



**Mwangangi & Co Advocates v Mbaabu (Miscellaneous Application E010 of 2023) [2024] KEELC 5375 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5375 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**MISCELLANEOUS APPLICATION E010 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. E033 OF 2021**  
**AND**  
**IN THE MATTER OF THE 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**

**Introduction**

1. Before court is a chamber summons application dated 25<sup>th</sup> January 2023 filed by the advocate/ applicant against the client/respondent being an appeal against the decision of the taxing officer made on 15<sup>th</sup> December 2022, in Machakos ELC Misc. Appl. E033 of 2021. The applicant seeks the following orders;
  - a. Spent



- b. Spent
  - c. Spent
  - d. That the said decision dated 15/12/2022 in the said Machakos ELC Misc. Application No. E033 of 2021 be set aside or vacated for being erroneous on principle, law and the facts of the case regards 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 her award of instructions fees under item No. 1 on the bill of costs;
    - ii. Failure to make determinations on item Nos. 6, 10, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24, 26, 31, 35, 38, 41, 42, 45, 49, & 53 of the bill of costs;
    - iii. The matter of the value of LR No. 12648/149 herein whose registration gave rise to the matters herein;
    - iv. Making improper determinations on item Nos. 23, 33, 34, 36, 37, 40, 43, 47 & 48 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 LR No. 12648/149.
    - 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 LR No. 12648/149;
    - viii. The taxing of the bill of costs of at Kshs. 753, 808/20= and that the Respondent had paid the applicant in the excess of Kshs. 84,868/21, both figures being erroneous not only on account of the matters under 4 a- g but also from the awards that the taxing officer made on various items of the bill of costs.
  - 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.
  - f. 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 No. 395124 which resulted in the registration of LR No. 12648/149 measuring 10.99 hectares (27 acres) situated in Athi River in Lukenya area along Nairobi-Mombasa road, being a subdivision of LR No. 12648/1. That she filed her bill of costs and on 15<sup>th</sup> December 2021 the taxing officer made a decision thereon which she is dissatisfied with.



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 race or 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. 12648/149;
  - 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 of a Title for the said LR No. 12648/149;
  - 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. 1 on the Bill of Costs;
  - 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, 24, 26, 31, 35, 38, 41, 42, 45, 49 & 53 of the Bill of Costs;
  - 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 rendering a decision that is greatly prejudicial to 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 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;
  - k. Erred in law and fact by failing to award storage charges for the Title and related documents for LR. 12648/149;
  - l. Erred in law and fact by making improper determinations on Item Nos. 23, 33, 34, 36, 37, 40, 43, 47 & 48 of the Bill of Costs by reason of failing to appreciate that the said items related to matters that were in a Miscellaneous Application in a 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. 753,808/20 and finding that the respondent had paid the applicant in excess of Kshs. 84,868/21, as the two are



erroneous both on account of the matters under 5 a – k above and even 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 so inordinately 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; rulings of taxing officer; and applications.
5. The reference is opposed.
6. The respondent/client filed grounds of opposition dated 18<sup>th</sup> 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.
7. The respondent further averred that she had since filed Machakos Misc. Application No. E004 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. She maintained that the taxing officer considered all the items before her and applied the relevant laws. She 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.
8. The reference was disposed by way of written submissions. On record are submissions by the applicant dated 20<sup>th</sup> April 2023. As the submissions placed on the file by the respondent are not signed, dated or filed, the same do not form part of the court record and are therefore disregarded accordingly.

### **Applicant's Submissions**

9. The applicant relied on the case of *Vipul Premchand Haria v Kilonzo & Company Advocates* [2020] eKLR and submitted that taxation of costs, is an exercise of discretion which ought to be proper, reasonable and judicious. Citing the case of *Price & Another v Hilder* [1984] eKLR, the applicant argued that a higher court has jurisdiction to interfere with exercise of discretion by a lower court where the lower court misdirected itself and made a wrong decision or because it took into account irrelevant matters or failed to consider relevant matters.
10. On instruction fees, the applicant argued that the taxing officer failed to appreciate the nature of the legal services rendered by the applicant, as she failed to appreciate that the applicant's brief was to obtain a first registration of the above property in the respondent's name and not merely cause transfer by transmission. The applicant 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. She submitted 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, Chief Land Valuer, Kenya Revenue Authority, Land Control Board, County Government and National land Commission, to obtain among others; deed plan, payable stamp duty, rent and relevant consents.



11. She maintained that the brief involved land which is of great importance and interest to the respondent. It was further submitted by the applicant that by failing to appreciate the value of the subject matter, the taxing officer fell into an error of principle hence the instruction fees awarded was not commensurate with the work done.
12. 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 paragraph 13A of the [Advocates Remuneration Order 2014](#). The applicant 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 EA 92 for the proposition that the value of the subject matter is ascertained from the pleadings, judgment or settlement. Further reliance was placed on the case of [Kamunyori & Co. Advocates v Development Bank of Kenya Ltd](#) [2015] eKLR for the proposition that failure to ascertain the correct subject matter for purposes of taxation amounts to an error of principle.
13. The applicant contended that she listed the value of the subject matter as Kshs. 515,969, 510/= based on the argument that the suit property measures 27 acres while an adjacent property being LR No. 7885 was sold at Kshs. 19 Million in 2016, while the respondent exhibited an agreement for Kshs. 16.8 million per acre. She Submitted that in contesting the value of the subject matter, the respondent filed a supplementary affidavit in Machakos ELC Misc. Application. E22 of 2021 over another of the respondent's parcel 7885/5 which was sold at Kshs. 16.8 Million per acre. She argued that she had invited the taxing officer to order a valuation if the value is contested. She took the view that in finding that the value of the subject matter was unascertainable and failing to invoke provisions of paragraph 13A of the [Advocates Remuneration Order](#), the taxing officer fell into an error of principle. To buttress this position, the applicant referred the court to the case of [Otieno Ragot & Company Advocates v Kenya Airports Authority](#) [2015] eKLR among others.
14. It was further argued by the applicant that the taxing officer fell into error of principle by 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.
15. She maintained that the taxing officer failed to apply principles under schedule 5, failed to take into account relevant matters 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. The applicant 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. She argued that the award for instruction fees was manifestly low. She contended that advocates should be well motivated by fair remuneration but at the same time legal fees ought to be reasonable not to put justice beyond reach of the poor. Reliance was placed on the case of [DK 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.
16. Regarding Paragraph 7 of the [Advocates Remuneration Order](#), the applicant submitted that the taxing officer misapprehended and misapplied the same in awarding interest on costs. She contended that she had demonstrated that she had served the respondent with a fee note on 8<sup>th</sup> December 2020 and that the respondent had made an admission in January 2018 of receiving fee notes, when the respondent contested the brief. She argued that Paragraph 7 provides for interest at 14% per annum from the



- delivery of the bill of costs. She relied on the case of *Otieno Ragot & Company v Kenya Airports Authority* (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.
17. 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, 35, 38, 41, 42, 45, 49 & 53. The court was referred to 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. She further submitted that the taxing officer made improper awards for item Nos. 33, 34, 36, 37, 40, 43, 47 & 48 relating to filing, which was a total of Kshs. 19,363/=. The applicant submitted that the above items fell under schedule 6 yet they were taxed under schedule 5 of the *Advocates Remuneration Order*.
  18. The applicant 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 12648/149. She submitted further that the sums arrived at of Kshs. 753,808/20= with an excess of Kshs. 84,868/=, were erroneous for failure to take into account relevant matters.
  19. Regarding storage charges, the applicant submitted that she held title for LR 12648/154 as lien on account of unpaid legal fees, and was entitled to storage fees as the respondent had failed to pay the same on time despite having been informed in writing that she is liable to pay the same.
  20. Regarding the respondent's grounds of opposition, the applicant submitted that the same are a deliberate misrepresentation of facts and law, and malicious. Counsel relied on the case of *Lubullellab & Associates Advocates v N.K. Brothers Ltd* [2014] 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, the applicant argued 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**

21. 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 justification for this court to interfere with the decision of the taxing officer.
22. The brief is not disputed and therefore the applicant indeed offered legal services to the respondent in obtaining first registration of LR No. 12648/149 measuring about 27 acres being a subdivision of LR 12648/1, subsequent to a succession cause. The applicant's argument is that the taxing officer did not base her taxation on the relevant applicable principles, the law and the facts as she failed to appreciate the nature of the legal services offered to the respondent; failed to judiciously exercise discretion; failed to make a determination on certain items; applied schedule 5 instead of schedule 6 in respect of some items; failed to allow interest on costs from the date of service of the bill of costs; failed to grant storage charges for the title and erroneously discounted the costs on allegedly security paid.
23. It is trite that taxation of bills of costs is an exercise of discretion 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 decision on taxation was clearly wrong due to a misdirection by failure to take into consideration relevant matters or taking into consideration irrelevant matters or that the awarded sum is manifestly excessive or too low to justify a conclusion that it was based on an error of principle.



24. 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.

25. 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. 12648/149 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.

26. 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.

27. 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.

28. 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.

29. The applicant's argument is that the brief was complex because she was required to start from a point where LR No. 12648/149 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.
30. 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.
31. 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 4<sup>th</sup> June 2016 issued in Nairobi HCC Succession Cause No. 1657 of 2011, wherein the respondent/client was awarded 10.99 Ha to be excised from parcel No. 12648/1. Therefore, the applicant's brief was to ensure that the respondent becomes the registered proprietor of 10.99 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 12648/149 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.
32. 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 in 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.
33. 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.
34. 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 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.

35. In the instant case, the brief is not in regard to a contentious matter which would ordinarily involve pleadings, judgment or settlement and therefore the decision in the case of *Joreth Ltd v Kigano* (*supra*) which found that the value of the subject matter may be ascertained from pleadings, judgment or settlement is inapplicable in this matter.
36. In the bill of costs, the applicant applied the value of adjacent 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.
37. Paragraph 13A 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.

38. 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.
39. 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 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.
40. Paragraph 21 of the *Advocates Remuneration Order* 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.
41. 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, in the preceding three years.
42. I have considered the documents produced by the applicant and it is clear that 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 adjacent 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.
43. 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 the parties herein had provided the acreage and situation of the property and values of adjacent properties, which are sufficient basis to enable estimation of the average market value in the preceding three years.
44. 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. 12648/149 is Kshs. 14 Million per acre, which totals to Kshs. 378,000,000/= for 27 acres. The question therefore is whether in view of the estimated value of the subject matter being Kshs. 378 million, the award of Kshs. 500,000/= would be deemed as reasonable in all the circumstances of the case and a judicious exercise of discretion by the taxing officer.
45. 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 the award of Kshs. 500,000/= for instruction fees in respect of obtaining registration of LR No. 12648/149 measuring 27 acres situated along Mombasa road at Lukenya, was too low and it justifies the conclusion, which I hereby arrive at, that it was based on an error of principle. In my view, as LR No. 12648/149 had an estimated average market value as at 2016 of Kshs. 378,000,000/=, I award a sum of Kshs. 4,000,000/= as instruction fees.
46. On whether the taxing officer failed to determine items 6, 10, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24, 26, 31, 35, 38, 41, 42, 45, 49 & 53, the ruling shows that the taxing officer did not refer to all the items but grouped them into attendances, copies, travelling and made the findings which are at paragraphs 11 to 14. I therefore find that the fact that determinations were made on grouped items without specifying each of them did not in any way result in miscarriage of justice.
47. In addition, the applicant argued that items 23, 33, 34, 36, 37, 40, 43, 47 & 48 ought to have been taxed under schedule 6 and not 5 as was done by the taxing officer.



48. The said items are in regard to drawing a bill of costs and making copies thereof, drawing taxation notice and making copies thereof; making copies of affidavit of service; drawing certificate of costs and photocopying. I agree with the applicant that those items ought to be taxed under schedule 6 as the same refer to contentious matters and were done pursuant to the taxation in court after the parties could not agree, all of them having been done in regard to contested proceedings being Machakos Misc. Application No. 33 of 2021. In the premises, I find and hold that the taxing officer was wrong in principle in applying schedule 5 on the above items as she ought to have applied schedule 6.
49. Item 23 being for perusal of a letter on rent apportionment, was pursuant to instructions of the client and therefore, I find and hold that schedule 5 applies. Schedule 6 applies to the rest of the said items. On item 33, for drawing a bill of costs of 56 folios, the applicant is entitled to Kshs. 10,080/= under paragraph 4 (e) of schedule 6. For item 34 which is in regard to making copies of 112 folios of the bill of costs, under paragraph 5 (a) of schedule 6 which provides for Kshs. 25/= per folio, the applicant is entitled to Kshs. 2,800/=. For item 37 regarding making copies of 4 folios of taxation notices, the applicant is entitled to Kshs. 100/-. On items 38, 41 and 45 seeking costs on travelling to court to file bill of costs, schedule 6 does not provide for travelling. However, under paragraph 7 (b) thereof attendance to offices of court provides for Kshs. 500/= which is allowed for each item. Regarding item 40 for making copies for 2 folios of return of service, Kshs. 50/= is awarded. On item 43 for drawing certificate of certificate of taxation of 2 folios, a sum of Kshs. 360 is hereby allowed. Item 48 does not disclose the particulars of the documents photocopied and therefore it is taxed off. This makes a total of Kshs. 14,890/=. Therefore, in awarding a sum of Kshs. 19,363/= for the above items, the taxing officer erroneously awarded an excess sum of Kshs. 4,746/=.
50. 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.
51. 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.
52. 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 8<sup>th</sup> 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 capable of attracting interest 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 bill must include 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.
53. In this matter, the bill presented by the applicant for taxation is dated 28<sup>th</sup> May 2021. It is not possible that a bill drawn and dated in 2021 could have been served in 2020. In any event, no return of service was presented by the applicant to demonstrate when she served the said bill on the respondent giving



her 30 days to settle the costs, before filing the same before the taxing officer. 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. Therefore, in the absence of evidence that the bill of costs was served before filing, the applicant cannot be entitled to interest before taxation. I therefore find no justification to interfere with the taxing officer's decision on interest.

54. On storage charges, it is not disputed that the title of the respondent was held as lien by the applicant, for non payment of legal fees. 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, it is clear that 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 the brief which she held as lien pending payment of her fees.
55. The applicant has not referred the court to any provision in the *Advocates Remuneration Order* that entitles her to storage charges of documents placed 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, does not entitle her to charge that which is not provided for in the *Advocates Remuneration Order*. In my view, I find no justification in law or equity for an advocate to charge storage charges for documents placed in her custody by dint of the instructions given by the client and which she holds as lien. Therefore, that claim is unjustified and is hereby rejected.
56. On the question of deposit/security paid, although the applicant stated that there was no evidence of payment of the same, the respondent demonstrated by way of cheque and RTGS the payment of the stated amount. The applicant having failed to rebut that evidence, I accept the same as being the deposit paid.
57. In the premises, the reference succeeds, and the court awards the applicant Kshs. 4,000,000/= in regard to instruction fees. The award in regard to items 33, 34, 35, 37, 38, 40, 41, 42, 43 and 45 are taxed as per schedule 6 and the sum of Kshs. 4,746/= which was an over assessment is taxed off. The total amount above attracts VAT of 16%. In the end, taking into account the deposit paid by the respondent in the sum of Kshs. 838,676.41/=:, the applicants bill of costs dated 28<sup>th</sup> May 2021 is hereby taxed in the sum of Kshs. 3,969,626/=. Each party shall bear its own costs.
58. It is so ordered.

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

**A. NYUKURI**

**JUDGE**

In the presence of;

Mrs. Mwangangi for the applicant

Ms. Murugi holding brief for Mr. Kakinga

Court assistant – Josephine

