



**M’Mbiwiwe (Being the legal representative of the Estate of Gilbert Kabeere  
M’Mbiwiwe – Deceased) & another v Muthee & 7 others (Miscellaneous  
Application 26 of 2023) [2024] KEELC 740 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 740 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
MISCELLANEOUS APPLICATION 26 OF 2023  
CK NZILI, J  
FEBRUARY 14, 2024**

**BETWEEN**

**KINYUA M’MBIJIWE (BEING THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF GILBERT KABEERE M’MBIJIWE – DECEASED) ... 1<sup>ST</sup> APPLICANT  
NASIR MUNENE (BEING THE LEGAL REPRESENTATIVE OF THE ESTATE  
OF GILBERT ZAKAYO M’MIGWI – DECEASED) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FRANCIS MUTHEE ..... 1<sup>ST</sup> RESPONDENT  
M’KAUMBUTHO KAUMBUTHO ..... 2<sup>ND</sup> RESPONDENT  
MWANJALU MAORE ..... 3<sup>RD</sup> RESPONDENT  
MUTHAURA MUROE ..... 4<sup>TH</sup> RESPONDENT  
THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER –  
IGEMBE ..... 5<sup>TH</sup> RESPONDENT  
THE COMMISSIONER FOR LANDS ..... 6<sup>TH</sup> RESPONDENT  
THE MINISTER FOR LANDS ..... 7<sup>TH</sup> RESPONDENT  
THE HON ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

**RULING**

1. On 19.12.2023, the applicants made a reference to this court by way of a chamber summons under Rule 11 of the Advocates Remuneration Order of the *Advocates Act*. In the said reference, the court is asked to set aside a ruling or order dated 17.12.2023 on the taxation of the respondent's Bill of Costs



- dated 30.8.2023 in Meru E.L.C. Petition No. 25 of 2012. Upon setting aside, the court is asked to re-tax the bill.
2. The applicants aver the taxed Bill was wrongly and erroneously assessed at Kshs.148,700,000/=, contrary to the facts, circumstances, and the nature of the petition.
  3. In the supporting affidavit of Kinyua M'Mbijiwe sworn on 15.12.2023, it is deposed that the court dismissed their petition and an application for an amendment on 11.5.2022. A bill of costs was filed dated 30.8.2022, to which they filed an objection. Subsequently, a ruling was delivered on 11.12.2023. The applicants averred that after the ruling, they filed a notice of objection dated 15.12.2023.
  4. The application was opposed through grounds of opposition, a preliminary objection dated 19.12.2023 and 21.12.2023 by the 1<sup>st</sup> – 5<sup>th</sup> respondents. Regarding the grounds of opposition, the 1st-5<sup>th</sup> respondents state the taxing masters' ruling was well-reasoned and guided by the law and principles on taxation; he discerned the value of the subject matter as per the applicant pleadings; the instructions fees are earned the moment the brief is accepted and pleadings filed and are not affected by the state at which the proceedings are terminated; the figures arrived at were properly guided by the law hence the reference was without merit.
  5. The 1<sup>st</sup> – 5<sup>th</sup> respondents' preliminary objection was that:
    - i. No notice was given under Rule 11 of the Advocate's Remuneration Order.
    - ii. No reasons were sought and given by the taxing officer under Rule 11 thereof, and lastly, that the chamber summons was premature and incompetent.
  6. When this application came for hearing on 25.1.2024, Mr. Murango Mwenda learned counsel for the 1<sup>st</sup> – 5<sup>th</sup> respondents argued the preliminary objection that the chamber summons was premature and incompetent for Rule 11 of the Advocate's Remuneration Order requires a party objecting to a taxed bill of costs to within 14 days of the date of taxation to give a notice in writing to the taxing master of his intention to object to the High Court.
  7. Further counsel submitted that the aggrieved party must indicate the items he was objecting to, after which the taxing master would give his reason for the taxed items. Counsel submitted it was only after the reasons are given that a party can file a reference at the High Court within 14 days of issuance of the reasons.
  8. In the instant reference, counsel submitted that no such notice was given by the applicant, listing the item objected to. Counsel submitted that Sub-Rule 4 of Rule 11 underscores the importance of the notice, which would be cured through an enlargement of time. Counsel relied on *Mundusi Investment Limited vs Patrick Kimathi M'Mugambi & another*, Meru H.C Misc Civil Application No. E082 of 2023.
  9. Rising to oppose the preliminary objection, Mr. Muia Mwanzia, learned counsel for the applicants, termed the preliminary objection as misplaced and unfounded in law, since the applicants had fully complied with Rule 11 of the Advocates Remuneration Order as read together with Section 48 of the *Advocates Act* since on 15.12.2023, a notice was filed and on the said notice sought for the reasons for Item No. (1) of the bill of costs. Counsel submitted the notice was attached as annexure K.M. "7" to the reference.
  10. Counsel submitted the Deputy Registrar received the notice and at the bottom of it made some comments saying the reference be made within 14 days. The applicants, therefore, submitted they were properly before the court in view of the Deputy Registrar's remarks.



11. In response, Mr. Murango Mwenda learned counsel for the 1<sup>st</sup> – 5<sup>th</sup> respondents submitted that the documents served upon his clients did not contain annexure marked K.M. "7" and, therefore, the applicants could not rely on documents not correctly served to the parties.
12. Rule 11 of the Advocates Remuneration Order provides a detailed procedure of objecting to taxation of costs. The taxing master, upon receipt of an objection under Sub-rule (2), shall forthwith record and forward to the objector the reasons for his decision on those items, and the objector may within 14 days from the receipt of the reasons apply to a judge by chamber summons, setting out the grounds of the objection.
13. In *Kipkorir Titoo & Kihara Advocates v Deposit Protection Fund Board* [2005] eKLR, the Court of Appeal said that where a taxing master fails to record any reason and to forward them to the objector, then that would be a good ground for a reference and the absence of such reasons in itself would not preclude the objector from filing a competent reference. In *Ahmednasir Abdikadir & Co. Advocate v National Bank of Kenya (2)* [2006] 1 E. A Ochieng J, as he then was held where reasons for the taxation are contained on the ruling there would be no need to seek for further reasons. The court said a reference filed way out of the period should be dismissed. In *Evans Thiga Gaturu v KCB* [2012] eKLR, Odunga J, as he then was, held that it would be foolhardy to expect a taxing officer to redraft another ruling containing the reasons in order to comply with Rule 11 (2) of the Advocates Remuneration Order. Further, in *Twiga Motor Ltd v Hon. Dalmus Otieno Onyango* (2015) eKLR, the court said the limits of Rule 11 of the Advocates Remunerations Order must be adhered to; otherwise, the application would remain incompetent.
14. In *Otieno Ragot & Co. Advocates v Kenya Airports Authority* [2021] eKLR, which was cited with approval in *Kipkorir Titoo and Kiara advocates* (supra), that a judge will not usually interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. The court also cited *Mbogo and another v Shah* [1968] E. A 15 that an appellate court will not interfere with the exercise of discretion by the trial court unless it was manifest from the case as a whole that the court was clearly wrong in the exercise of judicial discretion and that; as a result, there was mis-justice. On the subject matter, the court cited with approval *Joreth Ltd v Kigano and Associates* [2002] 1 E. A 92 that the value of a subject matter of a suit for purposes of taxation ought to be determined from the pleadings, judgment, or settlement, and if the same was not ascertainable, the taxing officer must consider what was just, taking into account the nature and importance of the cause or the matter, the interest of the parties, general conduct of the proceedings and all other relevant circumstances.
15. Applying the preceding case law to both the preliminary objection, grounds of opposition, and the application before the court, what is not disputed is that a reasoned ruling on the taxation of the bill was delivered on 11.12.2023. The applicants object to Item No. (1), the instructions fees saying it should not have been based on the pleadings. Counsel relied on *Mahansons Food Distribution Ltd & another v. Kenya Commercial Bank* [2021] eKLR and *Peter Muthoka & another v Ochieng & others* [2019] eKLR.
16. The applicants insist that since the petition was determined by way of a ruling, the bill of costs cannot be based on pleadings; counsel submitted that from the ruling, the value of the subject matter was not discernible and, therefore, the court should use its discretion to assess what was just since the matter did not go to full trial, but was only dismissed due to effluxion of time upon the death of the petitioners. Counsel submitted on item No. 1 that Kshs.100,000/= would be enough in line with Schedule V1 (2) (iii) of the Advocates Remuneration Order 2009. As to item No's. 3 to 52 of the bill counsels submitted it could be allowed subject to confirmation of the attendance.



17. The applicants take the view that they substantially complied with the law by filing a notice of objection dated 15.12.2023, which was received by the taxing master on the same day who directed the reference to be filled within the requisite period. The notice of objection attached a K.M. "7" which bears the stamp of the Deputy Registrar and her signature. There are some directives for the filing of the reference on the face of the notice.
18. From the case law cited, courts have had varied views on whether there is a need for further reasons if the ruling contains sufficient reasons. In the instant case, the applicants substantially complied with Rule 11 of the Advocate Remuneration Order by filing the notice of objection after receiving a go-ahead from the Deputy Registrar to file the reference. I find the preliminary objection misguided.
19. As to the merits of the reference, the 1<sup>st</sup>-5<sup>th</sup> respondents oppose it that the law and principles of taxation were duly considered by the taxing master, the value of the subject matter was pleaded and prayed for, and that instructions fees are earned during pleadings and not at the termination of the proceedings.
20. The applicants think otherwise and insist that the pleadings should not have been the only guide to the taxing master. Reliance was placed on Peter Muthoka & another vs Ochieng (supra). In that case, there was a settlement deed dated 7.2.2014. The court said it was only where the value of the subject matter was neither discernible nor determinable from the pleadings, the judgment, or the settlement that the taxing master was permitted to use his discretion to assess instruction fees in accordance with what he considered just, bearing in mind the various elements either the pleadings, the judgments or settlement. The court said it was not open for the taxing master to choose one or the other or to use them in combination.
21. What was before the court was the petition dated 29.12.2012 by the Antuame Mugaa clan, claiming 3,300 acres of land situated in Kinanduba location Igembe North district, otherwise known as Kinanduba Downs Ranching Land. The applicants were praying for declaratory orders that the respondent's actions of adjudication excising or alienating of their land as unconstitutional and illegal. They sought for issuance of a title deed by the 6<sup>th</sup> – 9<sup>th</sup> respondents and or in the alternative compensation of land valued at Kshs.9,900,000,000/=.
22. All this information was included on pages 6-7 of the ruling by the court. The court made a finding that the petition had abated after leave was not sought to revive or substitute the deceased petitioners within a year.
23. For the applicants to submit that the subject matter value was not discernable from the pleadings and or in the ruling dismissing the petition is not only misleading but lacking merits. Parties are bound by their pleadings. Kshs.100,000/= is the minimum instruction fee under paragraph 1 (J) (1) of Schedule 6 on constitutional petitions. It can be increased based on factors as held in Joreth Ltd vs. Kigano & Associates (supra), that the value of the subject matter of a suit for purposes of taxation ought to be determined from the pleadings judgment or settlement. The court said it was only where the value was not discernable that a taxing master might use his discretion on what he considered just, taking into account the nature and importance of the matter or cause, the interest of parties, and the general conduct of the proceedings.
24. In the ruling dated 11.12.2023, the taxing master relied on Schedule 6A of the Advocates Remuneration Order 2014, as regards instruction fees for constitutional petitions. The taxing master also relied on Kenyariri Associates Advocate vs Salama Beach Hotel Ltd and others (2015) eKLR on public law litigation as per Schedule VI (1) J.
25. The taxing master looked at paragraphs 10 and 24 of the petition. Further, the taxing master relied on Joreth Ltd vs Kigano & Associates (supra), to discount the submissions by the applicants that



- the subject value should be on the pleadings and not the ruling dismissing the petition. According to the taxing master, the value of the subject matter was discernable from the pleadings. The taxing master found the decision of *Joreth Ltd vs Kigano & Associates* (supra) more authoritative compared to *Mahansons Ford Distributors Ltd vs. Kenya Commercial Bank & Another* (supra) and *Lalji Mehji Patel & Co. Ltd vs PCEA Foundation & another* [2020] eKLR. Under paragraph J thereof, the taxing master may consider such factors as its nature, importance, complexity, difficulty, novelty of the questions raised, amount or value of the subject matter, and the time expended by the advocates.
26. In *Premchand Raichand Ltd v Quarry Services of E.A Ltd* [1973] E. A 162, the court said the taxation of costs was not a mathematic exercise but a matter of opinion based on experience, and a court will not merely interfere except if it was too high or so low as to amount to an injustice to one party or the other. In *Peter Muthoka & another vs Ochieng & others* (supra), the court said, citing *James Arthur v Nyeri Electricity Undertaking* [1961]EA92, that on quantum, it will only interfere in taxing master discretion in exceptional circumstances.
  27. In *First American Bank of (K) vs. Shah & others* (2002) E.ALB 64 as cited in *Lubulellah & Associates vs M.K Brothers Ltd & others* (2004) eKLR, the court said it could not interfere with the taxation officers' decision unless it was shown it was either based on an error of principle or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.
  28. In *Peter Muthoka & another vs Ochieng* (supra), the court said it must be shown there was misdirection of some matter, misapplication of settled principles, misapplication of discretion, and mis-justice. In *Republic vs Ministry of Agriculture & 2 others ex parte Samuel Muchiri W. Njuguna and others* (2006) eKLR, the court said taxation of costs was a judicial function to be conducted regularly on the basis of rational criteria which are clearly expressed such as the forensic responsibility placed on counsel, the novelty of the matter industry required if it was time-consuming and the documentation involved.
  29. In *Kagwimi Kangethe & Co. Advocates v Olerai Nurseries Ltd* [2009] eKLR, the court said one of the errors of principle is where costs allowed were so manifestly excessive as to justify an inference that the taxing master acted on wrong principles. In *Kenyariri and Associates Advocates vs Salama Beach Hotel Ltd & others* (supra), the court said taxation in constitutional petition falls under Schedule vi (1) (f). See *Muri Mwaniki & Wamiti Advocates v African Banking Corporation Ltd* [2020] eKLR and *Wambugu Mutende and Associates v Kajuju Holdings Ltd & 5 others* [2014] eKLR.
  30. In *Republic vs Ministry of Agriculture ex parte Muchiri W. Njuguna* (supra), Ojwang J, as he then was, observed that taxation of costs was more or less than reasonable compensation for professional work done; the taxation should avoid any prospect of unjust enrichment for any particular party, objectivity should be applied and where counsel deploys novelty, time spent, research done and skill the pertinent details must be summarized.
  31. In *Premchand Raichand Ltd vs. Quarry Services of E. A Ltd* (supra), the court observed that costs should not be allowed to rise to a level as to confine access to justice to the wealthy, there should be consistency in the awards made, and remuneration should also attract recruits to the legal profession.
  32. The calculations for Item No's. (1) and (2) of the bill on page 11 of the ruling lack the rationale and explanation used to arrive at Kshs.148,700,000/=. The prayer for Kshs.9,900,000,000/= was the alternative to other prayers. See *Royal Media Services v Telkom (K) Ltd & others* [2000] eKLR.
  33. The 1<sup>st</sup> – 5<sup>th</sup> respondents did not explain the nature of the response they had filed against the petition. In *Maina & another vs J.M Njenga & Co. Advocates KECA 90 (K.L.R.) 22<sup>nd</sup> October [2021] Judgement*, the court said that by relying on an invalid juristic pleading to determine the value of the subject matter,



the taxing officer had made an error of principle which led to a manifestly excessive award that the respondent was not entitled.

34. In *Mbigi Njuguna & Co. advocates v Kenya National Highways Authority* (2018), eKLR, at issue was whether the taxing master had exercised discretion contrary to the principles of equity, justice, and fairness in awarding the total instruction fees. The claim was for an injunction and, in the alternative, Kshs.650,000,000. The court found the taxed bill excessive, considering the work done by the advocates.
35. In this reference, the taxing master was asked to give reasons but gave none save to direct the reference be made. The basis of the instruction fees is an alternative prayer for Kshs.9,900,000,000/= and not on the principal prayers. In my view, there was no justification to rely solely upon an alternative relief and not the main prayers. There was no consideration of the response, if any, made by the 1<sup>st</sup>-5<sup>th</sup> respondents. Further, the petition did not go for a full hearing.
36. Consequently, I find no justification for the taxed bill. The same is set aside for consideration by a different taxing master. There will be no order as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 14TH DAY OF FEBRUARY 2024**

**In presence of**

C.A Kananu

Gatwiri Mwiti for Murngo Mwenda for 1<sup>st</sup> – 5<sup>th</sup> respondents

Mwanzia for the applicant

Miss Maina for 6<sup>th</sup> – 9<sup>th</sup> respondents

**HON. CK NZILI**

**JUDGE**

