



Kariuki t/a Gacau Kariuki & Company Advocates v Njoroge (Administrator of the Estate of Henry Hillary Njoroge alias Henry Hilary Njoroge alias Henry Njoroge (Deceased) (Commercial Case E901 of 2023) [2025] KEHC 3327 (KLR) (Commercial and Tax) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3327 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E901 OF 2023
BK NJOROGE, J
MARCH 13, 2025

BETWEEN

**EDWARD GACAU KARIUKI T/A GACAU KARIUKI & COMPANY
ADVOCATES ADVOCATE**

AND

**KAREN WANJIRU NJOROGE (ADMINISTRATOR OF THE ESTATE OF
HENRY HILLARY NJOROGE ALIAS HENRY HILARY NJOROGE ALIAS
HENRY NJOROGE (DECEASED) CLIENT**

RULING

1. This Ruling is in respect of an Application by way of a Chamber Summons dated 30th October, 2024, filed by the Client/Applicant.
2. It is professed to have been filed pursuant to the provisions of paragraph 11 of the Advocates (Remuneration) Order, 1962 and all other enabling provisions of the law.
3. It is supported by the Affidavit of Karen Wanjiru Njoroge sworn on 30th October, 2024, with annexures.
4. It is in the nature of a reference and seeks the following orders:-
 - i. That the decision of the Taxing Master in HCCOMMISC No. E901/2023 delivered on 18th October, 2024, making an award of costs on the Respondent's Bill of Costs be set aside.
 - ii. That the Honourable Court be pleased to refer the matter back for re-Taxation of the Respondent's Bill of Costs dated 17th October, 2023, before a different Taxing Officer with proper directions thereto.



- iii. That in the alternative to prayer two (2) above, the Honourable Court does exercise its inherent jurisdiction and be pleased to retax the Respondent's Bill of Costs dated 17th October, 2023, afresh.
 - iv. That the Honourable Court be pleased to issue directions for a formal proof hearing.
 - v. That the costs of this Reference be granted to be Appellants/Applicants.
5. The Application is opposed by the Advocate/Respondent through the Replying Affidavit of Edward Gacau Kariuki. It is sworn on 18th December, 2024, with annextures.
 6. Directions were issued that the Application be disposed of by way of written submissions.
 7. The Court has seen and perused the Client/Applicant's written submissions dated 20th January, 2025, with authorities. The Court has equally seen and read the Advocate/Respondent's written submissions dated 3rd February, 2025, with authorities.
 8. The Client/Applicant is the administratrix of the Estate of the Late Henry Hillary Njoroge. The Respondent is an Advocate of the High Court.
 9. The Respondent maintains that there existed an Advocate and Client relationship initially between himself and the late Henry Hillary Njoroge. That upon the deceased's demise, the Appellant who was the wife took over as the instructing client on behalf of the Estate.
 10. The Advocate claims that he acted in respect of a conveyance of land and later as Counsel in the succession proceedings at Kiambu.
 11. The Client denied the retainer in the conveyance stating they had another Advocate. She also maintained that she had agreed on the fees for the succession matter, at Kshs. 50,000/- all inclusive.
 12. A dispute on fees having arisen, the Advocate filed a Bill of Costs dated 17th October, 2023, claiming a sum of Kshs. 1,404,045/- from the Client. The Bill was opposed.
 13. The Deputy Registrar taxed the Advocates Bill of Costs at Kshs.1,404,045/-. It is this Ruling on Taxation that has triggered this reference.

The Applicant's case

14. The Applicant submits that the Taxing Master erred in failing to consider that no instructions were given to the Advocate by the Client. For that reason, she erred in making awards relating to instruction fees, being items numbers 1 and 2. The Applicant maintains the sale agreement, the subject of the conveyance was drawn up by M/s Ringera & Co. Advocates and not the Advocate herein.
15. The Court was referred to the decisions in Wilfred Konosi t/a Konosi & Co. Advocates - Vs – Flamco Limited [2017] eKLR. It was therefore submitted that all items charged under items 3, 4, 5, 6, 7, 8, 9, 15 and 16 should have been disregarded.
16. The Applicant further submits that items numbers 12, 13 and 14 of the Bill of Costs have no correlation with the conveyancing transaction.
17. That it is unfair to charge for the conveyancing as the sub-division process is yet to be completed. This is without prejudice to the denial of instructions of the Advocate in this matter.
18. The Applicant submits that taxation relating to expenses incurred by an Advocate or party is dependent on production of vouchers. The vouchers are required to support the claim for expenses.



The Court was referred to Charles Lutta Kasamani t/a Kasamani & Co. Advocates Vs. Patrick Johnson Okwaro and Geoffrey Denis Oluoch t/a Otieno Yoko & Co. Advocates [2015] eKLR.

19. It is also submitted that some items are charged contrary to Regulations set out in the Advocates Remuneration Order.
20. The Applicant goes on to submit that with respect to the Succession Cause, there was an agreement to charge Kshs. 50,000/- all inclusive. Therefore, any charges in excess of that amount ought to be struck out. In any event, it was submitted that the Advocate did not attend to the matter to the very end.
21. Other items like VAT are said to have been overcharged. Generally, the Advocates Bill of Costs is said to have been overtaxed, as to warrant that it be remitted back to be taxed afresh.
22. The Court has been asked to allow the reference and award the costs to the Applicant.

The Respondent's submissions

23. The Respondent submitted that he was duly instructed to act in the conveyancing and the Succession Cause. That he duly represented the late Henry Hillary Njoroge. Upon his demise, he continued acting for the Estate through the Administratrix, who is the Respondent. That the action is against the Respondent as an Administratrix of the Estate of her late husband. That he held documents relating to the conveyance, which confirmed the oral instructions that he had received.
24. He denied having agreed on a retainer of Kshs. 50,000/- all-inclusive for the Succession Cause.
25. He relied upon Ochieng' Onyango, Kibet & Ohaga Advocates - vs – Akiba Bank Limited [2007] eKLR to the effect that instructions to an Advocate can be expressed or implied.
26. He maintained that the bill was drawn to scale on both the conveyance and the Succession Cause. That Section 36 of the [Advocates Act](#) prohibits undercutting. Hence, he could not charge less than that which the Advocates Remuneration Order provided for. As no agreement for fees had been agreed upon in writing, he was entitled to present a Bill of Costs for taxation. It was up to the Taxing Master to assess what was fair.
27. On the expenses, he submitted that they were reasonable and reflected expenses incurred in the course of executing the instructions.
28. He submitted that the case of Joreth Limited – vs- Kigano Associates [2002]eKLR provided a route map to the Taxing Officer. This is for purposes of assessing instruction fees. Therefore, in the succession matter, the value of the Estate was estimated at Kshs. 21,000,000/-.
29. The Respondent submits to the Court that the principles upon which we can interfere with the discretion of the Taxing Master are well settled. This is in First American Bank of Kenya –vs- Shah and others [2002] EALR 64, and Singh Gitau Advocates –vs- City Finance Bank Limited [2021] eKLR.
30. The Respondent asserted his right as an Advocate to recover fees for services rendered. He referred the Court to Mereka & Co. Advocates –vs- Zakhem Construction (Kenya) Ltd [2014] eKLR. He urged the Court to dismiss the reference with costs.

Issues for determination

31. The Court frames 2 issues for determination as follows:-
 - a. Is the reference merited?
 - b. What orders should the Court issue in relation to the Chamber Summons dated 30/10/2024?



Analysis

32. The Court notes that this is a reference. The jurisdiction of the Court in a reference is donated by Paragraph 11 of the Advocates Remuneration order which states the following;

“ 11. Objection to decision on taxation and appeal to Court of Appeal

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.(2)The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.(3)Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.(4)The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

33. The powers vested in this Court in a reference as stated in *Joreth Limited v Kigano & Associates* [2002] KECA 153 (KLR) are as follows;

“ A High Court judge when hearing such an objection is not sitting in his capacity as a judge exercising his appellate jurisdiction as, say, would be the case when he hears an appeal against the decision of a magistrate. The taxing officer whilst taxing a bill of costs is carrying out his functions as such only. He is an officer of the superior court appointed to Tax bills of costs.”

34. The principles upon which this Court can overturn the decision of a Taxing Officer are spelt out in the case of *Peter Muthoka & another v Ochieng & 3 others* [2019] KECA 597 (KLR)

“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in *MBOGO -vs- SHAH* (Supra), then the decision though discretionary, may properly be interfered with. See also *ATTORNEY GENERAL OF KENYA -vs- PROF. ANYANG' NYONG'O & 10 OTHERS*, EACJ App. No. 1 OF 2009”



a. Is the reference merited?

35. The Court can summarize the arguments presented by the Applicant as follows:

- i. There was no Advocate Client relationship.
- ii. Itemized amounts were taxed that ought to be part of the instruction fees.
- iii. The amounts charged are excessive.

36. The Court proceeds to be considered these 3 arguments as follows;

i. There was no Advocate Client relationship.

37. The Court noted that the instructions to the Advocate were given orally. There are no instructions that were in writing.

38. The Court agrees that instruction to Counsel can be express or implied from the conduct of the parties. Hence oral instructions do suffice as instructions sufficient enough to establish a retainer. The Court will have to look at the conduct of the parties.

39. An example is when a party acquiesces to an Advocate attending to his/her matters in Court. The Client cannot later turn around after three (3) years to say they never instructed the Advocate. If they did not accept the representation, they should not have accepted to have an Advocate continue to represent them in an ongoing matter. Such is but an example of how oral instructions can be gleaned by the Court from the conduct of the parties.

40. A look at the Replying Affidavit by the Advocate shows that on 19th October, 2021, the Respondent handed over to him various documents relating to the conveyance of the land. The Advocate has attached copies of some of the completion documents that he says he procured. The original title is said to be held by the Advocate.

41. It is not unusual for a Vendor to start a conveyance at one firm and thereafter leave to proceed or complete at another firm. It is not recommended, but a Vendor and a Purchaser can share an Advocate. It may be that the Vendor started off with the firm of M/s Ringera & Co. Advocates, but later moved instructions to the Advocate in this matter. The fact that M/s Ringera & Co. Advocates drew the agreement, does not mean the Client could not instruct another Advocate.

42. From the materials placed before the Taxing Officer, this Court is persuaded that Mr. Edward Gacau Kariuki had instructions to act in the conveyance.

43. The question then arises, what would be the instruction fees when the Counsel acts for both the Vendor and the Purchaser?

44. The Court makes reference to Rule 29 of the Advocates Remuneration Order which provides as follows;

29. Charges where same advocate acting for both vendor and purchaser

Where an advocate acts for both vendor and purchaser he shall be entitled to charge as against the vendor the vendor's advocate's charges and as against the purchaser the purchaser's advocate's charges, such charges in each case to be reduced by one-sixth.

45. The Taxing master arrived at an instruction fee for the conveyance at Kshs.103,000/=. This figure is not seriously disputed by the Client/Applicant. Using the formula provided for by Rule 29 above, it



ought to have been reduced by a one-sixth. The Bill is remitted back to the Taxing Master to assess this item bearing in mind the provisions of Rule 29 above.

As to the succession matter

46. The Court notes that there was no agreement for fees between the Advocate and the Client. There is no agreement in writing as is required by the law. It is such a written agreement that would oust the application of the remuneration order between the parties.
47. Rule 51 C of the Advocates Remuneration Order states as follows;
51C. Costs in probate and administration cases
Subject to paragraph 22, the scale of costs applicable to proceedings concerning probate and the administration of estates is that set out in Schedule 10.
48. The Advocate charged the instruction fees at Kshs. 250,000/-. This amount was taxed as drawn. The Advocate submits that the value of the Estate was Kshs. 21,000,000/-.
49. Other than submitting that they had an oral agreement to charge Kshs. 50,000/-, the Client/Applicant does not seem to challenge this quantum.
50. A look at the Schedule 10 of the Advocates Remuneration Order shows the instruction fees for an Estate whose value is Kshs. 21,000,000/- should be Kshs.250,000/-. The Court will not disturb this figure.

ii) Itemized amounts taxed ought to have been part of the instruction fees.

51. The Court refers to Rule 19 of the Advocates Remuneration Order to answer this question.
19. Expenses chargeable in addition to remuneration
The remuneration prescribed by this Order does not include stamps, auctioneer's or valuer's charges, agent's fees, travelling expenses, fees paid on searches in public offices or on registration, costs of extracts from any register, record or roll, cost of photocopies and other disbursements reasonably and properly incurred, but includes stationery, copies of letters and charges and allowances for time of the advocate and his clerks.
52. To this Court, the Advocate was entitled to bill for such other items and activities that were not part of the instruction fees.
53. In any event the Taxing master had discretion to allow such costs and charges as may appear to her to be necessary as per Rule 16 of the Advocates Remuneration Order.
16. Discretion of taxing officer
Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through overcaution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.
54. This Court is unable to discern whether the Taxing Master applied her mind as to whether these items were being duplicated or they were not part of the instruction fees.



55. Therefore this is an issue that need to be relooked afresh.

iii)The amounts charged are excessive.

56. The Applicant's grievance is mainly that no vouchers were presented to support the expenses, contrary to Rule 74 of the Advocates Remuneration Order.

74. Vouchers to be produced

Subject to paragraph 74A, receipts or vouchers for all disbursements charged in a bill of costs shall be produced on taxation if required by the taxing officer.

57. The Taxing Officer is allowed to exercise her discretion and tax expenses at what is considered reasonable.

58. A reading of the Ruling does not reveal whether the Taxing Officer took into consideration whether the amounts charged, in absence of vouchers, were necessary expenses/charges. Failure to exercise or indicate the exercise of discretion can lead this Court to interfere with the discretion of the Taxing Officer. See *Wasuna & Company Advocates v Kajulu Holdings Limited & 3 others (Miscellaneous Civil Application 123 of 2018) [2022] KEHC 10994 (KLR) (Commercial and Tax) (17 June 2022) (Ruling)*. Neutral citation: [2022] KEHC 10994 (KLR)

59. The Court has had a look at the Bill of Costs. The disbursements claimed are not ascertainable. The submissions do not indicate the disbursements that the Client Applicant complains of.

60. Having said so the Court has looked at the Bill of Costs. The Court finds no basis to interfere with the rest of the items as taxed, unless specifically stated otherwise.

b) What orders should the Court issue in relation to the Chamber Summons dated 30/10/2024.

61. The Court remits the Bill of Costs back to the Taxing Master for reconsideration and to retax items 1, 2, 3, 4, 5, 7, 8, 9, 15, 16, 26, 27, 30, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 and 56.

62. Save for items 1 and 2 above which are to be retaxed in accordance with Rule 29 of the Advocates Remuneration Order, the Taxing Master is to apply the following parameters when retaxing the Bill of costs.

(i) Whether the items are included in the relevant instruction fees or can be taxed separately under Rule 19 of the Advocates Remuneration Order.

(ii) Whether the items are a duplication of the instruction fees

(iii) Whether the amounts charged are reasonable and fair following the nature of the transactions.

63. In view of the above, the Reference succeeds partially.

64. As to costs, the best cause is that each party should bears his or her costs.

Determination

65. The Application by way of a Chamber Summons dated 30th October, 2024 is allowed in the following terms

a. That the decision of the Taxing Master in HCCOMMISC No. E901/2023 delivered on 18th October, 2024, making an award of costs on the Respondent's Bill of Costs is partially set aside.



- b. That the matter is referred back for re-Taxation of the Respondent's Bill of Costs dated 17th October, 2023 on items 1, 2, 3, 4, 5, 7, 8, 9, 15, 16, 26, 27, 30, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 and 56, before a different Taxing Master other than the one who delivered the Ruling on Taxation dated 18th October, 2024. The Taxing Officer to abide the directions set out in this Ruling at paragraphs 59 and 60 herein above.
- c. Each Party to bear his or her own costs.

66. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH MARCH, 2025.

NJOROGE BENJAMIN. K

JUDGE

In the presence of: -

Mr. Mutugi for the Client/Applicant

Mr. Gacau for the Advocate/Respondent

Court Assistant: Mr. Luyai.

