those parcels were not pleaded; and the developments allegedly made on each of those parcels were not identified. In short, the figure of Kshs.13,932,000,000, a figure claimed as special damages that is said to be the value of the subject matter is a *'figure from nowhere'*.

19. There is a striking resemblance between the circumstances in this case, and those in the case of ***Moronge & Company Advocates vs. Kenya Airports Authority [2014] eKLR***, a judgment of this Court from which I find it necessary to quote at great length:

"The record of the taxing officer shows that he determined instructions fees under schedule VI (1) (b) of the Advocates (Remuneration) Order which gives a guide on how the value of the subject matter of a suit may be determined. The value may be found from the pleadings, judgment or settlement between the parties. In the matter before us the taxing officer took the figure which was given in paragraph 12 of the amended plaint aforesaid which reads as follows: -

"12. The Plaintiff avers (sic) that the acts of the Defendant has (sic) deprived them livelihood of themselves, their children, grandchildren, great grandchildren, and great great grandchildren and their future personal representatives. The plaintiffs also claim mesne profits and loss of income from their parcels of land. Particulars of loss and damage suffered by the plaintiff (sic)

(i) Loss of respective parcels of land Belonging to the plaintiffs.

(ii) Non-compensation of Land compulsorily acquired.

(iii) Inadequate, compensation for land illegally acquired.

(iv) Non-compensation and inadequate compensation for loss and damages suffered by the plaintiffs.

(v) Fraudulent representation for adequate compensation and or compensation at all.

(vi) Loss of profits for the development on the respective parcels of land.

(vii) Disturbances and in concurrencies (sic) suffered as a result of loss and damage and illegal acquisition.

(viii) Mesne profits

PARTICULARS OF SPECIAL DAMAGES

(i) Each Plaintiff claims an average of Kshs. 258 Million for loss of land, development, inconveniences, current and future loss of profits to be earned from their respective parcels of land which aggregates to Kshs.25,542,000,000.00 which also represents loss for their children, personal representative (sic) future grandchildren and great grandchildren.

Each Plaintiff will tender evidence for loss of land, loss of profits, damage and inconveniences suffered at the hearing hereof."

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."

The Court did not stop there. It went on to state:

"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. It could not therefore be the value of the subject matter of the suit. The suit was dismissed on a preliminary objection. The value of the subject matter of the suit could not also be ascertained from the judgment or settlement as there was none. 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." [Emphasis added]

I respectfully agree and adopt the same.

20. 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. The mere mention of a figure in the pleadings should not prevent a taxing officer from exercising judicial discretion and inquiring whether such figure is indeed representative of the value of the subject matter for purposes of taxation. Consequently, I consider that the taxing officer and the learned Judge were right in concluding that the value of the subject matter was not ascertainable from the pleadings, in which case, the taxing officer, rightly used her discretion based on other relevant consideration to assess the instruction fee. As held in ***Joreth Limited vs. Kigano*** (supra) and also ***Peter Muthoka & another vs. Ochieng & 3 others [2019] eKLR***, where the subject matter is not ascertainable from the pleadings, the taxing officer is at liberty to use his discretion to assess instruction fees.

21. I will next consider whether, as contended by the Advocates, the learned Judge erred in failing to hold that the taxing officer made an error of principle for failing to take into account the certificate of costs in respect of party and party that had been issued in the same matter. It was also asserted that the fact that party and party costs had in this case been certified distinguishes it from the circumstances in ***Moronge & Company Advocates vs. Kenya Airports Authority***(above). In that regard, the taxing officer expressed that:

"I find that indeed the party and party bill of costs and advocate client bill of costs are independent from one another and I cannot blindly *rely* ***on the party and party bill of costs while taxing the bill before me."***

22. Concurring with the taxing officer, the learned Judge of the High Court stated:

"My conclusion is that whereas the formula in Schedule 6 Part B has to be adhered to as a basis for determining the basic instruction fee and other items, the advocate/client costs are not wholly pegged on the party and party costs as certified. The party and party costs should not simply be taken globally and increased by one-half. The taxing officer must consider each item independently bearing in mind the principles of taxation. I therefore find and hold that the Deputy Registrar did not err in failing to take into account the certificate of costs while assessing the value of the subject matter."

23. The contention by the Advocates that a taxing officer has no discretion in assessing advocate/client costs where party and party costs have been certified and that their role is merely to add one-half has support in judicial pronouncements. For instance, in ***D. Njogu and Co. Advocates vs. Kenya National Capital Authority Miscellaneous Application No. 21 of*** **2005 [2005] eKLR** the High Court, ***Ochieng, J.*** stated that:

"Advocate/Client costs can never be less than the Party and Party Costs. I say so because, it has been expressly provided that the minimum fee shall be either prescribed fees, the fee ordered by the court or the fee agreed between the parties, increased by one half. Furthermore, the rule expressly state that the increment is to include all proper attendances."

And later that:

d) That though Taxing officers do have the discretion to either decrease or increase the instruction fees awarded in a Party and Party Bill of Costs, once he has exercised that discretion by fixing the Party and Party Bill of Costs, the Advocate/Client costs cannot be taxed at a lesser sum". [Emphasis added]

From my reading of that ruling in its entirety, it seems to me that the Judge's focus was in relation to attendances and how attendances charged in party and party costs relate to attendances charged in advocate client bill.

24. The other High Court decision to which reference was made was ***Kenya Tea Development Agency vs J.M. Njenga & Co Advocates [2011] eKLR***. To my mind, that decision is a clear demonstration why a taxing officer in assessing advocate client costs must scrutinize and apply their independent judicial minds in the taxation and not *"blindly"* apply the taxed party and party costs. I think this is particularly important where, as here, the taxation of the party and party bill of costs and the taxation of the advocate/client bill of costs was done by different taxing officers. In the above case the Judge (***H. Waweru, J.***) stated:

"Indeed the formula for taxing an advocate and client bill of costs for work done in the High Court is provided for in Part B of Schedule VI of the Order. But the phrase "fees prescribed in A above increased by one-half" in part B of Schedule VI, does not necessarily mean the fees as taxed in a Party and Party Bill"

"In the present case, the taxing officer did not look at each item in the party and party bill in order to know what was properly due to the respondent. Had he done so, he would have noted that the instruction fee awarded in the party and party bill of costs was 4.540,000. He would then have increased this sum by one-half in order to arrive at the correct award for instruction fee for the respondent. This failure amounted to grave misdirection and error of principle that resulted in an award to the respondent that is wholly erroneous and excessive*." [Emphasis]*

25. In the same case ***Waweru J.*** stated that the taxing master is duty bound to look at each item in the party and party bill of costs in order to arrive at what is properly due to the advocate. He pointed out that this is especially important where more than one advocate has acted for a party in a matter because an advocate can only charge for the work he has done. The latter matter appears to have moved back and forth with several references being made to the High Court from decisions of taxing officers as captured in the ruling of the High Court (***K.H. Rawal, J.***) in ***J. M. Njenga & Co Advocates vs. Kenya Tea Development Agency Limited [2011] eKLR*** where the procedural history is fully detailed. ***K.H. Rawal J.*** agreed with the sentiments expressed by ***Waweru J.*** stressing the need for a taxing officer to look at each item in the party and party bill of costs in order to arrive at what is properly due to the advocate and that "*the items in the party and party bill of costs not due to him has to be ignored by the taxing master*" before expressing that "*the party and party bill of costs after certificate of costs is an order of the court as regards the instruction fees and becomes an order of the court as stipulated in Schedule V Part B.*"(sic).

26. Nevertheless, though persuasive, those decisions of the High Court are not binding on this Court. However, we were referred to the ruling in ***Central Bank of Kenya vs. Makhecha & Co. Advocates [2019] eKLR***, where this Court:

"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…"

27. It is, I think noteworthy that in the last-mentioned ruling, the Court was dealing with an application for review of its own decision. The question presently under consideration was not before the Court. Most respectfully, the above statement appears to have been made in passing while addressing the application for review. It was not a pronouncement, with tremendous respect, that was necessary in relation to the question whether the matter was suitable for review or not, which is the matter that was before the Court. It also not apparent that the Court was addressed on the matter and no reference was made to previous decisions that "*taxation of costs is not a mathematical exercise.*" It seems to me, and I say so with the greatest possible respect, that the pronouncement was *obiter dictum*.

28. I am keenly aware that this was a taxation of advocates/ client costs and as stated by this Court in ***Kipkorir, Tito & Ikiara Advocates vs Deposit Protection Fund Board*** (above), "*the formula for taxation of those costs is provided by schedule VIA and VIB of the Order. According to the formula, the Advocates/Clients costs in this case would be the party and party costs prescribed in schedule VIA increased by one half*". In the same case, the Court went on to observe that the taxing officer has discretion in assessing instructions fees as follows:

"**The main component of the bill of costs in dispute is the instructions fees. The appellant was defending the suit and so the instruction fees as provided in schedule VIA (1) (d) is the instructions fees calculated under sub-paragraph (1) (b) of schedule VI subject to the discretion of the taxing officer to increase or reduce the instructions fees. In exercising its discretion, the Taxing Officer is required to consider the matters specified in proviso (i) of schedule VIA (1) which states**:

"Provided that:

(i) the taxing officer, in the exercise of his discretion shall take into consideration the other fees and allowances 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 discretion by the trial judge, and all other relevant circumstances." [Emphasis added]

29. That observation is consistent with the view expressed by this Court in the **Moronge** case that *"schedule VI (1) (b) of the Advocates (Remuneration) Order which gives a guide on how the value of the subject matter of a suit may be determined"*. In my view, the formula provided that advocate client costs are comprised of the party and party costs prescribed in schedule VIA increased by one half cannot fetter the judicial discretion of the taxing officer. This is especially so where, as here, the party and party bill of costs is taxed by a different taxing officer from the one taxing the advocate bill of costs and the reasons for arriving at the costs certified as party and party costs may not be apparent. If for instance, I ask, costs are certified for more than one counsel in a matter, and the party and party bill of costs is taxed on that basis, is the taxing officer dealing with the advocate client bill of costs to blindly take the instruction fee awarded in the party and party bill of costs and simply apply or add the one half" I would think not! Section 51(2) of the Advocates Act which stipulates that a certificate of costs is final does not in my view alter this position. The finality of costs relates to costs 'covered by such certificate'.

30. To hold otherwise, would in my view negate the judicial discretion of the taxing officer, and in the circumstance of this case, lead to an injustice where the Client is burdened with excessive costs in a matter where the taxing officer found the work done is not commensurate with the fees claimed; where the party and party bill of costs appears to have been presented and taxed for the sole purpose of anchoring the advocate/ client Bill of costs as the Advocates appear to have been well aware there was no prospect of recovery of the party and party costs as witnessed in their communication to the Client of 11th January 2011 that they avoided pursuing party and party costs because *"it would appear the plaintiffs are villagers who might not be in a position to meet the hefty costs taxed."*

31. In my view, had the taxing officer allowed the 'manifestly excessive' instruction fee as claimed in advocates Bill of Costs, there would then have been justification for the High Court to interfere on basis of error of principle. See ***Arthur v Nyeri Electricity Undertaking [1961] EA 497.***

32. Being of the view that the appeal is for dismissal, I need not address the issue raised regarding interest. I would therefore dismiss the appeal with costs. I am however in the minority.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL