Pineapples Edge Limited v Kipkenei & Co Advocates (Miscellaneous Application 010 of 2024) [2025] KEELC 1412 (KLR) (Environment and Land) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1412 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

MISCELLANEOUS APPLICATION 010 OF 2024

MC OUNDO, J

MARCH 20, 2025

BETWEEN

PINEAPPLES EDGE LIMITED .... APPLICANT

AND

KIPKENEI & CO ADVOCATES .... RESPONDENT

RULING

1. Vide a Chamber Summons dated 19th September, 2024 brought pursuant to the provisions of Rule 11(1) and (2) of the Advocates Remuneration Order, Cap 16 and Sections 3A and 63 (e) of the *Civil Procedure Act* and all other enabling provisions, the Applicant herein has sought for the following orders:

   i. That the Honourable Court be pleased to set aside the Learned Deputy Registrar/Taxing Master's decision delivered on 5th September, 2024 with respect to the Respondent's Bill of Costs dated 19th October, 2023.

   ii. That the Honorable Court be pleased to exercise its discretion to tax the Bill of Costs dated 19th October, 2023 afresh and also determine whether there existed an advocate-client relationship between the Applicant and the Respondent.

   iii. That in the alternative to (ii) above, the court be pleased to refer the Respondent's Bill of Costs dated 19th October, 2023, for fresh taxation before a different Taxing Master with suitable directions.

   iv. That the court be pleased to grant any other relief that it may deem necessary to secure the ends of justice.

   v. That the costs of the Application be provided for.

2. The said application was based on the grounds therein as well as on the Supporting Affidavit of equal date sworn by Hellen Kimooi Kiplagat, the Applicant's director who deponed that they were disputing the Advocate-Client Bill of Costs dated 19th October 2023 filed by the Respondent wherein in a ruling of 5th September, 2024 the Taxing Master had made a finding that the 2nd, 3rd and 4th Applicants in the Notice of Motion dated 15th November, 2023 had been separate and different from the Applicant Company herein and consequently they had been struck out as parties in the proceedings. That the Deputy Registrar had thus partially allowed the Notice of Motion dated 15th November, 2023 but had declined to make a finding that there had been no advocate-client relationship between the Applicant herein and the Respondent and had proceeded to tax the bill against the Applicant at Kshs. 27,846,050/=.

3. That being dissatisfied with the said decision, the Applicant's advocate on record had issued a Notice of Objection to the Taxing Master vide a letter dated 10th September, 2024.

4. The Applicant's contention was that the Taxing Master had erred by making a finding that there had been an advocate-client relationship between the Applicant and the Respondent. Secondly, that the Taxing Master had also erred in awarding sums in the absence of supporting documents. That further, the Taxing Master had erred by awarding excessive amounts in items 1 and 9 in the Respondent's Bill of Costs. That the Taxing Master had misdirected himself by taxing the items 19-34 using the higher scale, and lastly that he had also misdirected himself by taxing the items 35-55 of the Bill of Costs without considering the number of folios. That the Taxing Master's decision had been based on the wrong principles.

5. In response and in opposition to the Applicant's application, the Respondent through his Replying Affidavit dated 24th September 2024 and sworn by Raymond Kiprop Kipkenei deponed that whereas each party had been granted an opportunity by the Deputy Registrar to submit on both issues of retainer as well as taxation of the bill, the Applicant had chosen to dwell on the issue of retainer while ignoring to give her opinion on the Bill. That subsequently, she could not turn around and seek to set aside the taxed costs.

6. He deponed that the Applicant had instructed him to defend the company via Nakuru ELC Case No. 37 of 2022 and Nakuru ELC 38 of 2022 in EACC v Pineapples Edge Limited & 3 Others which two files were later consolidated. That the Applicant had then taken away her file from his office hence he was entitled to legal fees on both files. That the Applicant was out to buy time hence she should be ordered to pay him half of the taxed costs so that she can take her time to ventilate her issues.

7. That in any case, the Applicant had to date not expunged his pleadings from the court record. That the Deputy Registrar had not committed any error in fact or in law to warrant the setting aside of the taxation or to warrant a reference of the taxation to a different Taxing Officer. That the Applicant having not stated the amount that she was willing to pay, had no intention of paying him unless compelled by the Honorable Court. That there had been no legal basis to set aside the bill of costs.

8. Directions were issued for the Application to be canvassed by way of written submissions wherein only the Applicant complied and framed two issues for determination as follows:

    i. Whether the Deputy Registrar erred in finding that there existed an advocate-client relationship between the Respondent and the Applicant.

    ii. Whether the Deputy Registrar made an error of Principle by taxing items 1, 9, items 19-34 and items 35-55 as he did.

9. On the first issue for determination as to whether the Deputy Registrar had erred in finding that there had existed an advocate-client relationship between the Applicant and the Respondent, the Applicant's response was in the affirmative wherein reliance was placed in the Court of Appeal's decision in the case of Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] eKLR. That whereas the Respondent had alleged that the Applicant had given him instructions to defend the suit, he did not annex either a letter or any form of communication giving him the instruction. That the Respondent had only attached as his exhibits the Memorandum of Appearance, Notice of Preliminary Objection, Letters to the Applicants and email correspondences which did not give any evidence of receipt of instructions from the Applicant. It was thus its submission that theTaxing Master, in delivering his ruling, did not take into consideration the fact that it was clear from the correspondence annexed by the Advocate that the client did not understand that the proceedings subject to the instant bill of costs had been new proceedings that had been filed in the year 2022 but had been under the impression that the Advocate was handling an old dispute going back to the 90's over the property. That subsequently, the Taxing Master did not correctly interpret the Advocate's annexure RKK 6 in the Replying Affidavit dated 11th January 2024.

10. That further, whereas the Respondent had alleged that there had been telephone communications and meetings with the Applicant, no evidence had been annexed depicting the kind of discussion that had been held. That there had been no call logs, minutes or letters following up on those meetings. That accordingly, the Respondent did not provide clear evidence to substantiate his allegations that the Applicant had instructed him to act on its behalf. It placed reliance on the provisions of Section 107 of the *Evidence Act* and the decided case of Mereka & Company Advocates v Zekhem Construction (Kenya) [2014] eKLR to submit that when the question of instructions was contested, the burden of proving that an Advocate had instructions fell squarely on such Advocate, which burden the Respondent did not discharge. That subsequently, the Taxing Master had no requisite jurisdiction to tax the Bill of Costs on the basis that the Respondent did not have instructions.

11. On the second issue for determination as to whether the Deputy Registrar made an error of principle by taxing items 1, 9, 19-34 and items 35-55 as he had done, the Applicant submitted that the instruction fee (item 1) taxed at Kshs. 20,832,375/= was unreasonably high wherein the Taxing Master had failed to consider and contextualize the work that had been done by the Advocate. That the said instruction fee as had been awarded by the Honorable Taxing Officer had been manifestly excessive and had served to unjustly enrich the Respondent especially considering how the proceedings had been conducted. That the Respondent had only drawn a Memorandum of Appearance, a preliminary objection and a defence which was 3 folios as he had stated in his Bill of Costs. That indeed, the Deputy Registrar had in paragraph 63 of his ruling noted that the suit had been an everyday suit which had been very straightforward with nothing complex to be determined.

12. That however, despite indicating so, the Deputy Registrar had committed an error of principle by making his taxation a mere mathematical exercise by solely relying on a valuation dated 30th November 2021 as his basis of instruction fees and failing to consider the amount of work that had been done. Its reliance was hinged in the Supreme Court's decision in the case of Kenya Airports Authority v Otieno Ragot & Company Advocates [2024] KESC 44 (KLR) to submit that by only relying on a valuation report as the basis of the instruction fees, the Taxing Master had failed to apply his discretion correctly. Further reliance was placed in the decided case of Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR.

13. The Applicant further submitted that the Taxing Master had committed an error of principle by not considering the work that had been done by the Respondent so as to assess what would have been reasonable compensation for the work. That in fact, the matter did not substantially take off nor did

the Respondent carry out any complex work to warrant the high instruction fees. That further, the valuation report which the Respondent had relied on had not been filed by the said Respondent as a document in support of the Bill of Costs. That resultantly, the Deputy Registrar had delved into the arena of parties by going beyond what was in the file before him, to examine the valuation report which was allegedly contained in the parent file.

14. With regard to the getting up fees under item 9, Schedule 6A (2) of the Advocates Remuneration Order was clear that such fee was payable after establishing that an Advocate had prepared the case for trial or that the case had been confirmed for hearing. The Respondent herein did not provide evidence to indicate that he had taken steps to prepare the suit for hearing or that the matter had been set down for hearing. That subsequently, the Advocate was not entitled to the sum of Kshs. 6,944,125/= as getting up fees and the same should be set aside. Reliance was placed in a combination of decisions in the case of Kenya Commercial Bank Limited v Stagecoach Management Limited [2017] KEHC 7336 (KLR) and Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd [2014] KEHC 5481 (KLR).

15. That there having been no evidence that the case had been prepared for trial or had been confirmed for hearing, the Deputy Registrar had committed an error of principle by awarding Kshs. 6,944,125/= as getting up fees as the same ought to have not been allowed in its entirety.

16. On items 19-34, it submitted that whereas there had been no express order directing that the higher scale was applicable, the Deputy Registrar had taxed the said items using the higher scale. Its reliance was placed on the provisions of paragraphs 50 and 50A of the Advocates Remuneration Order, 2014 to submit that the Taxing Master had made an error of principle by applying the higher scale without an order being made under Paragraph 50A directing that the taxation be based on the higher scale. That further, all the court attendances had been mentions and no evidence had been provided to show that the Respondent had spent half a day in court for the said mentions. That additionally, there had been no proof of the costs that had been incurred in attending, filing and service of documents that had been adduced. The Applicant sought that the said items be taxed afresh, and the attendances be taxed at Kshs. 1,100/=, service at Kshs. 1,400/= while attending court to file documents be taxed at Kshs. 500/=.

17. Regarding items 35-55, the Applicant reiterated that the said documents had not been filed by the Respondent as part of the documents to be relied on during the taxation proceedings thus the Applicant would not have an opportunity to examine the same and ascertain the number of folios for purposes of the submissions in opposition to the Bill of Costs. That nevertheless, the Taxing Master in his ruling, taxed the said items as drawn by the Advocate on the basis that the evidence of the documents had been available in the parent file. It was its submission that the same had been an error of principle as the Applicant had been denied an opportunity to examine the said documents and make its submissions. That the position that had been adopted had been extremely prejudicial to the Applicant especially since the Taxing Master had powers to direct that the documents be filed for the sake of fairness.

18. The Applicant relied on the provisions of Paragraph 13A of the Advocates Remuneration Order to submit that the power donated by the said provision was not a carte blanche for introduction of unsanctioned, wild and irregular evidence outside the known rules of evidence since it was a must that introduction of such evidence ought to be formal and follow due process of the law. That subsequently, the Taxing Master had erred in failing to exercise his discretion to direct the Respondent to file the documents that had been relied on in drawing items 35-55 so to enable the Applicant effectively submit on the same. It was thus its submission that the Taxing Master should have only dealt with what had been presented on record before him and not to examine the court file in determining the number of folios.

19. In conclusion, the Applicant submitted that the Taxing Master committed fundamental errors of principle that had resulted in a manifestly unjust decision. That without clear evidence of instruction, the Taxing Master lacked the jurisdiction to proceed with taxation and that any taxation conducted devoid of the said jurisdiction was a nullity and could not stand.

20. The Applicant thus urged the Court to allow the instant Application to avoid a grave miscarriage of justice and offend the principles of fairness.

Determination.

21. I have considered the Application, the response in opposition, the submissions, as well as the authorities herein cited by the Applicant. The Applicant, for reasons herein above stated, seeks to set aside the decision of the Taxing Master in the Advocate Client Bill of Costs dated 19th October 2023 so that the same can be taxed afresh. The application was opposed on the basis of the above captioned grounds.

22. By consent, parties took directions to dispose of the application through the filing of written submissions wherein the court acquiesced and directed that the application be canvassed by way of written submissions but only the Applicant complied.

23. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that the Respondent having failed to file its submissions as ordered by the court is deemed as a party who has failed to defend the application and therefor the application as it stands is undefended. The filing of submissions having been ordered by consent, the failure by the Respondent to exercise the leave granted to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on its part in the prosecution of the matter and although I am minded to grant the prayers sought yet every undefended application has to be considered on its merit.

24. I thus find the issue arising for determination as being: -

    i. Whether there existed an advocate client relationship.

    ii. Whether the Taxing Officer had committed any errors of principle while taxing the bill of costs.

25. On the first issue for determination as to whether or not there existed an advocate client relationship, I find that the Taxing Master in his ruling of 5th September 2024 rightly found that the starting point to tax a bill of costs was to first ascertain whether he had jurisdiction to do so after the issue of want of advocate/client relationship had been raised because absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill. Upon considering the authorities therein cited visa vie the correspondence between the Applicant and the Respondent, the Taxing Master had found that indeed such relationship existed.

26. I have considered the course of dealings between the parties as demonstrated by the correspondence herein annexed wherein the Respondent entered the appearance on 6th July 2022 for the Applicant who was the 1st Defendant in Nakuru ELC 37 of 2022 and Nakuru ELC 38 of 2022 wherein the firm had filed a Notice of Preliminary objection stating that the suit against the 1st Defendant was statutory bad and should be struck out with costs. Subsequently the preliminary objection in Nakuru ELC 37 of 2022 was heard and the ruling delivered on 16th February, 2023 dismissing the same as being

misconceived. It is also not in dispute that vide an email dated the 18th October 2022, the Applicant's Chair lady one Hellen Kiplagat had written an e-mail to the Respondent in the following terms:

> ''Good afternoon Mr Kipkenei:
>
> I would Iike to introduce you to MG Law Advocates Lawyer Mr Gideon Muturi and Lawyer Mr. Brian Moaou.
>
> They have both been briefed on the cases between EACC VS Pineaple Edge Limited which has been going on for several years.
>
> I would like you to work with them in this case so that they understand the full case between the two parties.
>
> Working with them I believe will enable us to be more understanding of the case as it has taken too long and I would like to close this matter in the soonest time possible.
>
> Please send the files to them to go through it before the next court mention."

27. The Respondent via a letter dated 18th October 2022 informed the Applicant's Chairman of the receipt of the e-mail and also advised them on the date scheduled for the above caption ruling. From the Memorandum of appearance filed, the Notice of Objection as well as the email correspondences between the parties, it can clearly be implied that the Applicant was agreeable to the process and the steps taken by the Respondent in representing it and therefore it would be superfluous for the Applicant to now claim that it did not instruct the Respondent to act on its behalf.

28. It is trite that an Advocate need not obtain a written authority from the client before he commences a matter for the participation and authority of an Advocate in a matter can be implied or discerned from the conduct of the client.

29. The Black's Law dictionary, 9th Edition defined a retainer as:

    1. A client's authorization for a lawyer to act in a case.
    2. A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter.
    3. A lump sum fee paid by the client to engage a lawyer at the outset of a matter- also termed engagement fee.
    4. An advance payment of fees for work that the lawyer will perform in the future- also termed retaining fee."

30. In Halsbury's Laws of England, (supra) at page 13 para 763; the concept is also defined thus:-

> " The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment......"

31. The court of Appeal in Omulele & Tollo Advocates v Mount Holdings Limited [2016] KECA 523 (KLR) held as follows;-

> ''......'retainer' covers a broad spectrum. It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties. However, if there is no evidence of retainer, except a statement from the advocate, which a client contradicts, the court will

treat the advocate as having acted without authority from the client (see. Halsbury's Laws of England, (supra) at page 14 para 765)."

32. Further in Ochieng' Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited [2007] KEHC 2677 (KLR) (Persuasive), Warsame J, as he then was had held as follows:

> " ...The act of authorizing an Advocate to act on behalf of a client constitutes the Advocate's retainer by the client. It is not the law that an Advocate must obtain a written authority from the client before he commences a matter. The participation and authority of an Advocate in a matter can be implied or discerned from the conduct of the client.
>
> In my view retainer is no more than an authority given to an Advocate to act in a particular matter and manner. It may be restrictive; it may be wide. And nevertheless it can be implied from the conduct of the client/Advocate relationship. The bank recognized the Respondent was brought on board and on their behalf to salvage a delicate situation, which the earlier Advocate thought may not succeed. That is a recognition that the agent acted for them in their best interest. The act by M/S Mohamed Madhani & co. Advocates to appoint the Respondent to act on behalf of the bank though initially without authority becomes the act of the principal when the bank subsequently ratified that decision."

33. This said and done, I find that there is well supported evidence of an advocate client relationship between the parties herein and I am unable to fault the conclusion reached by the Taxing Master of the existence of such relationship and the Applicant is estopped from denying that it did instruct the Respondent to act on its behalf. Once the extent of the Advocates' instruction was clear and (s)he undertook steps in furtherance of those instructions, (s)he would have earned some instruction fee.

34. On the second issue for determination, Rule 11 of the Advocates Remuneration Order provides as follows: object

    1. Should any party object to the decision of the Taxing Officer, he may within fourteen days after the decision give notice in writing to the Taxing Officer of the items of taxation to which he objects.

    2. The Taxing Officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

    3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

    4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) far the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

35. Pursuant to the provisions of Paragraph 11 of the Advocates Remuneration, I note that being aggrieved by the decision of the Taxing Master in his ruling dated 5th September 2024, the Applicant objected to the same vide a Notice of Objection dated 10th September, 2024 which was therefore within the prescribed period of fourteen days.

36. It was held in the decided case in Paul Imison & Another vs Jodad Investments Limited [2014] eKLR, the Applicant could pursue the Reference but with regard to only those items which it had given notification in writing that it was objecting to and no more. In the instant case The applicant vide the notice of objection to the taxing officer objected to items 1, 9, 19-34 and 35-55.

37. I note from the impugned ruling that the Taxing Master had given his reasons for his decision on the items therein objected to.

38. The often cited case of First American Bank of Kenya vs. Shah & Others [2002] 1 EA 64 sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can interfere with the Taxing Master's exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162 and Arthur vs Nyeri Electricity Undertaking [1961] E.A 492. The said principles were also re-affirmed by the Court of Appeal in Joreth Limited vs Kigano and Associates [2002] 1 E.A 92. These principles include

    i. that the Court cannot interfere with the Taxing Master's discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;

    ii. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

    iii. if the Court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

    iv. it is within the discretion of the Taxing Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary."

39. From the above stated, it can be discerned that there is thus a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low so as to lead to an injustice.

40. The Plaintiff brought this suit in respect of loss suffered by the Government of Kenya on the allegations of irregular and/or illegal alienation and allocation of Naivasha Municipality Block 5/289 (the suit property) which property was at all material times planned and set aside for use as public utility reserved for KALRO (Kenya Agricultural and Livestock Research Organization), previously KARI (Kenya Agricultural Research Institute) for purposes of livestock research.

41. In the case of Joreth Limited case (supra)the Court of Appeal had held that the value of the subject matter 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/her discretion to assess such instruction fee as (s)he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings.

42. In the instant case, Taxing Master took into consideration the value of the subject matter, the importance of the matter, the general conduct of the parties, the time research and skill expanded in

brief and how far the matter had proceeded as well as the length of time the Respondent had acted for his clients wherein he had taxed item No. 1 at Ksh 20,832,375/=. The Applicants failed to demonstrate that the calculation of instruction fees was erroneous and was not based on any discretionary powers vested on the Taxing Master.

43. I thus find that there was nothing to show that the amount allowed by the Taxing Master on the instruction fees was not within the scale fees. The Taxing Master used his discretion to award the instruction fees and I will not fault him.

44. On item No 9 which was the getting up fee, based on the provision of the law under Schedule 6 paragraph 2 of the Advocates Remuneration Order, 2014 under sub heading of "fees for getting up or preparing for trial" provides that:

> 'In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that —

i. ....

ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned.......'

45. It is clear that no fee is chargeable for getting up and preparing for trial until the case is confirmed for hearing and where the case is not heard, the taxing officer must be satisfied that the case has been prepared for trial. In the instant case, there is no doubt that the Respondent filed a Preliminary Objection to the suit wherein the same had been heard and a ruling subsequently delivered. There is no compelling reason to justify any interference on this item either as in the instant case the matter did not proceed for hearing and therefore the getting up fee being $^{1}/3$ of the instruction fee, was in order.

46. On items 19-34 and 35-55 I find that the same had been drawn to scale for which I am not satisfied that I ought to interfere with Taxing Master's discretion on taxation as the decision made was not based on an error of principle and the fee awarded was not manifestly excessive. In the end, I find no merit in this reference and proceed to dismiss the same with cost.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 20TH DAY OF MARCH 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE