



**County Government of Siaya v Oruenjo Kibet & Khalid Advocates (Miscellaneous Case E008 of 2024) [2025] KEELC 1477 (KLR) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1477 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**  
**MISCELLANEOUS CASE E008 OF 2024**  
**AE DENA, J**  
**MARCH 24, 2025**  
**(FORMERLY HC MISC E008 OF 2024)**  
**AND**  
**TAXATION OF ADVOCATES CLIENT BILL OF COSTS DATED 9<sup>TH</sup> MARCH 2024**  
**BETWEEN**  
**COUNTY GOVERNMENT OF SIAYA ..... APPLICANT**  
**AND**  
**ORUENJO KIBET & KHALID ADVOCATES ..... RESPONDENT**

**RULING**

1. The applicant by way of Chamber Summons application dated 19<sup>th</sup> June 2024 seeks the following verbatim orders
  1. Spent
  2. Spent
  3. That this Honourable Court be pleased to set aside the Ruling of the Taxing Master delivered by the Honourable L. Simiyu, Deputy Registrar on the 29<sup>th</sup> day of May, 2024 save for the itemized items which were not contested.
  4. That this Honourable Court be pleased to direct that the Applicant's Bill of Costs be taxed afresh in relation to the items which the Applicant contested.
2. The application is based on the grounds on its face and the affidavit of Leonard Okanda the County Solicitor.



3. It is deponed that the Respondent received instructions to act on behalf of the Applicant in Siaya ELC Misc. Application No. E019 OF 2022. That the Respondent thereafter filed Advocate-Client Bill of Costs dated the 9<sup>th</sup> day of March 2024 where the Applicant opposed some items thereof including but not limited to instructions fees. That it was agreed to canvas the issues on the contested items by way of written submissions. That the Taxing Master delivered a Ruling on the said Bill on the 29<sup>th</sup> day of May, 2024 and upheld as legally sound the bill of Ksh. 156,025,500 as instructions fees among other contested items.
4. Being aggrieved by the Ruling on the instruction fees and other contested items the Applicant filed this reference. It is contended that the Taxing Master fell in grave error by disregarding the Applicant's submissions and upholding the Respondent Bill on the issue of instruction fees.
5. The application is opposed by the replying affidavit of Collins Omondi Otieno an advocate in the Respondents law firm. It is deponed that the application is based on erroneous interpretation of law and facts. That the fact that the matter was determined at preliminary objection stage does not negate the complexity, importance and nature of a matter. The preliminary objection raised a matter of substantial public interest. That the instruction fees is charged once and is not affected by the stage the suit has reached.
6. It is deponed that the Taxing masters discretion under the Advocates Remuneration Order (herein ARO) is not limited to the stage of determination but extends to considering the nature and importance of the subject matter. That the value of the Yala Swamp property comprising of 20,756 acres is discernible and its estimated value of Kshs.500,000 per acre totals Kshs.10,378,000,000/= which was conservatively lower than prevailing market rate for similar properties in Siaya county. That a cursory internet search confirms the estimated value of Kshs.10,000,000,000. The Taxing Masters reliance on such information is both reasonable and permissible in law.
7. That courts have held that where the value is not expressly stated the Taxing Master may exercise discretion under paragraph 13A of the ARO. It is averred that the instruction fees of Kshs.156,025,000. is justifiable and reflective of the complexity and value of the matter. That the case involved proprietary interests affecting the livelihoods of thousands of people inhabiting and utilizing the Yala swamp property. The applicants claim that the fees are unreasonably high disregards the discretion afforded to the Taxing Master herein.
8. The application is termed as a ploy to unjustly delay the realisation of costs lawfully due to the Respondent. That there is no reason to interfere with the ruling delivered on 25/5/2024. It is prayed that the application is dismissed with costs.

### **Submissions**

9. The application was canvassed by way of written submissions. The Applicants' submissions are dated 8/01/2025 and the Respondents 15/01/2025.

### **Applicants submissions**

10. The Applicant submits that the court ought not have derived the value from submissions made in pursuance of taxation of a bill of costs but from the pleadings. The discretion exercised ended up awarding punitive, excessive costs an impediment to the right to access justice and occasion unjust enrichment. That the fees payable should be commensurate to the work done and must ensure a delicate balance. Reliance is placed on Joreth Ltd Vs Kigano & Associates NRB Civil Appeal No.66 of



1999(2002) eKLR; Ratemo Oira & Company Advocates Vs Magereza Sacco Society Ltd (2019)eKLR and Kenya Airports Authority Vs. Otieno Ragot & Company Advocates (2024)KESC 44 (KLR).

### **Respondent Submissions**

11. It is submitted that the applicant has not demonstrated any valid grounds for setting aside the Taxing Masters ruling. The submissions reiterate the averments raised in the Respondents replying affidavit. Reliance is placed in the case of Joreth Ltd Vs Kigano & Associates (supra) to buttress the point that instructions fees is not affected or determined by the stage the suit has reached. It is submitted that the instructions fees was duly earned and once served with pleadings counsel chose to act on his clients instructions to raise the PO. That a PO constitutes a denial of liability and attracts full instruction fees. Reliance was placed on the case of Softa Bottling Company Ltd & Others Vs. Nairobi City Council (2006)eKLR.
12. On the issue of discretion and the value of the property reliance is placed in the case of Joreth Ltd Vs Kigano & Associates (supra) where the court further stated that discretion could factor any direction by the trial judge and all other relevant circumstances. That the fact that the subject matter has been identified then its value can be estimated by the Taxing Master. The court is also referred to *Mwiti & Another Vs. Viljoen & another (Civil Case E002 of 2022)* (2023) KEHC 24906 (KLR) on powers under section 13A of the ROA. That since the vast property would touch on livelihood of thousands of people inhabiting and utilizing the property this was a proper consideration deployed by the Taxing Master.
13. It is lastly submitted that courts will only interfere with a Taxing Masters discretion if it is demonstrated that an error of principle was committed or that the award is manifestly excessive or inadequate as to amount to injustice which the applicant had failed to demonstrate.

### **Analysis and Determination**

14. The court has considered all the foregoing. The issue for determination is whether the Applicant has established valid grounds to warrant setting aside the taxing masters ruling. If yes should the Bill of costs be remitted to a different Taxing Master to be taxed afresh.
15. The main contention in this reference is the instructions fees raised in the Bill of costs dated 9/03/2024 the subject of the taxation in the impugned ruling dated 29/05/2024. The instructions fees were raised at Kshs 156,025,500. and which the Taxing Master Hon. L.Simiyu upheld after considering submission from both sides as this item was contested. The amount is termed as excessive in the circumstances and impedes access to justice. The Applicant who was the Respondent then had submitted for a figure of Kshs.150,000/- It is the Respondents case herein that the instruction fees were duly earned in view of the complexity and nature of the case.
16. The application is brought under Paragraph 11(2) of the Advocates Remuneration Order (RAO) which provides for objections to any items of a bill of costs to be raised to a judge by Chamber Summons. This is where the jurisdiction of this court is derived to entertain this reference.
17. Having appreciated the grounds upon which this reference is filed and the responses in opposition thereto I will first set out the law and judicial precedent that informs the taxing of instructions fees bearing in mind the circumstances of this case.
18. Schedule 6 of the Advocates Remuneration Order applies with regard to costs of proceedings in the High Court. The suit where the bill of costs was subject of the taxation arises from proceedings commenced in the Environment and Land Court a court of equal status with the High Court.



19. Part B of schedule 6 is on Advocate Client Bill of costs. Provision is made on how instructions fees shall be charged in an ordinary suit where no appearance is entered, where a suit is determined in a summary manner or any manner without going for full trial, where settlement is reached prior to confirmation of the first hearing date, where the value of the subject matter cannot be ascertained from the pleading or judgement or settlement between the parties and also where the value can be ascertained. This position is confirmed in some court decisions I will highlight shortly.
20. In the current proceedings the value of the subject matter was not pleaded in Siaya ELC Misc E019 of 2022, there was no settlement and no judgement either. The ARO gives guidance on how the Taxing Officer should proceed in such circumstances by using its discretion. How then should that discretion be exercised because it is trite that the same must be exercised judiciously and not whimsically. The issue has been subject of many judicial pronouncements as follows.
21. In the case of Joreth Limited Vs Kigano and Associates NRB Civil Appeal No.66 of 1999(2002) eKLR; the court held 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 importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. That is what C.K. Njai Esq. did when he said:

“ As we do not know the capital value of the property in dispute, one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of counsel”.

22. Discussing instructions fees and the construction that is to be attached to the principle contained in the 6<sup>th</sup> Schedule Part A of the Advocates Remuneration Order the Court of Appeal in the case of Peter Muthoka & Another Vs Ochieng, Onyango, Kibet & Ohaga Advocates & 3 Others Civil Appeal No. 328 of 2017(2019)eKLR pronounced itself thus;-

‘It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

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.’

23. Based on the above rendition of the Court of Appeal as to the correct approach to taxation of instruction fees where the subject matter is not pleaded or discernible, I will proceed to further discuss the reference herein.
24. I have read the ruling on taxation. The court also called for the lower court file to appreciate the taxation proceedings in L. Misc E005 of 2024 Oruenjo Kibet & Khalid Advocates Vs. County Government of Siaya and arguments raised by Counsels in their submissions. I note that the Advocate client bill was taxed and allowed at Kshs. 232,138,100. This court also had occasion to peruse the pleadings and proceedings in Siaya ELC Misc E019 of 2022 Justus Ouma Owino & 3 Others Vs National Land Commission & 2 Others. This was to appreciate the nature of the case which has featured prominently as a consideration in applying discretion including all the pleadings filed in the matter.
25. I note that the taxing officer was firstly guided by the holding in Joreth Limited Vs Kigano and Associates. The relevant extract has already been quoted elsewhere in this ruling (see paragraph 21). The Taxing Officer after citing the above dictum observed that there was no valuation produced in the substantive suit neither had any of the parties supplied such report in the taxation proceedings. The Taxing officer went on further to state thus;-

‘However it is not traversed that the subject matter was the vast YALA swamp and the people of the respondent were highly interested in the matter as their livelihoods depended on the subject matter and the nature of investment that was forecasted. It is not denied by the applicant that prayer (b) in the substantive file mentioned the subject matter to be 20,756 acres. The respondent who in whose jurisdiction has not also traversed that the value of an acre of land within Siaya could be Kshs.500,000.’
26. The taxing officer further noted that the conservatory orders that were being sought in the substantive file were in respect of a specified suit land measuring the above acreage. That the importance of YALA swamp entirely to the people of Siaya and the interest of the respondent in the matter influenced the respondent engagement of counsel in the matter.
27. Based on the above the Taxing master proceeded to apply its discretion to award the instruction fee as drawn. Applying the guidance in the authorities cited above and which are binding on this court and having reviewed the records as indicated elsewhere in this ruling, it is clear to me that the pleadings did not state the value of the suit property neither was the value of the previous lease stated in monetary term. There is no figure attached to the value of the subject matter of the litigation.
28. I must interrogate where the proposition that one acre of land in Siaya could be Kshs500,000/- emanated from since the Taxing Master clearly stated the pleadings did not mention any value neither was there a valuation presented.
29. My review of the submissions dated 17/04/2024 filed by the Respondent herein during taxation (paragraph 23 and 24) reveal that the Respondent gave the said estimate per acre which was pointed to be conservative and a just a fair value. Further the respondent drew an estimated value of Kshs 10,000,000,000/= from google search.
30. Was the Taxing Master correct in considering the above proposals which clearly she was persuaded by? It is now trite that submissions are not evidence. I take the position of the Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR where it was held that submissions cannot take the place of evidence. They are generally parties’ “marketing language”.



31. Moreover while reliance has been placed on the case of Joreth Limited Vs Kigano and Associates (supra) by the Respondent which decision I have read the Court of Appeal observed thus on the value;-

‘In our view C.K. Njai quite correctly rejected the "opinions of value" as proffered by Mr. Kigano from the bar. These opinions are not evidence...C.K. Njai Esq. had declined to take into account the valuation letters proffered by Mr. Kigano to enable him to assess the capital value of the suit premises for the purposes of assessing the instruction fee. He said:

"Under item No. 1, the applicant charges Shs.13,500,000/=. In arriving at this amount he has estimated the value of the suit land at Shs. 1 billion. Two "opinions of value" have been tendered giving the average value of suit land as 1.2 Billion. These valuations or opinions as they are referred to are not (in the) pleadings. They cannot be relied on here. For a money value the subject matter of a suit to be the basis of assessing instruction fees, that value has to be ascertainable from the pleadings, judgment, or settlement. (See Schedule VIA1)." Schedule VIA1 referred to by C.K. Njai Esq. is in regard to instruction fee. It reads: "

32. I therefore respectfully agree with the Applicants submissions that though the acreage was discernible being 20,756 pleadings did not disclose the value of the subject matter and the court ought not to have considered proposals given during submissions presented at taxation. In any event the acreage is not the value of the suit property neither is google or counsel a valuer.

33. But was the Taxing Master right to apply the figure proposed by Counsel and at the same time consider other factors which were noted in the ruling such as the importance of the YALA swamp to the people of Yala and the Applicant. My answer is in the negative. In this regard I'm emboldened by the Court of Appeal dictum in Peter Muthoka & Another Vs Ochieng, Onyango, Kibet & Ohaga Advocates & 3 Others (supra).

‘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.’

34. The Taxing Officer having chosen to be guided by the propositions which had placed a value on the suit property albeit outside of the pleadings then they were limited to this choice. They could not combine by noting the importance of the matter or other factors. This point was not urged by the parties and I will leave it that.

35. Since the proceedings in Siaya Misc E019 of 2022 were determined before it was heard on merit the value of the subject matter could only be ascertained from the pleadings. The effect of the entirety of the foregoing analysis is that there was an error of principle in arriving at the Taxing Officers decision to uphold the instructions fees as raised by considering propositions outside the pleadings which were not evidence of the value of the subject matter.



36. The above notwithstanding the argument by the Applicant is that the Taxing Masters decision was punitive, excessive and unjustly impedes access to justice. The Applicant does not dispute retaining the Respondent firm in the Siaya Misc E019 of 2022 except that the fees are not commensurate to the work done as the suit was disposed of at a preliminary stage pursuant to a preliminary objection filed by the Respondent. That the Taxing Masters discretion was not to be used to end up awarding excessive and punitive fees. The Respondent posits that instruction fees is static and cannot be affected by such proposition.
37. I will first deal with the contention that instructions fees are static. This was the position taken by the Court of Appeal in *Joreth Vs Kigano* (supra). However case law has evolved in this regard. It will become clear that instruction fees are not static. The Supreme Court of Kenya has now introduced the aspect of reasonability based on the circumstances of every case as will be seen shortly.
38. On reasonability of fees charged by advocates I will highlight several judicial decisions on the subject.
39. In *Kenya Airports Authority Vs Otieno Ragot & Company* advocates Petition No. E011 of 2023 SC, the Supreme Court pronounced itself on the objectives of the Advocates Remuneration order thus; -
- (50) The overall objective is to prevent exploitation of parties to a suit/transaction with regard to remuneration of advocates and compensation of costs or expenses incurred by a successful party as well as maintain the standards of the legal profession. Differently put, it is to ensure that fees/costs paid to an advocate and a successful party are reasonable. Of importance, is that what amounts to reasonable costs can only be determined on a case-by-case basis.
40. The Supreme court further added thus; -

‘As emphasized in the many authorities and submissions made to us, instruction fees ought to take into account the amount of work done by an advocate, the prevailing economic times and should be reasonable to a level where the charges should not impede access to justice. Odunga, J., (as he then was) in *Nyangito & Co. Advocates vs. Doinyo Lessos Creameries Ltd.*, HC Misc No. 843 of 2013; [2014] eKLR expressed as follows: “... the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.” Equally, the finding by Ojwang, J. (as he then was) in *Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’njuguna & 6 Others*, HC Misc 621 of 2000 [2006] eKLR, resonates with the matter at hand. He stated as follows: “Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the Taxing Officer is to provide only for reasonable compensation for work done; the should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious;...”



41. In the case of Fredrick Otieno Outa Vs Jared Otieno Odoto & 3 Others SC PETITION NO.6 OF 2014 the court emphasised thus

‘.....that in awarding costs, courts must be guided by the principles of fairness, justice, and access to justice. See Mercy Kirito Mutegei v Beatrice Nkatha Nyaga & 2 others; [2013] eKLR, Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others (supra); Dennis Magare Makori & Another v IEBC & 3 Others, Kisumu Election Petition Appeal No. 22 of 2018; and Philip Kyalo Kaloki v IEBC & 2 Others, Election Petition Appeal 25 of 2018.’

42. Arising from the foregoing it is therefore clear that instructions fees are not static as propounded by the Respondent.

43. Now back to the costs awarded. The court has already made a finding that the court ought not to have taken the values proposed by counsel outside of the pleadings. This was an error of principle. However the Taxing Master still went ahead to apply its discretion by considering the importance of the Yala Swamp interalia as noted hereinabove.

44. The court has been invited by the Applicant to set aside the Ruling of the Taxing Master herein save for the itemized items which were not contested. The question that arises at this juncture is what are the circumstances under which a court can interfere with the use of discretion in taxation by a taxing master? I will fall back to the undernoted caselaw.

45. In the case of Fredrick Otieno Outa Vs Jared Otieno Odoto & 3 Others SC PETITION NO.6 OF 2014 the court stated thus;-

‘(10) The principles of setting aside the decision of a Taxing Officer are now old hat, going by the numerous decisions of the superior courts below. As early as 1972 these principles were propounded by Spry VP, in the leading case of Premchand Raichand Limited & Another v. Quarry Services of East Africa Limited and Another; [1972] EA 162, which has been approved in a long line of subsequent rulings, for example, First American Bank of Kenya v. Shah and Others; (2002) EA 64 and Joreth Ltd v. Kigano and Associates (2002); 1 EA 92, to name but two.

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

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

To these general principles, I may add that;



- i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,
  - ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,
  - iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes.'
46. Drawing from the above guidelines including the principle of reasonability I must now consider if the discretion as exercised offended the above criterion. In my view the discretion was not exercised judiciously. Firstly and foremost was the application of evidence on the value of the suit property which was outside the pleadings. Secondly the Taxing Master did not fully consider the stage at which the litigation was resolved when taxing the instruction fees as between advocate and client. This factor was only considered on fees for getting up and preparing for trial.
47. It is not in contestation that the matter was resolved through a preliminary objection. It is trite therefore that the suit was not heard on its merits. I have already shown that there is now the principle of reasonability of fees charged by lawyers commensurate to the work undertaken. There was no reasonability in charging the full instructions fees for a matter that was disposed of at preliminary objection stage.
48. My review of the proceedings in Misc. E019 of 2022 herein show that the Respondent filed a preliminary objection and was not the only party who objected to the suit based on jurisdiction of the court. The National Land Commission the 1<sup>st</sup> Respondent did raise objections as well. At the point of the preliminary objection which was largely on the forum where appeal of the decision of the NLC would lie, complexity of the matter cannot be said to have kicked in since counsels cannot be said to have sat down to do the substantive analysis for the hearing. This is where the rubber would meet the road but never materialised.
49. In my view I think the fees was excessive given the circumstances of the case. It would be against public interest and policy and fairness to uphold the instructions fees in the circumstances. In as much as the people of Siaya deriving an income from the Yala swamp are in their thousands, it does not escape my mind that the same people of Siaya pay taxes to the Applicant for service delivery and their hard earned money must be put to proper use. I don't think the people of Siaya would welcome the fees with joy and ululation. It will be indeed a sad a day for the people of Siaya including those that don't utilize the Yala Swamp. There must be a balance for the people, the Advocate who was instructed based on the work he deployed and the instructing party.
50. Having arrived at the foregoing conclusion what orders should issue in the circumstances? I have already observed that the court is being asked to remit the matter for taxation before another Taxing Master. I further note that the Respondents contend that there is no need to interfere with the decision of the Taxing Officer which from my analysis I have demonstrated there is reason to interfere. The Respondents hold the view that there must be an end to litigation.
51. In *Joreth Ltd Vs Kigano & Associates* NRB Civil Appeal No.66 of 1999(2002) eKLR the court stated
- If the judge comes to the conclusion that the taxing master has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. It was stated by the predecessor of this Court in the



case of Steel Construction & Petroleum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd (1970) E.A. 141 per spry JA at page 143:

“ Counsel for the appellant submitted, relying on D’Souza v. Ferao [1960] EA 602 and Arthur v. Nyeri Electricity Undertaking [1961] EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re -assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion.”

52. The above pronouncement resonates with the Applicants desire and or prayer that the matter is remitted to a different taxing officer to be taxed afresh except items that were not contested. It is however noteworthy that in the subsequent authorities cited by the Supreme Court in the case of Kenya Airports Authority Vs Otieno Ragot & Company advocates (supra) I did not come across any pronouncement that remittance back for taxation is mandatory. In my understanding the discretion is still available for the court to tax the bill. There must be an end to litigation, though I recognise the right conferred upon litigants under article 48 of *the Constitution*.
53. The court therefore taking into consideration the circumstances of this case, the value of the subject matter not being ascertainable, the matter having been determined at preliminary stage, the public interest involved which I have also demonstrated and the principle of reasonability as enunciated in the precedents referred to herein above and exercising my discretion this court taxes the instruction fees at Kshs. 5,000,000/-.
54. In arriving at the said figure the court is guided by the decision of Justice Majanja (may his soul rest in peace) upholding the decision of the Taxing Officer who tasked instruction fees at Kshs 5,000,000/- in the case of Kenya Airports Authority Vs Otieno Ragot & Company advocates (supra). Having read the Supreme Court decision it is clear that the court upheld the decision of Majanja J by dismissing the Court of appeal decision.
55. Item 2 of the Bill of costs increased the instruction fees by half (50%) making it Kshs. 78,012,500/=. The item was allowed by the Taxing Officer. This was based on the impugned instructions fees it cannot therefore be upheld. The Respondent therein submitted that this item ought to be taxed in reference to the instruction fee which they had submitted should be 150,000/- thus Kshs.75,000/- . Having perused the ruling striking out Misc. E019 of 2022, the judge directed that each party was to bear their own costs. This therefore means that there would be no party to party costs and which decision I cannot review. Item 2 herein would have been taxed at Kshs.2,500,000/- based on the figure of Kshs.5,000,000/- above. This court therefore taxes Item 2 at Kshs.2,500,000/-
56. The court will not interfere with the other items as taxed by the Taxing Officer some of which were also by consent of the parties. I will also not award any costs in respect of this reference to avoid escalation of costs.
57. Accordingly, I find that the Chamber Summons dated 19<sup>th</sup> June 2024 has merit. The following orders therefore issue to dispose of the same;-
  1. The ruling of the Taxing Master delivered by the Honourable L. Simiyu, Deputy Registrar on the 29<sup>th</sup> day of May, 2024 is hereby set aside on items 1 and 2 of the Bill of costs dated 9<sup>th</sup> March 2024.



2. Items 1 and 2 of the Bill of costs dated 9<sup>th</sup> March 2024 are hereby taxed at Kshs. 5,000,000/- and 2,500,000/- respectively
3. The rest of the items of the Bill of costs dated 9<sup>th</sup> March 2024 shall be retained and are hereby upheld as taxed by Honourable L. Simiyu, Deputy Registrar on the 29<sup>th</sup> day of May, 2024.
4. The Certificate of Costs issued pursuant to the ruling of the Taxing Master delivered by the Honourable L. Simiyu, Deputy Registrar on the 29<sup>th</sup> day of May, 2024 is hereby set aside.
5. Certificate of Costs to issue based on the ruling of the court under this reference.
6. Each party to bear their costs on this reference for the reasons already stated.

Orders accordingly.

**DELIVERED AND DATED AT SLAYA THIS 24<sup>TH</sup> DAY OF MARCH 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**24/03/2025**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for the Applicant

Mr. Otieno for the Respondent

Court Assistant: John Okumu

