



Mwangangi & Co. Advocates v Mbaabu (Environment and Land Miscellaneous Application E007 of 2023) [2024] KEELC 5329 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2023**

A NYUKURI, J

JULY 10, 2024

**IN THE MATTER OF A TAXATION DECISION DATED 15/12/2022
IN MACHAKOS ELC MISC. APPLICATION NO. E032 OF 2021**

AND

**IN THE MATTER OF THE {{>/AKN/KE/ACT/1989/18
ADVOCATES ACT}} CAP 16 LAWS OF KENYA**

AND

**IN THE MATTER OF SCHEDULE 5 OF THE ADVOCATES
(REMUNERATION) (AMENDMENT) ORDER, 2014 AND RULES 7,
11 (1) & (2) & 13A OF THE ADVOCATES (REMUNERATION) ORDER**

AND

IN THE MATTER OF LAND REFERENCE NUMBER 12648/154

BETWEEN

MWANGANGI & CO. ADVOCATES APPLICANT

AND

ANGELLINA MUENI MBAABU RESPONDENT

RULING

1. Before court is an appeal against the decision of the taxing officer made on 15th December 2022, in Machakos ELC Misc. Appl. E032 of 2021, presented by way of a chamber summons dated 25th January 2023 filed by the advocate/applicant against the client/respondent seeking for the following orders;



- a. Spent
 - b. Spent
 - c. Spent
 - d. That the decision dated 15/12/2022 in the said Machakos Miscellaneous Application No. E032 of 2021 be set aside or vacated for being erroneous on principle, law and the facts of the case regarding the finding of the taxing officer on;
 - i. The nature of the legal services rendered to the respondent by the applicant which gave rise to the bill of costs herein and the award on instruction fees under item No. 1 on the bill of costs;
 - ii. Failure to make determinations on item Nos. 6, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 31, 36, 42, 43, 46 & 47 of the bill of costs;
 - iii. The matter of the value of LR No. 12648/154 whose registration gave rise to the matters herein;
 - iv. Making improper determinations on items Nos. 34, 35, 37, 38, 40, 41, 44 & 45 of the bill of costs by reason of failing to apply the applicable law in assessing costs thereunder;
 - v. The purported security and disbursements allegedly paid by the respondent on the registration of a title for the said L.R No. 12648/154;
 - vi. The interest chargeable on the applicant's costs;
 - vii. The issue of storage charges for the certificate of title and related documents for the said L.R No. 12648/154;
 - viii. The taxing of the bill of costs of the bill of costs at Kshs. 741,018/= and that the Respondent had paid the applicant in the excess of Kshs. 97,658/41;
 - e. That in the interest of justice and on the basis of the overriding objective principle, this honourable court be pleased to assess the costs lawfully payable to the applicant on the bill of costs herein by determining the issues raised under prayer 4 a- h above and also in alternative the bill of costs be expeditiously re-taxed by a different taxing officer on the said issues in prayer 4 a – h above upon appropriate directions of this honourable court.
 - a. That this honourable court do issue such other/further orders as it may deem fit to issue for a just and expeditious disposal of the application to serve the ends of justice in the circumstances herein.
 - g. That the costs hereof be borne by the respondent.
2. The application is premised on the affidavit sworn by the applicant and grounds on its face. The applicant's case is that in 2016 the respondent instructed her to register title in the respondent's name regarding deed plan 395129 measuring 0.9000 hectares (2.2239 acres) situated in Athi River in Lukenya area along Nairobi-Mombasa road, being a subdivision of LR No. 12648/1.
 3. She faulted the decision of the taxing officer arguing that the same was unreasonable, unjust, and not founded in principle, law and facts citing the following reasons;



- a. Erred on principle thereby arriving at decisions that are contrary to the law applicable and the facts of the case and also contradictory to and/or are unsupported by her own findings on the face of the said Ruling;
- b. Erred in law and fact by misapprehending or failing to appreciate the nature of the legal services rendered by the Applicant to the Respondent on account of the said LR No. 12648/154;
- c. Misapprehended and misapplied the principles and law of taxation on the nature of the legal services rendered by the Applicant to the Respondent of registering a Title for the said LR No. 12648/154;
- d. Failed to correctly apply the principles and formula provided for in Schedule V of the Advocates (Remuneration) (Amendment) Order, 2014 for assessing the instruction fees under Item No. I on the Bill of Costs resulting in an erroneous award;
- e. Erred in law and fact by failing to make determinations on Item Nos.6, 10, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 31, 36, 42, 43, 46 & 47 of the Bill of Costs resulting in prejudice to the applicant;
- f. Erred in law and fact by failing to exercise properly and judiciously or at all, the powers and discretion given to her under Part II paragraph 1 of Schedule 5 of the Advocates Remuneration Order and Rule 13A of the Advocates (Remuneration) Order and the law on taxation generally for a just determination of the matter thereby making erroneous findings to the great prejudice of the Applicant;
- g. Erred in law and fact by failing to apply her mind properly on the Bill of Costs, the documentary evidence and submissions of the Applicant and by allowing herself to be influenced by information from the Respondent which is non-factual and misleading even on its face;
- h. Misapprehended and misapplied the law under Rule 7 of the Advocates Remuneration Order on the interest payable to the Applicant on the Bill of Costs;
- i. Misapprehended and grossly misdirected herself on the principles and law as enunciated in the authorities or misapplied the authorities on the matters before her thereby arriving at erroneous decisions;
- j. Erred in law and fact by failing to award storage charges on the Title and related documents for the said LR No. 12648/154 when the respondent had deliberately refused to pay the applicant costs of registering the Title and had been notified that storage charges would be payable;
- k. Erred in law and fact by failing to consider relevant facts and taking into consideration irrelevant facts which resulted in a decision which is not founded on the law and facts of the case;
- l. Erred in law and in fact by making improper determinations on Item Nos 34, 35, 37, 38, 40, 41, 44 &45 by reason of failing to appreciate that the said items related to matters that were in Miscellaneous Application in superior court, the ELC, and that the applicable schedule for the taxation of the same was Schedule 6 of the Advocates Remuneration Order;
- m. Erred in law, principle and fact by taxing of the Bill of Costs at Kshs. 741,018/- and finding that the respondent had paid the applicant in excess of Kshs. 97,658/41, as the two are erroneous



both on account of the matters under 5 a-k above and on the awards that the taxing officer made on various items of the bill of costs.

- n. Erred in law and fact by deviating from principle, law and the facts of the matter before her thus awarding the applicant costs which in all the circumstances of the case were manifestly disproportionate to the legal services rendered to the respondent by the applicant was unreasonable and low as to amount to substantial oppression and injustice to the applicant and a mockery of legal practice.
4. She attached her bill of costs; schedule of documents; several affidavits and their respective annexures; submissions; deed plan; certificates of title; preliminary objection and ruling; court order; applicant's letter and court receipt; ruling of taxing officer; and application in ELC Misc. Appl. No. E003 of 2023.
5. The reference is opposed.
6. The respondent filed grounds of opposition dated 18th March 2023. She stated that the applicant was guilty of non disclosure of material facts including that the parties had agreed how to settle the question of costs and that the applicant had made a professional undertaking to be bound by the taxing officer's decision. Further that the applicant benefitted from the undertaking as she was given security and therefore under the doctrine of equitable estoppel, she was precluded from filing this reference. She stated that she had since filed Machakos Misc. Application No. E01 of 2023 seeking to enforce the professional undertaking issued by the applicant, hence this reference amount to breach of honesty and ethical standards and the same is an afterthought. He maintained that the taxing officer considered all the items before her. He stated further that the taxing officer duly exercised her discretion in determining the applicant's bill of costs and therefore the applicant's challenge thereon was unjustified.
7. The reference was disposed by way of written submissions. On record are submissions by the applicant dated 20th April 2023. As the submissions placed on record by the respondent were not signed, dated or filed, the same do not form part of the court record and are disregarded accordingly.

Applicant's submissions

8. The applicant relied on the case of Vipul Premchand Haria v Kilonzo & Company Advocates [2020] eKLR and submitted that in taxation of bills of costs, the taxing officer exercises discretion which ought to be properly, reasonably and judiciously done. Citing the case of Price & Another v Hilder [1984] eKLR, counsel further contended by the applicant that a higher court has jurisdiction to interfere with exercise of discretion by a lower court whenever it is necessary.
9. On whether the taxing officer appreciated the nature of the work done by the applicant, counsel argued that the taxing officer failed to appreciate the pleading under item 2 of the bill of costs which indicated that the applicant was instructed to register by transmission the title in the respondent's name. Counsel took the position that the transfer by transmission to administrators would be what can be referred to as ordinary transfer, however the transfer to an heir to obtain a new title where none previously existed cannot be said to be ordinary. Counsel maintained that that task called for more diligence, responsibility and industry on the part of the applicant than is required in ordinary transfer by transmission, as she needed to coordinate with many offices including the Survey of Kenya, Land Secretary and Chief Land Valuer, Kenya Revenue Authority, Land Control Board, County Government and National land Commission to obtain among others deed plan, payable stamp duty and rent and relevant consents.



10. She maintained that the brief involved land which is of great importance and interest to the respondent. Counsel maintained that by failing to appreciate the subject matter the taxing officer fell into an error of principle hence the instruction fees awarded was not commensurate with the work done. Counsel maintained that the taxing officer in holding that it was not disputed that the work done by the applicant was in respect to transfer by transmission was a misdirection as the applicant ensured first registration and not registration by transfer.
11. It was also contended by the applicant that the taxing officer failed to find that the value of the subject matter was ascertainable and further failed to exercise the powers under Rule 13A of the Advocates Remuneration Order 2014. Counsel argued that the taxing officer acted erroneously by failing to mention the agreement produced by the applicant showing the value of the adjacent property. Reference was made to the case of Joreth Limited v Kigano & Associates [2002] 1 E.A 92 for the proposition that the value of the subject matter is ascertained from the pleading, judgment or settlement. Counsel argued that she listed the value of the subject matter as Kshs. 42,254,100/=. Counsel submitted that in contesting the value of the subject matter, the respondent filed a supplementary affidavit in Machakos ELC Misc. Appl. E22 of 2021 over another of the respondent's parcel 7885/5 which was Kshs. 16.8 Million. Counsel submitted that she had invited the taxing officer to order a valuation if the value is contested. Counsel argued that in finding that the value of the subject matter was unascertainable and failing to invoke provisions of Rule 13A of the Advocates Remuneration Order, the taxing officer fell into an error of principle. To buttress this position, counsel referred the court to the case of Otieno Ragot & Company Advocates v Kenya Airports Authority [2015] eKLR among others.
12. It was further argued by the applicant that the taxing officer fell into error of principle by holding failing to consider the value of the subject matter on the premises that under Schedule 5 of the Advocates Remuneration Order, there is no scale to calculate instruction fees.
13. Counsel maintained that the taxing officer failed to apply principles under Schedule 5, failed to take into account relevant matter and took into account irrelevant matters as she failed to take into consideration the care and labour applied, the number of papers to be perused, nature and importance of the matter, value of subject matter, interest of the parties, complexity of the matter and other circumstances of the matter. Counsel took the position that she had in her bill of costs provided evidence of the factors to be taken into account under schedule 5 by stating, which was not disputed that the property involved was along Nairobi-Mombasa road; and the documents involved. Counsel argued that the award for instruction fees was manifestly low. She took the view that advocates should be well motivated by fair remuneration abut at the same time legal fees ought to be reasonable not to put beyond reach of the poor. Counsel placed reliance on the case of D.K Law Advocates v Zhong Gang Building Material Co. Ltd & Another [2021] eKLR for the proposition that a judge will interfere with the taxing officer's discretion where the latter's decision is premised on an error of principle among such errors being failure to take into account relevant matters or taking into account irrelevant matters.
14. Regarding Paragraph 7 of the Advocates Remuneration Order, counsel submitted that the taxing officer misapprehended and misapplied the same in awarding interest on costs. Counsel contended that she had demonstrated that she had served the respondent with fee noted on 8th December 2020 and that the respondent had made an admission in January 2018 of receiving fee notes, when the respondent contested the brief. Counsel argued that paragraph 7 provides for 14 % per annum from the delivery of the bill of costs. Counsel relied on the case of Otieno Ragot & Company (supra) and submitted that the taxing officer fell into an error when she held that interest runs from one month after service of certificate of taxation.



15. It was also submitted by the applicant that the taxing officer failed to make determinations on items 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 31, 36, 42, 43, 46 & 47. Counsel placed reliance on the case of Kenya Tea Development Agency v. J.M. Njenga & Co. Advocates [2011] eKLR for the proposition that a taxing officer must look at each item and failure to do so amounts to a grave misdirection and error of principle. Counsel further submitted that the taxing officer made improper awards for items 34, 35, 37, 38, 40, 41, 44 & 45 relating to filing, which was a total of Kshs. 17, 610/=. Counsel also submitted that items 34, 35, 37, 38, 40, 41, 44 & 45 fall under schedule 6 yet they were taxed under schedule 5.
16. Counsel also argued that the taxing officer relied on the respondent's unsubstantiated allegations that she had been paid security, which was discounted from the assessed costs, yet no evidence of payment of the said security was availed. She argued that the security was in regard to LR No. 7885/17 and not LR 12648/154. Counsel submitted further that the sums by the taxing officer were erroneous as the sum arrived at of Kshs. 741,018/= included VAT of Kshs. 102,008/= meaning that the total before VAT was Kshs. 637,550/=. which excludes awards made for items 5, 6, 7, 8, 9, 10, 13 and 14 by a shortfall of Kshs. 94,460/=.
17. Regarding storage charges, counsel submitted that the applicant held title for LR 12648/154 on account of unpaid legal fees, and was entitled to storage fees as the respondent had failed to pay the same on time.
18. On the grounds of opposition, counsel submitted that the same are a deliberate misrepresentation of facts and law, and malicious. Counsel relied on the case of Vishva Stone Suppliers Company Limited v RSR Stone [2006] eKLR and argued that the reference was filed in good faith and in the exercise of a constitutional and non derogable right of being heard in appeal. Regarding the professional undertaking, counsel submitted that the same was premature and meant to circumvent this reference. That courts can set aside a taxation and therefore a taxation cannot be said to be complete where there is a reference.

Analysis and determination

19. The court has carefully considered the reference, the grounds of opposition and the submissions made by the applicant. The issue for determination is whether there is sufficient material presented by the applicant to justify this court's interference with the decision by the taxing officer.
20. The applicant's argument is that the taxing officer did not base her taxation on the relevant applicable principles, the law and the facts because she failed to appreciate the nature of the legal services offered to the respondent; failed to judiciously exercise discretion; failed to determine certain items; applied wrong legal provisions on some items; failed to allow interest on costs; failed to grant storage charges for the title and erroneously discounted the costs allegedly paid without proof of payment.
21. Taxation of bills of costs is a discretionary exercise by the taxing officer and that discretion must be exercised judiciously. Therefore this court will not ordinarily interfere with the taxing officer's exercise of discretion merely on the basis that the award is too low or too high, unless it is demonstrated clearly that the taxation was based on an error of principle or the awarded sum is manifestly excessive or too low to justify a conclusion that it was based on an error of principle.
22. In the case of First American Bank of Kenya v Shah & Others (2002) 1 EA 64, the court held as follows; The court cannot interfere with the taxing officer's decision 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 inference that it was based on an error of principle. Of course, it would be an error of principle to take



into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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.if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved.

1. In the instant case, in disputing instruction fees, the applicant's first grievance is that the taxing officer failed to appreciate the nature of the brief, which was to obtain a first registration into the respondent's name of title LR No. 12648/154 and that the taxing officer was wrong to state that this was an ordinary transfer by transmission, hence failed to find that the matter was a complex one.
24. Paragraph 5 of the Advocates Remuneration Order provides for special fee for exceptional importance and complexity as follows;
Special fee for exceptional importance and complexity
 1. In business of exceptional importance or of unusual complexity an advocate shall be entitled to receive and shall be allowed as against his client a special fee in addition to the remuneration provided in this Order.
 2. In assessing such special fee regard may be had to—
 - a. The place at or the circumstances in which the business or part thereof is transacted;
 - b. The nature and extent of the pecuniary or other interest involved;
 - c. The labour and responsibility entailed; and
 - d. The number, complexity and importance of the documents prepared or examined.
25. Therefore, to determine complexity of a matter the court ought to interrogate the place where and circumstances in which the matter is done; the nature and value of the subject matter; the labour involved, and the volume, importance and complexity of documents involved.
26. A party alleging complexity bears the burden of proving the same. And in that regard, my view is that where an advocate alleges complexity of a brief, they must, with specificity, demonstrate elements of the brief that constitute complexity and how that complexity has constrained them to apply time-consuming industry in dealing with the matter. I think that the question of complexity is not merely on the volume of documents involved, or the value of the subject matter, or the journeys made in the course of working on the brief, but also includes the labour and industry involved in executing the client's instructions and the difficulty and the novelty of the matter.
27. I am fortified in my reasoning with the decision in the case of *Republic v Minister for Agriculture & 2 others Ex Parte Samuel Muchiri W'Njuguna & 6 others* [2006] eKLR where the court held that a party claiming complexity must specify the complex elements in the proceedings, including the nature of forensic responsibility placed on counsel and if there is novelty in the proceedings, it must be conscientiously identified and where there was deployment of considerable inordinately time consuming industry, the details of such circumstances must be clearly described.
28. The applicant's argument is that the brief was complex because she was required to start from a point where LR No. 12648/154 did not exist and had to work to create a new title and that it was



- laborious and time consuming task requiring the applicant to coordinate with various offices including the Survey of Kenya, Land Secretary, Chief Land Registrar, and National Land Commission among others.
29. On the question of complexity, the taxing officer found that the brief was not complex, as the only tedious work was the follow up with government agencies.
30. From the history of this matter, it is clear that the respondent is one of the heirs of her late father Peter Mikya Kakenyi (deceased). A succession cause was filed and concluded and a certificate of confirmation of grant dated 4th June 2016 issued in Nairobi HCC Succession Cause No. 1657 of 2011, wherein the respondent/client was awarded 0.8 Ha to be excised from parcel LR. No. 12648/1. Therefore, the applicant's brief was to ensure that the respondent becomes the registered proprietor of 0.8 Ha to be hived from LR No. 12648/1. In other words, the brief was to obtain registration into the respondent's name her share of her late father's estate from LR No. 12648/1. As the brief started after confirmation of grant, the applicant was tasked with preparing relevant applications, obtaining relevant consents and subdivision and presenting the relevant transfer instrument and other attendant documents for registration to the relevant government offices. I have considered the particulars of the bill of costs and the documents perused and prepared, and I find nothing therein to demonstrate complexity. While it is true that the applicant made several trips to relevant government offices, the same have been accounted for in her items on travel. In addition, the applicant has not specified which part of her instructions presented complexity, difficulty or novelty. The transfer of LR No. 12648/154 to the respondent being property from her late father is by way of transmission, and the fact that the transfer is preceded by a subdivision of the mother title does not change that fact. For those reasons, I find and hold that the brief was not complex and the taxing officer was right to find as much.
31. On the question of the value of the subject matter, it is not in dispute that the brief to the applicant was in regard to a non-contentious matter. Therefore, the applicable provisions are those Schedule 5 of the Advocates Remuneration Order. Under that schedule, an advocate has two options; either to base his or her taxation on an agreed hourly rate or use the alternative method of assessment under part II. In the instant matter there was no agreed hourly rate and therefore, the applicable provisions are part II of schedule 5.
32. On instruction fees, Paragraph 1 of Part II of Schedule 5 provides as follows;
- Instructions
- Such fee for instructions as, having regard to the care and labour required, the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances the case, may be fair and reasonable, but so that due allowances shall be given in the instruction fees for other charges raised under this Schedule.
33. While paragraph 1 of Part II of Schedule 5 of the Advocates Remuneration Order requires the taxing officer to consider the value of the subject matter in assessment of instruction fees, there is no scale provided in regard to the value of the subject matter. Despite the fact that there is no scale provided in regard to the value of the subject matter under schedule 5, the taxing officer is under duty to take into account the value of the subject matter in assessing instruction fees. Therefore, the value of the subject matter is a relevant matter that must be considered by a taxing officer in non-contentious matters, and failure to consider the same amounts to an error of principle.
34. In the bill of costs, the applicant applied the value of neighbouring property to estimate the value of the subject matter regarding the brief and stated that if the value is contested then the taxing officer ought



to invoke Paragraph 13A of the Advocates Remuneration Order and proceed to order valuation of the subject matter. She therefore faulted the taxing officer for failing to order valuation of the property involved.

35. Paragraph 13 A of the Advocates Remuneration Order provides for the power of the taxing officer as follows;

Powers of taxing officer

For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.

36. I agree with the applicant's submissions that the taxing officer has power to order a valuation of property under the above provision. However, that power can only be invoked where the taxing officer is properly moved. A party who wishes to obtain orders of valuation of property must file an application before the taxing officer for the latter to order a valuation where the application is merited. This ought to be done before the taxing officer is moved to tax the bill of costs.

37. In the instant case, the applicant stated in her bill of costs that if the value of the subject matter is contested, then the taxing officer ought to order a valuation. My view is that a bill of costs is not an application upon which the taxing officer can invoke his or her powers under paragraph 13A to order valuation of the property involved. A taxing officer cannot be moved for such an order through a bill of costs. The matters ordinarily stated in the bill of costs are those that the taxing officer ought to consider while taxing the costs, but cannot be the basis for exercising his or her jurisdiction under Paragraph 13A of the Advocates Remuneration Order. Therefore, in the circumstances of this case, the applicant cannot fault the taxing officer for failure to order valuation of the property involved, when she did not move the taxing officer accordingly.

38. Paragraph 21 of the Advocates Remuneration Order relates to non contentious matters and provides how to calculate scale charges as follows;

Scale fees: how calculated

In the calculation of scale charges the basis of charge shall unless otherwise provided in the Schedules, and irrespective of the number of titles involved or documents required to be prepared or approved, be the sum set forth in the deed or document as the price or consideration or, if no price or consideration or only a nominal price or consideration is set forth, the value of the subject matter affected by the deed, which shall be deemed to be—

- a. The value fixed for the purpose of stamp duty; which failing
 - b. The sum at which the property affected has last been passed for estate duty; which failing
 - c. The last price at which a sale has taken place within ten years from the date of the transaction; which failing
 - d. The estimated average market value during the preceding three years.
39. Therefore, where the subject matter value is not expressly stated, like in this case, the taxing officer may apply the above provisions to arrive at the value of the subject matter by considering the stamp duty, failing; the sum passed for the property for estate duty, failing; the last price of the property within ten years, failing; an estimation of the average market value of the property.



40. I have considered the documents produced by the applicant and the applicant did not provide documents for the property involved that would disclose the value of the subject matter. What the applicant presented was a sale agreement for the neighbouring property for Kshs. 19 million per acre, which was countered by the respondent's sale agreement for another nearby property for Kshs. 16.8 million per acre. Therefore, as there was no evidence of the value on stamp duty, estate duty value, the last price of the sale; the taxing officer was at liberty to use the available evidence to arrive at an estimated average market value of the subject matter during the preceding three years. From the evidence and for the above reasons, I find that the value of the subject matter was ascertainable by way of estimation as there was evidence of sale of adjacent properties made in 2016.
41. In view of the above, I agree with the applicant that the finding by the taxing officer that the value of the subject matter could not be ascertained, was erroneous as paragraph 21 of the Advocates Remuneration Order allows the taxing officer to make an estimation and in this case the parties had provided the acreage and situation of the property and values of adjacent properties, which in my view are sufficient basis to enable estimation of the average market value of the subject matter in the preceding three years.
42. Considering that the parties presented two proposals for estimation being Kshs. 19 Million and 16.8 Million respectively, and the fact that instructions to the applicant were made in 2016, my estimation of the average market value for three years preceding 2016 for LR No. 12648/154 is Kshs. 14 Million per acre, which totals to Kshs. 30,800,000/=. The question therefore is whether in view of the estimated value of the subject matter being Kshs. 30,800,000/= the award of Kshs. 500,000/= would be deemed as reasonable in all the circumstances of the case.
43. In view of the fact that under schedule 5 paragraph 2 of the Advocates Remuneration Order, the value of the subject matter is a relevant matter to be considered by the taxing officer, although no scale is provided for the same, it is my considered view that, although the taxing officer did not place an estimation on the value of the subject matter, yet the award of Kshs. 500,000/= for instruction fees was reasonable in the circumstances of the case and therefore there is no justification for this court to interfere with that decision.
44. On whether the taxing officer failed to determine items 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 31, 36, 42, 43, 46 & 47, I note that the taxing officer did not refer to all the items but grouped them into attendances, copies, and travelling and made the findings which are in paragraphs 7 to 13 of the ruling. I therefore find that the fact that determinations were made on grouped items instead of single items, did not in any way lead to miscarriage of justice.
45. On whether the proper scale was used in regard to items 34, 35, 37, 38, 40, 41, 44 & 45, it is clear that the same are in regard to drawing the bill of costs, making copies thereof, drawing taxation notice and making copies thereof; drawing affidavit of service and making copies thereof; and drawing certificate of taxation and making copies thereof. All these happened in pursuance or upon filing the bill of costs in Machakos ELC Misc. Application 32 of 2021. That matter being a contentious matter before this court, it follows that the applicable law ought to have been schedule 6 of the Advocates Remuneration order. I agree with the applicant that the taxing officer was in error in applying schedule 5 to those items. Applying Schule 6 therefore would result in an award of Kshs. 9,180/- for item 34; Kshs. 2,550/- for item 35; Kshs. 360/- for item 37; Kshs. 50/- for item 38; Kshs. 240/- for item 40; Kshs. 50/- for item 41; Kshs. 360/- for item 44; and Kshs. 100/-for item 45. This makes a total of Kshs. 12,890/-. As the above items were taxed by the taxing officer at a cumulative sum of Kshs. 1,120/-, therefor there was an under assessment of a total of Kshs. 11,770/-.
46. On interest, paragraph 7 of the Advocates Remuneration order provides as follows;



- An advocate may charge interest at 14% per annum on his disbursements and costs whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided such a claim for interest is raised before the amount of the bill has been paid or tendered in full.
47. My understanding of paragraph 7 of the Advocates Remuneration order is that interest on costs is chargeable 30 days after service of the bill of costs, which bill ought to include a claim on interest.
48. In the instant case, the taxing officer granted interest after one month of service upon the respondent of the certificate of costs. The applicant challenged this position arguing that she should be granted interest from 2020 when the respondent alleged to have been made aware of the bill of costs. I have considered the respondent's further affidavit plus annexures thereto, which is relied upon by the applicant. The document the applicant relied on, is a letter dated 8th December 2020 by the applicant which referred to previous correspondence between the parties and mentioned costs due to the applicant. In my view, that letter does not amount to a bill of costs contemplated under paragraph 7 of the Advocates Remuneration Order. My understanding of the said provision is that entitlement to interest is pegged on non compliance by the client in 30 days after receiving service of bill of costs which also includes a claim on interest. Therefore, in such case, interest would start running from 30 days after the date of service of the bill of costs. Besides, the same bill served on the client should be the same that is filed before the taxing officer, to entitle the advocate to interest.
49. In this matter, the bill presented by the applicant for taxation is dated 28th May 2021. No return of service was presented by the applicant to demonstrate that she served the said bill on the respondent and gave her 30 days to settle the costs, before filing the same for taxation. In the premises, I find and hold that there being no evidence of service on the respondent of the bill of costs filed in court, the applicant cannot claim for interest under paragraph 7 of the Advocates Remuneration Order. Therefore in the absence of evidence that the bill of costs was served before filing, the applicant could not be entitled to interest before taxation. I therefore find no justification to interfere with the taxing officer's decision on interest.
50. On storage charges, it is not disputed that the title of the respondent was held as lien by the applicant. The applicant argued that she was entitled to storage charges because the respondent intentionally failed to settle costs and that she had been informed orally and in written that she would be liable to pay storage charges. In declining to award storage charges, the taxing officer found that although the same were charged as disbursements no receipts were produced to support that claim. Having considered the applicant's bill, she sought storage charges for certificate of title, deed of assent and deed plan. Those are documents that came into her possession by dint of her instructions which she held as lien pending payment of her fees. The applicant has not referred the court to any provision in the Advocates Remuneration Order that entitles her to storage charges of documents in her possession pursuant to instructions given to her by the client and which she holds as lien for payment of her fees. The fact that the applicant informed the respondent that she was to pay storage charges do not entitle her to charge that which is not provided for in the Remuneration Order. In my view, I find no justification in law or equity for an advocate to charge storage charges for documents in her custody by dint of the instructions given to the client and which she holds as lien. Therefore, that claim is unjustified rightly rejected by the taxing officer.
51. The applicant argued that the taxing master ought to have applied schedule 1 of the Remuneration Order as the matter involved a first registration. The said schedule has three scales and provides for scale fees on sales and purchases affecting land registered in any registry; scale fees on debentures, mortgages or charges affecting registered land; and negotiating sale of property. As the instructions to the applicant were to have the respondent's share in the estate of her late father registered in her name,



there is nothing on record to show that there was a sale or purchase; debenture, mortgage or charges or a negotiation to place the taxation under the ambit of schedule 1 as argued by the applicant. I therefore find that schedule 1 was not applicable in the circumstances of this case.

52. Although the applicant argued that there was no evidence to show that there was a deposit made by the respondent, the record shows that the respondent produced a cheque and evidence of payment by RTGS the sum of Kshs. 838,676.41/= to the applicant. That evidence was not rebutted by the applicant and therefore the taxing officer was right in discounting the same against the taxed costs.
53. Having found that there was an under assessment on 8 items of Kshs. 11,770/=, and that there was a deposit of Kshs. 838,676.41/=, it therefore follows that there is an excessive payment to the applicant of Kshs. 85,888.41/= On that ground, the reference is allowed to the extent that the finding of the taxing officer that an excess of Kshs. 97,658.41/= paid to the applicant is hereby set aside and substituted with an order that the applicant received from the respondent excess payment in the sum of Kshs. 85,888.41/=. I make no order as to costs.
54. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms. Mwangangi for applicant

Ms. Murugi holding brief for Mr. Kakinga for respondent

Court assistant – Josephine

