



**Nyamu t/a Nyamu Nyaga & Co Advocates v Meru University of
Science and Technology (Miscellaneous Reference Application
E009 of 2023) [2023] KEELC 21174 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21174 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT MERU
MISCELLANEOUS REFERENCE APPLICATION E009 OF 2023**

CK YANO, J

NOVEMBER 2, 2023

IN THE MATTER OF THE ADVOCATES ACT CAP 15 LAWS OF KENYA

AND

IN THE MATTER OF THE ADVOCATE/CLIENT BILL OF COSTS

AND

IN THE MATTER OF ENVIRONMENT AND LAND COURT AT MERU

MISCELLANEOUS APPLICATION NO. E017 OF 2022

AND

IN THE RULE 11(2) OF THE ADVOCATES (REMUNERATION) ORDER

BETWEEN

DESDERIO NYAGA NYAMU T/A NYAMU NYAGA & CO

ADVOCATES APPLICANT

AND

MERU UNIVERSITY OF SCIENCE AND TECHNOLOGY RESPONDENT

RULING

1. By a chamber summons application dated 6th March 2023 brought under Rule 11(2) *Advocates (Remuneration) Order*, the applicant sought for orders;
 1. That the Honourable court be pleased to set aside the advocate/client's costs taxed on 3rd February, 2023 in Meru Environment & Land Court misc Application no E017 of 2022.



2. That upon setting aside the said taxation as per prayer no 1 hereinabove, the Honourable court be pleased to exercise its discretion and tax the said amended bill of costs and/or order for re-taxation of the said bill of costs.
 3. That the Honourable court be pleased to make such other or better orders as it may deem just and fit to meet the ends of justice.
 4. That costs of this application be assessed and be provided for.
2. The application is based on the ground set out on the face of the application and on the supporting affidavit dated 6th March 2023 sworn by Desderio Nyaga Nyamu. The applicant contends that on 28th October, 2013, the respondent herein instructed the applicant to defend constitutional petition no 22 of 2013. That pursuant to the said instructions, the applicant herein defended the respondent until the petition was concluded on 28th May, 2020 when the court delivered judgment in favour of the respondent.
 3. The applicant states that in the said petition, the petitioner was seeking to be paid ksh 2,200,000,000/= being the value of land parcel no 1595 and 1651 situated in Uringu II adjudication Section. That the respondent herein paid the applicant ksh 746,000/= as interim fees and upon conclusion of the matter, the applicant wrote to the respondent for payment of the final fees but which was not paid.
 4. That consequently, the applicant filed advocate/client bill of cost vide Meru Environment & Land Court misc Application no E017 of 2022 which was taxed on 3rd February, 2023 by taxing officer, Hon.Maureen Odhiambo who awarded the applicant a sum of ksh 21,738, 651 inclusive of VAT.
 5. That on 15th February, 2023, the applicant filed a notice of objection to taxation which the taxing officer made a direction to the effect that the applicant files a reference to the High Court (ELC) if he was not satisfied with her decision because the court was functus officio. Pursuant to the direction, the applicant filed this reference as provided under Rule 11(2) of the *Advocates (Remuneration) order*.
 6. The applicant states that the reference is based on the notice of objection to taxation filed on 15th February, 2023 in Meru ELC misc application no E017 of 2022 which indicated the items in the amended advocate/client bill of costs which the applicant was objecting to and reasons.
 7. It is the applicant's contention that the reference raises pertinent issues which the taxing officer did not consider even as the same issues were raised in the submissions to the amended advocate/client bill of costs in the replying affidavit filed by the applicant in Meru ELC misc Application no E017 of 2022 and in the notice of objection to taxation, and that it is only just and fair that this application be allowed,
 8. In the affidavit in support of the application, the applicant has annexed copies of the pleadings, affidavits and the annexures thereto, judgment, submissions and ruling in both ELC Petition no 22 of 2023 and Meru misc application no E017 of 2022.
 9. The respondent did not respond to the application at all despite being duly served.
 10. The application was canvassed by way of written submissions. The applicant filed its submissions dated 26th September, 2023 through the firm of M/s Nyamu Nyaga & Co. Advocates. He submitted that on 23rd October 2013 the firm of M/s Nyamu Nyaga & Co advocates, the applicant herein received instructions from the then Vice Chancellor of Meru University of Science and Technology, one Prof Japhet Magambo, to defend the respondent herein in a Constitutional Petition filed by one Charles Kiunga M'Mbogori in Meru ELC Petition no 22 of 2013. That pursuant to the said instructions the applicant filed notice of appointment of Advocates, memorandum of appearance and a replying affidavit to the said petition. The said petition which was later amended was seeking for a declaration



under Article 23 (3) (a) of the Constitution of Kenya to the effect that land P/Nos. 1595 measuring about 420 acres and 1651 measuring about 20 acres, belonged to the late M’Kiunga M’Mbogori and so, his estate ought to be compensated commensurably for the deprivation of the same by the respondent herein and two others and order for compensation under Article 23 (3) (e) of the Constitution of Kenya compelling the respondent herein and another to fully, adequately and promptly compensate the said estate the current market value of the said parcels of land as well as costs and interest thereon.

11. The applicant submitted that in the said petition, the petitioner annexed a valuation report showing the amount he sought to be compensated as ksh 2,200,000,000 and which the respondent herein duly replied through the application, denying the petitioner’s claim. It is the applicant’s submissions that it is clear that the value of the subject matter in the said petition was known as at the time the same was concluded. The applicant referred to the said amended petition, the supplementary affidavit together with the annexed valuation report and the further replying affidavit and argued that under rule 11(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 a party can annex the documents to be relied upon to the petition itself or to the supporting affidavit to the petition. That it follows therefore that the supplementary affidavit together with the annexed valuation report filed by the petitioner in Meru ELC Petition no 22 of 2013 to support the amended petition formed part of his pleadings and was not just an ordinary affidavit within the meaning of order 19 of the Civil Procedure Rules 2010.
12. The applicant submitted that the process of filing of constitutional petitions is guided by the Constitution of Kenya 2010 itself and the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 while Schedule 6 paragraph 1 (J) of the Advocates (Remuneration) Amendment) Order 2014 specifically provide for taxation of constitution petitions and prerogative orders. That the filing of constitution petition is not premised on the Civil Procedure Act or the Civil Procedure Rules.
13. The applicant contends that after the applicant and the respondent failed to agree on the amount payable to the applicant, the applicant filed Advocate/client bill of costs which was subsequently amended on 17th October, 2022 and which was opposed by the respondent. That thereafter, the Deputy Registrar as the Taxing Officer taxed the applicant’s amended advocates/client bill of costs at ksh 21,738,651 inclusive of VAT. That dissatisfied with the said ruling, the applicant filed a Notice of Objection to taxation dated 15th February, 2023 as per Rule 11 (1) of the Advocates (Remuneration) Order Cap 16 Laws of Kenya, but the Taxing Officer returned the same with remarks that if the applicant was not satisfied with her ruling, the applicant files a reference to this court since the court became *Functus Officio*
14. It is the applicant’s submission that the taxing officer never addressed herself to the issues raised in the Notice of Objection to taxation to the amended advocate/client bill of costs and argued that the instructions fees should be based on the value of the subject matter which was ksh 2,200,000,000/= which the petitioner in Meru ELC Petition no 22 of 2013 sought to be compensated. The applicant further contended that had the petitioner succeeded, but which he did not, he would have been awarded a sum of ksh 2,200,000,000/= as compensation plus costs.
15. The applicant submitted that the finding by the Taxing Officer that she could not rely on the valuation report annexed to the supplementary affidavit in support of the amended petition was erroneous and not supported by any law or fact because under Rule 11(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that a party who wishes to rely on any document may annex it to the petition or the supporting affidavit. The applicant argued that the supplementary affidavit which the valuation report in question was annexed, was not an ordinary affidavit within the meaning of Order 19 of the Civil Procedure Rules 2010,



but an affidavit falling within Rule 11(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. That Rule 2(a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defines what a document is and therefore the valuation report annexed to the supplementary affidavit cannot be taken in the manner the taxing officer did in her ruling. The applicant added that Rule 21(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that a party wishing to file further information at any stage of the proceedings may do so with the leave of the court and submitted that the Taxing Officer ought not to have ignored the said valuation report which was filed pursuant to the leave of court in determining the value of the subject matter which formed the said petition in Meru ELC no 22 of 2013.

16. The applicant submitted that whereas the Taxing Officer can exercise his/her discretion in taking Advocates instruction fees where the pleadings do not disclose the value of the subject matter, the Taxing Officer in the instant case wrongly exercised her discretion when she awarded the applicant ksh 10,000,000/= as advocate's instruction fees whereas the amount of compensation of ksh 2,200,000,000/= which was sought by the petitioner was disclosed in the valuation report annexed to the supplementary affidavit in support of the amended petition, and which amount was not disputed by the respondent, though not awarded as the petition was dismissed. It is the applicant's submission that the value of the suit property was therefore known and ought to have been the basis of calculating the advocate's instructions fees.
17. The applicant submitted that whereas the Taxing Officer correctly set out the principles laid down by the Court of Appeal in *Joreth Limited v Kigano & Associates Advocates* (2002)EA 92 in taxation of the Advocates instructions fees, the compensation which the petitioner sought in the said petition was known and therefore ascertained from the pleadings and argued that the taxing officer wrongly relied on the ruling in *Unlimited (Africa) Limited Investment Limited* (2017) eKLR which the subject matter of the suit was not a constitutional petition, but an originating summons which did not indicate the amount of the value of the subject matter. The applicant also distinguished the case of *S.G Mbaabu & Co. Advocates v Joseph Muoki Kakenyi & 2 others* (2018) eKLR relied on by the Taxing Officer which was also an originating summons whose procedure of filing falls within the Civil Procedure Rules and not a petition filed under the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
18. The applicant submitted that the taxing officer should have taxed item no 4 at ksh 33,640,000/= as the value of the subject matter was pleaded and indeed known to the parties and the court as ksh 2,200,000,000/=. The applicant argued that the findings by the court in the cases of *Unlimited (Africa) Limited Muchanga Investment Limited (Supra)* and *S.G Mbaabu & co. Advocates v Joseph Muoki Kakenyi & 2 others (Supra)* that valuation reports annexed to the affidavits cannot be used to determine advocates instructions fees unless the amount is pleaded could not therefore be applicable in assessing the advocate instructions fees in the amended Advocates/client bill of costs dated 17th October 2022. That the circumstances and rules applicable in the above two cases are distinguishable with the petition no 22 of 2013 in which compensation was pleaded and the amount shown.
19. The applicant submitted that once the Advocates instruction fee is taxed at ksh 33,640,000/= , 1/3 of the instruction fees in item no 46 of the amended advocate client bill of costs ought to be ksh 11,217, 333/= and not ksh 3,084,000/= as taxed by the Taxing Officer. That before the interim fees of ksh 746,000/= which was earlier paid to the applicant is deducted, 1/3 of the instructions fees in item no 46 should be added to ksh 33,640,000/= in item no 4 of the said bill of costs. The applicant further submitted that in the alternative, the interim fees paid of ksh 746, 000/= could also be deducted from the total figure after adding half (1/2) of total of item Nos. 1 to 114 B of the amended advocate/client



bill of costs subject to correctly taxed items, but before calculating the payable VAT. The applicant therefore submitted that it was erroneous and/or improper on the part of the taxing officer to tax item no4 at ksh10,000,000/= and to deduct the interim fees from item no 4.

20. On the applicable Advocate (Remuneration) Order, the applicant submitted that it is only the Advocate (Remuneration) Amendment) Order 2014 which was applicable in taxing the applicant's bill of costs dated 17th October, 2022. The applicant cited Rule 3 of the Advocates (Remuneration) Order 2014 which provides that the principal Order is amended by changing all the references in the order from roman number to numeric reference. The applicant also cited Rule 4 which proves that "an advocate shall not agree or accept his remuneration at less than provided by this order." The applicant further cited Rule 2 which proves that "in this order, unless the context otherwise requires "Principal Order" means the advocate Remuneration Order 2009." The applicant submitted that once the principal order was amended and pursuant to Rules 3 and 4 referred to hereinabove, the Advocate Remuneration Order applicable in the taxation of the applicant's bill in question is that of 2014 and not that of 2009.
21. The applicant cited paragraph 1(j) of Schedule 6 of the Advocates (Remuneration) Amendment Order 2014 which provides for assessment of costs in constitutional petitions and prerogative order which provides inter alia, that where the matter is opposed and found to satisfy the criteria set out, such sums as may be reasonable but not less than ksh 100,000/=. The applicant submitted that the said paragraph 1(j) (ii) refers to the minimum fees and not the basic or maximum fees, and argued that paragraph 1(j) (ii) is what the Taxing Officer in his or her discretion has to take into consideration when taxing a bill relating to presenting or opposing application for a constitutional petition and prerequisite orders. These are, the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter and the time expended by the advocate. The applicant reiterated that the amount and value of the subject matter is crucial in determining the advocates fees in a constitutional petition.
22. The applicant submitted that it is settled law that instruction fees will be ascertained from the pleadings or judgment and relied on the case of Joreth v Kigano & Associates Advocates (*Supra*). The applicant urged the court to look at the amended petition and the supplementary affidavit in Meru ELC petition no 22 of 2013 and find that the value of the subject matter therein was ascertainable being ksh 2,200,000,000/= which the petitioner sought as compensation. The applicant submitted that based on that, the instruction fees is ksh33,640,000/= and cited on schedule 6 paragraph (b) of the advocates (Remuneration) Amendment) Order 2014. The applicant submitted that going by the provisions of paragraph (b) of the Advocates (Remuneration) Amendment) Order 2014, the total instruction fees will be ksh 120,000/= + ksh 540,000/=+ ksh 33,000,000/= which is a sum of ksh 33,650,000/= and not ksh 100,000/=. The applicant submitted that the amount of ksh 33,640,000/= prayed for by the applicant as instructions fees is merited.
23. With regard to paragraph 2 of the Advocates (Remuneration) (Amendment) Order 2014 Schedule 6 which provides for fees for getting up or preparing for trial, the applicant cited Rule 20 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules which provides that "the hearing of the petition shall, unless otherwise directed, be by way of
 - a) affidavit
 - b) written submissions
 - c) Oral evidence."

The applicant submitted that before the court made an order in Meru ELC Pet no E017 of 2013 that the petition be heard by way of written submissions, they had to prepare for trial. That it is on the date



when the petition was fixed for hearing that the court ordered that the petition be disposed of by way of written submissions which is one way of hearing the petition. The applicant pointed out that before the court directed that the petition be heard by way of written submissions it had come for hearing before several judges on several occasions but the same could not proceed because of one reason or the other. The applicant argued that they prepared for the hearing of the said petition irrespective of how the same was eventually heard. The applicant further submitted that in item no 45A in which he had asked for getting up fees and preparing for trial, the same was also informed by the fact that by the time the court directed and made an order on how the petition should be heard, they had already filed the pleadings in form of replying affidavits or further affidavits and other documents in response to the amended petition and or supplementary affidavit filed by the petition.

24. Regarding the other items in the amended bill of costs, the applicant relied on the objections raised in the notice of objection to taxation. The applicant also relied on the affidavit in support of the application herein together with the annexures thereto, the submissions in Meru ELC misc application no E017 of 2022 and the authorities cited therein and stated that taking into account the amount which was correctly taxed by the taxing officer and which are not objected to the applicant urged the court to find that all other items were drawn to scale and tax the amended bill of costs at ksh 77,417,428/42 inclusive of VAT.
25. I have considered the reference, the court records and submissions filed. I have also considered the decisions relied on and I find the following are issues for determination.
 1. Whether the ruling delivered on 3rd February, 2023 by the Taxing Master should be set aside.
 2. Whether the reference dated 6th March 2023 is merited
 3. Who should bear the costs of this application.
26. The facts leading to this reference are not in dispute. The respondent instructed the applicant herein to defend it in Meru ELC Petition no 22 of 2013. The applicant duly acted as per the said instructions and filed a notice of appointment of advocate, memorandum of appearance, and replying affidavits in response to the petition and amended petition. Pursuant to directions given by the court the matter proceeded to hearing by way of affidavits and written submissions. By a judgment dated 28th May 2020, the court dismissed the petition with costs to the respondent. A dispute then arose between the parties herein over fees.
27. The applicant filed an advocate/client bill of costs which was amended on 17th October, 2022 seeking to be paid a sum of ksh 77,438,552/= as legal fees. The said bill of costs was opposed and the same was taxed at ksh 21,738,651/= prompting this reference. Before filing the reference, the applicant wrote to the Taxing Officer a notice of objection to taxation in compliance with paragraph 11 of the [*advocates \(Remuneration\) Order*](#).
28. The main contention by the applicant is that the amount awarded under item 4 of the bill should have been taxed at ksh 33,640,000/= based on the value of the subject matter of the suit pleaded and shown in the valuation report annexed to the petitioner's affidavit as ksh 2,200,000,000/=. It is the applicant's view that the taxing officer erred in relying on the findings in [*Unlimited \(Africa\) Limited v Muchanga Investment Limited*](#) (2017) eKLR and [*S.G Mbaabu & co. advocates v Joseph Muoki Kakenyi & 2 others*](#) [2018] eKLR whose circumstances and the rules applicable are distinguishable with Meru ELC petition no 22 of 2013. The applicant pointed out that the former suits were not constitutional petition but originating summons which did not indicate the value of the subject matter and the valuation reports relied on were contested unlike the present case.



29. The principles of setting aside the decision of a taxing master were well established in the cases of *Premchand Raichand Limited & another v Quarry Services of East Africa Limited and another* (1972) EA 62, *First American Bank of Kenya v Shah and others* (2002) EA 64 and *Joreth Ltd v Kigano & Associates* (*Supra*). The principles include that there was an error of principle, the fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy, that the successful litigant ought to be fairly reimbursed for the costs incurred and that so far as practicable, there should be consistency in the award.
30. To begin with, the suit giving rise to this matter is a constitutional petition. Rule 11 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 provides that a party to a petition can annex the documents to be relied upon to the petition itself or to the supporting affidavit to the petition. It is clear from this provision that in a petition, a party can annex documents to be relied upon, either to the petition itself or to the supporting affidavit to the petition. This, in my view, is significant because unlike in a suit instituted by way of a plaint or an originating summons whereby such documents can either be filed separately, in a bundle of documents in the case of a plaint or annexed to the affidavit in support of an originating summons in a petition, a party can annex the documents to be relied on either to the petition itself or to the supporting affidavit to the petition.
31. In the present case, there is no dispute that pursuant to leave granted by the court, the petitioner in Meru ELC Petition no 22 of 2013 filed a supplementary affidavit in support of the amended petition in which he annexed a valuation report. The said valuation report gave the value of the suit properties as ksh 2,200,000,000/= In the petition, one of the reliefs sought by the petitioner was for full, adequate and prompt compensation being the value of the suit lands.
32. In response to the said valuation, the respondent herein filed a further replying affidavit dated 19th February, 2018 in which it pleaded for payment of ksh 2,200,000,000/= indicated in the valuation report, the same was denied and that the petitioner was not entitled to any compensation. The respondent however never stated what it thought was the value of the suit lands.
33. Going by the provisions of Rule 11(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, in my view, the valuation report annexed to the petitioner's affidavit formed part of the documents to be relied upon in the petition and indeed was responded to by the respondent. I am in agreement with the applicant's submissions that the said document became part of the petition. It follows therefore that the amount of compensation claimed by the petitioner was known and the instructions fees should have been taxed based on that sum which was the only known value of the subject matter.
34. I have anxiously looked at the ruling of the learned Taxing Master. With utmost due respect the Taxing Officer merely stated that she could not rely on the valuation report to determine the value of the subject matter. Whereas the Taxing Officer was justified in relying on the principles laid down in the cases relied on, it is clear to me that the Taxing Officer failed to consider the effect of Rule 11(2) of the Constitution of Kenya (Protection and Fundamental Freedoms) Practice and Procedure Rules, 2013 which expressly provides for documents that can be annexed to a petition and or an affidavit in support of such petition. It is my opinion that the value of the subject matter of the petition was known contrary to the finding of the Taxing Officer.
35. The applicant has sought to set aside the ruling of the taxing officer on the ground that the said bill of costs was not based on the value of the subject matter which is ksh 2,200,000,000/= being the amount of compensation prayed for by the petitioner in the amended petition. Having looked at the provisions of Rule 11(2) of the Constitution of Kenya (Protection and Fundamental Freedoms) Practice and



Procedure Rules 2013 which allows documents to be annexed to a petition or affidavit in support of a petition, which is not applicable to a plaint or an originating summons, it is my opinion that the value of the petition was known and the instructions fees ought to have been taxed based on that value which is ksh 2,200,000,000/=. In the circumstances, I am satisfied that the Taxing Officer failed to take into account relevant factor and fell into error.

36. In conclusion, I find merit in the chamber summons dated 6th March 2023 and the same is allowed and I make the following orders:
- a. The Taxing Officer's decision dated 3rd February, 2023 with respect to item 4 on instruction fees and all other items objected to are set aside.
 - b. The applicant's amended bill of costs dated 17th October, 2022 is remitted back to a different Taxing Officer with directions to reconsider the said items by applying the sum of ksh2,200,000,000/ as the value of the subject matter.
 - c. The other items not objected to remain as taxed by the Taxing Officer.
 - d. Each party to bear its own costs for this application.

37. Orders accordingly

DATED SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF NOVEMBER, 2023

In the presence of

Court Assistant V Kiragu/Lena M.

Mageria holding brief for Nyamu Nyaga for applicant

C.K YANO

JUDGE

