



George Kithi t/a Kithii & Co Advocates v Carneval Village Apartments & another (Miscellaneous Civil Application 177 of 2019) [2023] KEELC 18358 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18358 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION 177 OF 2019**

JO MBOYA, J

MAY 31, 2023

BETWEEN

GEORGE KITHI T/A KITHII & CO ADVOCATES APPLICANT

AND

CARNEVAL VILLAGE APARTMENTS 1ST RESPONDENT

COCONUT CAVE LIMITED 2ND RESPONDENT

RULING

Introduction and Background

1. It is apparent that the Advocate/Applicant herein was instructed, engaged and retained by the Respondents/Clients to represent same in the proceedings that were taken before the National Environment Tribunal vide Net Appeal No 100 of 2012. Instructively, the Applicant appears to have duly executed the instructions on behalf of the Respondents and there after costs were awarded.
2. Be that as it may, the Advocate/Applicant herein instead of filing the requisite bill of costs against the Respondents before the National Environment Tribunal in terms of provisions of rule 39(3) of the *National Environment Tribunal Rules, 2003*, proceeded to and filed his bill of costs before this Honourable court. In this respect, the named bill of costs was thereafter fixed for taxation before the Learned Deputy Registrar.
3. Nevertheless, upon being served with the Advocate Client Bill of Costs filed herein, the Respondents/Clients retained the firm of M/s AGN Kamau & Co, Advocates to act on their behalf. Consequently, the said firm of advocate proceeded to and mounted a Notice of Preliminary objection wherein same, inter-alia challenged the Jurisdiction of the taxing officer of this Honourable court on the basis of rule 39(3) of the *National Environment Tribunal Rules [2003]*.



4. Subsequently, the Learned taxing officer was called upon to adjudicate upon the Notice of Preliminary Objection and in this regard, same rendered a ruling dated the February 24, 2022, whereupon the Learned taxing officer upheld the preliminary objection and struck out the Advocate/Applicant's Bill of Costs that had hitherto been filed by the advocate. In addition, the taxing officer awarded costs to the Respondents.
5. Arising from the Ruling delivered on the February 24, 2022, the Respondents herein proceeded to and filed Party and party bill of costs, which was ultimately taxed and certified by the taxing officer vide ruling rendered on the January 26, 2023. For clarity, the taxing officer awarded to and in favor of the Respondents the sum of KES 166, 460/= only.
6. It is the said award of costs at the foot of the Ruling rendered on the January 26, 2023, which has provoked the filing of the Reference vide Chamber summons dated the February 9, 2023.
7. For coherence, the reliefs sought at the foot of the named Application are as hereunder;
 - i. The Decision of the taxing officer made on the January 26, 2023 on the Client's/Respondents bill of costs dated March 7, 2022 be set aside.
 - ii. This Honourable court be pleased to strike out the Client/Respondent bill of cost dated the March 7, 2022 in its entirety.
 - iii. In the alternative, the bill of costs dated March 7, 2022 be taxed a fresh by a different taxing officer other than Hon. Diana Orago (Deputy Registrar; Environment and Land Court, Milimani Law Courts).
 - iv. Cost of this application be provided for.
8. The instant Chamber summons Application is premised and anchored on various grounds, which have been alluded to and enumerated at the foot of the Application. Further, the Application is supported by an affidavit of one George Kithii, Advocate, sworn on the February 9, 2023; and in respect of which the deponent has annexed three documents thereto.
9. Upon being served with the subject Reference, the Respondents filed a Replying affidavit sworn by one, Faith Muthoni Mbirwe, Advocate, sworn on the February 17, 2023 and in respect of which the deponent has annexed a set of six (6) documents thereto.
10. For good measure, the subject Application came up for hearing on the February 23, 2023, whereupon the advocates for the Parties agreed to canvass and ventilate the application by way of written submissions. Furthermore, the advocates for the respective Parties covenanted to file and exchange the written submissions within 28 days, with counsel for the Applicant appropriating the first set of 14 days.
11. Instructively, the Advocates thereafter proceeded to and indeed filed their respective submissions, which submissions forms part and parcel of the record of the court.

Submissions By The Parties

a. Applicant's Submissions:

12. The Applicant herein filed written submissions, to wit, the submissions dated the April 14, 2023; and in respect of which same has highlighted and amplified two issues for consideration by the Honourable court.



13. Firstly, Learned counsel for the Applicant has submitted that the Ruling rendered by the taxing officer of January 26, 2023 and in particular the final amount awarded by the Learned taxing officer, was grossly and manifestly excessive. In this regard, Learned counsel for the Applicant has contended that though the minimum and basic Instruction fees prescribed by the Advocate Remuneration Order, 2014 was KES 75, 000/= only, the Learned taxing officer however proceeded to increase same to KES 100, 000/= only albeit without lawful cause and/or reasonable basis.
14. Further and in addition, Learned counsel pointed out that it was incumbent upon the learned taxing officer to award the scale fees as provided for by the Advocate Remuneration Order and not to increase same, arbitrarily and whimsically. In any event, counsel contended that the increment of the instruction fees also did not take into account that the advocate for the Respondent had only undertaken minimum work towards and in opposition of the Advocate/Client Bill of Costs which was , ultimately struck out.
15. In short, Learned counsel for the Applicant has submitted that the increment of the instructions fees by and at the instance of the Learned taxing officer was therefore informed by an Error in principle and thus ought to be interfered with and/or reviewed by the Honourable court.
16. In support of the foregoing submissions, Learned for the Applicant has cited and relied on, *inter-alia*, the holding in the case of *Joreth Ltd v Kigano & Associates* [2002]eKLR and *Kenya Oil Company Ltd v Kenya Ports Authority* [2009]eKLR, respectively.
17. Secondly, Learned counsel for the Applicant has submitted that the learned taxing officer failed to appreciate that the Applicant/Advocate herein had been duly retained and instructed by the Respondent in proceedings before The National Environment Tribunal and wherein, the advocate/ Applicant herein protected and vindicated the interests of the Respondent/Client.
18. Furthermore, Learned counsel for the Applicant has submitted that the Applicant herein has since filed Advocate/Client bill of costs before the National Environment Tribunal and which bill of costs is currently pending taxation by the tribunal. In this respect, Learned counsel has contended that the taxing officer ought to have taken the pendency of the bill of costs before the tribunal into account.
19. On the other hand, Learned counsel has submitted that it was incumbent upon the learned taxing officer to appreciate that the Applicant advocate is entitled to costs for the work done on behalf of the Respondent/Client herein before the tribunal. Consequently and in this regard, Learned counsel has contended that the taxing officer ought to have decreed a set-off and not otherwise.
20. Finally, Learned counsel has submitted that the Honourable court ought to vacate and set aside the entire ruling by and on behalf of the taxing officer, insofar as a failure to do so would be tantamount to rewarding a client, who has hitherto instructed and engaged an advocate in a matter.
21. Moreover, Learned counsel has added that the award and taxation of costs by the Respondent/Client would amount to the client taking advantage of the professional services rendered by an advocate and thereafter failing to pay for such services.
22. As a result of the foregoing, Learned counsel has therefore impressed upon the Honourable Court to set aside and vacate the entire ruling and the consequential orders made by the Learned taxing officer.
23. To vindicate the foregoing submissions, Learned counsel has cited various decisions, *inter-alia*, *Issa & Co. Advocate v Anbui Construction Engineering Group Company & Another* [2019]eKLR, *Kamunyori & Company Advocates v Development Bank Ltd* [2015]eKLR, *Moronge & Co Advocates v Kenya Airport Authority* [2014]eKLR and *Kipkorir Tito & Kiara Advocates v Deposit Protection Fund Board* [2004]eKLR, respectively.



b. Respondent's Submissions:

24. On the other hand, the Respondent filed written submissions dated the April 25, 2023 and same has similar raised and amplified two issues for consideration and ultimate determination by the Honourable Court.
25. First and foremost, Learned counsel for the Respondent has submitted that the learned taxing officer applied the correct formula in calculating and awarding the instruction fees in respect of the subject matter. In this regard, Learned counsel has cited and relied on the provisions of Schedule 6 paragraph 1(b) of the *Advocate Remuneration Order*, which prescribes the requisite fees to be charged in respect of a matter where the scale fees has not been expressly stipulated or provided for.
26. In addition, Learned counsel pointed out that the minimum scale fees provided for and chargeable in respect of a matter like the one beforehand was KES 75, 000/= only. However, counsel added that the taxing officer is bestowed with discretion to increase the minimum scale fees, taking into account various factors, inter-alia, the complexity of the work, the importance of a matter and the extent of research, if any.
27. Premised on the foregoing, Learned counsel for the Respondent has thus pointed out that the award of KES 100, 000/= only on account of instruction fees, was reasonable and in accordance with the Advocate Remuneration Order 2014. Consequently it has been stated that there was no error in principle, either as alleged by the Applicant herein or at all.
28. To underscore the manner in which a taxing officer is called upon to exercise his/her discretion in taxing a bill of costs and in particular, in awarding the instruction fees; Leaned counsel for the Respondent has cited and relied on *inter-alia Joreth Ltd v Kigano & associate* [2002]eKLR, *Peter Muthoka & another v Ochieng & 3 Others* [2019]eKLR and *Otieno Ragot & Company Advocates v Kenya Airport Authority* [2021]eKLR, respectively.
29. Secondly, Learned counsel for the Respondent has submitted that the issue of set-off, which has been alluded to by and on behalf of the Applicant does not lie. In this regard, Learned counsel has pointed out that the Applicant's costs, which are pending taxation before the National Environment Tribunal, can only be dealt wit upon taxation by the said tribunal.
30. Furthermore, Learned counsel has submitted that the costs herein relates to and concern the decision of the taxing officer rendered on the 24th February 2023, which awarded costs to the Responded/Client which decision has neither been impugned nor reviewed.
31. Based on the foregoing, Learned counsel for the Respondent has submitted that it is therefore erroneous to contend that the Learned taxing officer ought to have decreed set-off, whereas there is no such claim before the court. In this respect, Learned counsel has added that the question of set-off cannot now be purported to constitute an error on the part of the learned taxing officer.
32. Finally, Learned counsel for the Respondent has submitted that whereas the Honourable court is seized of the requisite Jurisdiction to set aside a certificate of taxation by the taxing officer; and/also to tax the bill afresh, Learned counsel has pointed out that no basis has been placed before the court to warrant the setting aside and variation of the certificate of taxation emanating from the ruling rendered on the January 26, 2023.
33. In support of the foregoing submissions, Learned counsel for the Respondent has invited the court to take cognizance of, inter-alia, the holding of the Honourable court in the case of *Kipkorir, Tito*



Ɖ Kiara Advocates v Deposit Protection Fund Board [2005]eKLR and Evan M Gakuu Ɖ 66 others v National Bank of Kenya Ltd Ɖ 8 others [2018]eKLR, respectively.

Issues for Determination:

34. Having reviewed the Reference vide Chamber summons Application dated the February 9, 2023 and the supporting affidavit thereto and having taken into account the Response thereto and upon considering the written submissions filed on behalf of the Parties, the following issues do arise and are thus worthy of determination;
 - i. Whether the Reference vide chamber summons dated the February 9, 2023 is Legally competent and tenable on the face of rule 11(1) of the Advocates Remuneration order, 2014.
 - ii. Whether the Applicant herein has established and demonstrated improper and inappropriate exercise of discretion by the taxing officer to warrant impeachment of the impugned Certificate of taxation.

Analysis and Determination

Issue Number 1. Whether the Reference vide chamber summons dated the February 9, 2023 is Legally competent and tenable on the face of Rule 11(1) of The Advocates Remuneration order, 2014.

35. It is common ground that the Applicant herein was/is aggrieved and dissatisfied with the ruling and the consequential certificate of taxation issued on the January 26, 2023. In this regard, the Applicant expressed his dissatisfaction and desire to challenge the taxation vide letter dated January 27, 2023.
36. Nevertheless, it is imperative to state and point out that any person, the Applicant not excepted, who is aggrieved and dissatisfied by a certificate of taxation, is first and foremost called upon to issue and serve a notice of objection to taxation, in the manner prescribed and stipulated vide rule 11(1) of the Advocates Remuneration Order, 2014.
37. Instructively, rule 11(1) of the Advocates Remuneration Order stipulates and provides that any person who is desirous to challenge and/or impeach the certificate of taxation, is called upon to issue the requisite notice of objection to taxation pointing out and/or identifying the items of the taxation that are sought to be challenged vide the intended reference.
38. Even though rule 11(1) of the Advocate Remuneration Order does not clearly provide the format and procedure for filing the notice of objection to taxation, it is express and explicit that irrespective of the format/form adopted, the Applicant is obligated to specify and/or identify the items of the taxation that are intended to be challenged.
39. To my mind, whether an Applicant generates a Letter or files the requisite notice of objection to taxation, in the usual form for drafting of pleadings, the common denominator is that same must speak to the impugned items and thereafter seek for provision of reasons for the taxation relating to and in respect of the identified items.
40. Furthermore, it is not lost on the court that the notice of objection to taxation, which is required by dint of rule 11(1) of the Advocates Remuneration Order, is a critical and integral document, which anchors the intended reference. By parity of reasoning, the notice of objection to taxation is the equivalent of a Notice of appeal, which one is expected to lodge before the Court of Appeal as a precursor to the filing of the substantive Record of appeal.



41. In my humble view, the Notice of objection to taxation therefore plays a critical role and forms the basis of Jurisdiction of this Honourable court to entertain and adjudicate upon the intended Reference or the ultimate reference, once same has filed.
42. I have gone to great length and extent in discussing the importance of a Notice of objection to taxation, in line with the provisions of rule 11(1) of the [Advocates Remuneration Order](#), because what the Applicant filed before the court does not amount to a Notice of objection to taxation or at all.
43. For good measure, it is imperative to reproduce the contents of the Letter dated January 27, 2023, which perhaps the Applicant herein believes to be the Notice of objection to taxation.
44. For ease of reference, same is reproduced as hereunder;

“We refer to the above matter where we act for the Applicant.

The Applicant being aggrieved with the ruling delivered by Hon Diana Orago (S/DR) on the January 26, 2023; will raise and object against the said ruling in as far the final total of KES 166, 460/=, as per Section 51 of the [Advocates Act](#), Chapter 16.

Kindly, let us have your reasons for your decision with regards to the above said sum items.

We undertake to pay your requisite charges.

Yours faithfully.

45. Juxtaposing the contents of the letter dated January 27, 2023, whose details have been reproduced herein before, as against the provisions of rule 11(1) of the [Advocate Remuneration Order](#), brings me to the conclusion that the impugned letter does not come close to meeting the ingredients alluded to in the said ruling.
46. Furthermore, it is imperative to note and underscore that the provisions of Rules 11(1) of the [Advocates Remuneration Order](#); are peremptory and mandatory and hence a failure to comply with and/or abide by the said provisions negates and/or militates against the entire reference, if any, filed by the Applicant.
47. In view of the foregoing, it is my humble position that the entire Reference before the court and which is anchored on the basis of the omnibus letter dated the January 27, 2023 is premature, misconceived and stillborn. Consequently, the entire reference is invalid.
48. For good measure, the import and significance of a valid Notice of objection to taxation was underscored by the Court of Appeal in the case of [Machira & Co Advocates versus Arthur K Magugu & Another](#) (2012)eKLR, where the Court of Appeal stated and observed as hereunder;

12. Sub-rule (1) requires the party objecting to give notice in writing within 14 days “of the items of taxation to which he objects.” As the trial judge correctly found, the Respondents notice of August 1, 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.

13. As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for



their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.

14. Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master's decision was received is immaterial and does not avail the Respondents. Under sub-rule (2), time stops running from the date a proper notice is filed, which of course must be within 14 days of taxation, until receipt of the taxing master's reasons for his decision.
49. Additionally, it is important to point out that where the law stipulates and provides for the manner of approaching a court of law, it behooves all and sundry to comply and abide by the provisions of the named law.
50. Further and in any event, the compliance with the provisions of the law is fundamental and thus where there is none compliance, there are instances where such none compliance vitiates and negates the Jurisdiction of the court.
51. In the case of *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR , the Supreme Court of Kenya underscored the importance of complying with statutory provisions which anchor jurisdiction in the following terms;
 - “(65) For the proper conduct of administration of justice, the statutory form is generally employed to confer jurisdiction, prescribe form, substance, process and procedure, governing the administration and dispensation of claims. A statute in this category may prescribe how to formulate a right of action – for instance, by petition, plaint, notice, or originating motion. On procedural aspects, the statute or the rules (as the case may be), may regulate timelines, and other facets of case- management. It may also regulate the confines within which a Court may exercise its adjudicatory powers, by prescribing the category of jurisdictional issues; or questions upon which a Court may make a determination of the case before it. This is the context in which the conduct of proceedings before our Courts is governed by the *Civil Procedure Act*, the Criminal Procedure Code, the *Appellate Jurisdiction Act*, the *Supreme Court Act, 2011* and the Rules made pursuant thereto, and by many other Acts of special character.
52. Notwithstanding the foregoing, the importance of complying with the Rules of procedure and more particularly where the Rules of procedures are intertwined and interwoven with the substance of the case was also discussed by the Supreme Court in the case of *Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR.
53. For coherence, the court held as hereunder;
 - (65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.



54. Premised on the foregoing reasoning, I come to the conclusion that the Reference vide chamber summons Application dated February 9, 2023 is misconceived and invalid. Consequently, on this account alone, the reference ought to be struck out.
55. Before departing from the foregoing issue, it is appropriate to underscore that the question of invalidity of the reference was neither raised nor canvassed by either of the Parties. Nevertheless, being a question of law and which goes to the root of the reference, the Honourable court is called upon to apply the law, irrespective of whether the Jurisdictional question was canvassed by the Parties or otherwise.
56. Accordingly and in this respect, I am reminded of the dictum in the case of *Kenya Ports Authority v Modern Holdings (EA) Ltd* [2017]eKLR, where the court of appeal stated and held as hereunder;

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself

- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

(See *All Progressive Grand Alliance (APGA) v Senator Christiana N.D. Anyanwu & 2 others*, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, *ex nihilo nihil fit* (out of nothing comes nothing).

Issue Number 2; Whether the Applicant herein has established and demonstrated improper and Inappropriate exercise of discretion by the taxing officer to warrant impeachment of the impugned certificate of taxation.

57. The Applicant herein has argued and taken a position that the learned taxing officer failed to properly and/or appropriately exercise her Jurisdiction in the course of taxing the bill of cost filed and lodged by the Respondent/Client. In this regard, the Applicant has contended that as a result of the inappropriate application of the law, the taxing officer has thus arrived at an improper award/final figure.
58. In particular, Learned counsel for the Applicant has submitted that the taxing officer erred in assessing and awarding instruction fees in the sum of KES 100, 000/= only, in favor of the Respondent, whereas Schedule 6 paragraph 1(b) of The Advocates Remuneration Order prescribes the scale fees in the sum of KES 75, 000/= only.
59. Perhaps, it is important to reproduce the aspect of the Applicant’s submissions that alludes to the foregoing position. For ease of reference, the pertinent aspect of the submissions are as hereunder;
- “In essence, very little was done in regard to the pending bill of costs dated the June 28, 2022. The Respondents only filed a preliminary objection. As such, work done was minimal and therefore the minimal basic fees should be KES 75, 000/= only according to the Order”
60. My understanding of the foregoing submissions by Learned counsel for the Applicant brings me to the conclusion that the Applicant herein indeed concedes that the basic and minimum instructions fees ought to be KES 75, 000/= only.



61. First forward, the Applicant is thereafter heard to be complaining that it was erroneous on the part of the Learned taxing officer to increase the instruction fees from KES 75, 000/= only to KES 100, 000/= only. In this respect, the Applicant thus complains that the impugned increase, constitutes an error in the exercise of discretion.
62. Other than the complaint directed to and in respect of the instruction fees, the Applicant herein does not speak to any other improper exercise of discretion by the taxing officer.
63. For clarity, the rest of the submissions by the Applicant relate to the question of set off and the fact that the impugned taxation was undertaken whilst the Applicant's bill of costs before National Environment Tribunal, was still pending.
64. Consequently and in the premises, I take it that the only item wherein the allegation of improper exercise of discretion is being raised relates to and concerns the instruction fees.
65. In view of the foregoing, I must now interrogate whether there was any improper exercise of discretion by the Learned taxing officer, in assessing and awarding instruction fees in the sum of KES 100, 000/= only.
66. To my mind, the Learned taxing officer correctly appreciated and understood that the bill of costs which was before her, related to a dispute for which the value of the subject was not ascertainable or discernable from the pleadings. Further, the Learned taxing officer understood that the instruction fees was informed by the provisions of Schedule 6 Paragraph 1(j) of The Advocate Remuneration Order, which relates to other matters.
67. For good measure, paragraph 1(j) of the *Advocate Remuneration Order 2014* stipulates as hereunder;
- “Other matters
- To sue or defend in any case not provided for above; such sum as may be reasonable but not less than;
- i. If undefended KES 45, 000/=
- ii. If defended KES 75, 000/=
68. Having correctly appreciated the relevant Schedule to be applied and having correctly understood the minimum scale fees, the Learned taxing officer thereafter exercised her discretion by increasing the Instruction Fees by KES 25, 000/=; culminating into a Final award of KES 100, 000/= only.
69. I beg to point out that the Learned taxing officer has clearly demonstrated the basis and/or foundation for increasing the instruction fees. In any event, there is no dispute that the taxing officer is vested with the requisite discretion to increase the Instruction fees, provided however that the increase is reasonable and same is explained.
70. Suffice it to point out that whereas a court of law can very well interfere with the exercise of discretion of the lower court, it must be noted that such interference can only arise where it has been shown and established that the lower court failed to take into account relevant factors; took into account irrelevant factors; committed an error in principle or otherwise arrived at a figure which is inordinately low or high, taking into account the circumstances of the case.



71. To buttress the foregoing position, it is instructive to restate and reiterate the holding of the Court in the case of *Mbogo v Shab* [1968] EA page 93; in which De Lestang VP (as he then was) observed at page 94:

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

It would be wrong for this Court to interfere with the exercise of the trial judge’s discretion merely because this Court’s decision would have been different.

72. In respect of the instant matter, the Applicant was called upon to establish and demonstrate improper exercise of discretion by the taxing officer. Unfortunately, the Applicant has failed to exhibit any scintilla of improper exercise of discretion on the part of the taxing officer.

73. To the contrary, I have examined the ruling of the taxing officer, which is challenged by the Applicant herein and I come to the conclusion that the taxing officer properly understood and exercising her discretion in assessing and awarding the instruction fees. For clarity, the Learned taxing officer correctly understood the starting point to be the minimum scale fees stipulated by the *Advocate Remuneration Order* prior to and before exercising her discretion in adjusting same.

74. Instructively, the manner in which the Learned taxing officer assessed the instruction fees accords with the dictum of the Court of Appeal in the case of *Peter Muthoka & Another v Ochieng & 3 others* [2019]eKLR, where the court succinctly observed and held as hereunder;

“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.”

75. In my humble view, the Learned taxing officer exercised her discretion properly and in accordance with the prescription of the *Advocate Remuneration Order 2014*. Consequently and in this respect, I do not find any iota of improper exercise of discretion.

76. Inevitably, I come to the conclusion that the complaints by the Applicants that there was an improper and/ or inappropriate exercise of discretion by the taxing officer is neither grounded nor legally tenable.

77. In short, Same are similarly bereft of merits.



Final Disposition

78. Having discussed the two issues that were highlighted in the body of the Ruling, it must have become apparent and evident that the subject Reference constitute an affront to the provisions of rule 11(1) of the [Advocates Remuneration Order](#).
79. Consequently and despite venturing to address the merits of the complaints ventilated by the Applicants; I am of the considered view that the entire Reference before the Honourable court is premature, misconceived and invalid.
80. In this regard, the Chamber Summons Application dated February 9, 2023 be and is hereby struck out.
81. Instructively, the import and tenor of rule 11(1) of the [Advocates Remuneration Order](#), which has colored the Ruling herein was neither raised nor canvassed by either of the Parties. For good measure, it was raised by the court and not otherwise.
82. In view of the foregoing and taking into account the Provisions of Section 27 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya, the order that commends itself to me on the question of costs is that either Party shall bear own costs of the reference.
83. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant

Ms. Naazi h/b for Mr. Kithi for the Applicant..

Ms. Faith Mbirwe for the Respondents/Clients

