



**M/S Oduk & Co. Advocates v Mideny (Miscellaneous Civil Application  
E054 of 2021) [2025] KEHC 6825 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6825 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
MISCELLANEOUS CIVIL APPLICATION E054 OF 2021**

**TA ODERA, J**

**MAY 15, 2025**

**IN THE MATTER OF THE ADVOCATES ACT  
AND  
IN THE MATTER OF TAXATION COSTS AS  
BETWEEN THE ADVOCATES AND THE CLIENT**

**BETWEEN**

**M/S ODUK & CO. ADVOCATES ..... ADVOCATE**

**AND**

**DONALD OCHIENG MIDENY ..... CLIENT**

**RULING**

1. The applicant filed the reference here vide the chamber summons dated 27.10.2022 challenging the order of the taxing master Hon. D. Mac'andere (SRM). The applicant sought the following orders:
  - a. The order of the taxing master dated 14.10.22 be set aside the same having proceeded on wrong principle of law and was manifestly so low as to make nonsense of legal representation.
  - b. The order of the taxing master setting the instruction fees at Kshs. 66,493/= be set aside the same having been based on the wrong amount of quantum.
  - c. The order of the taxing master disallowing items 2-5, 7-12, 14-17, 19-25, 28, 29, 31-35, 37-40, 42-50, 53-55, 59-61, 63, 64, 66, 67, 69, 70, 72, 74, 76-84, 86-90, 92, 94, 97, 98, 100-108, 110, 112, 113, 115-117, 119-122, 124-128, 130, 132-134, 136, 138-140, 143, 145, 157-158, 160-162, 164-166, 168-172, 174, 183, 189-194, 197-201, 203-243, by taxing the items completely off was an error in principle ought to be set aside.
  - d. The taxing master erred in not upholding the election made by the advocate on the schedule applicable in the advocates/clients Bill of costs dated 27.10.2021., in the alternative an order



issue directing that a Bill be drawn under Schedule 6 the taxing master having erred in principle by proceeding to tax the bill under schedule 6 when the bill was not drawn under the said schedule and thereby disallowed the bulk of item's charged instead of directing that the bill be drawn accordingly, a fact which caused serious prejudice to the advocate and was an error of principle.

2. The application is based on the grounds;
  - i. That the taxing master failed to appreciate that the advocate did make a valid election under paragraph 22 (1) of the advocates remuneration order and wrongly opted to tax the bill under schedule 6.
  - ii. The taxing master erred in principle by applying the wrong schedule not charged under.
  - iii. The taxing master erred in principle by failing to use the correct principle sum on quantum so as to determine the correct instruction fees.
  - iv. The taxing master disallowed the items charged by the advocates based wholly on the wrong notion of law and an improper exercise of her discretion.
  - v. The bill as taxed in manifestly low as to be offensive to fair practice and notion of legal representation.
3. The application is based on the annexed affidavit of Mr. Ezekiel Oduk advocate who deponed that the advocate rendered services to the respondent as per the bill of costs dated 27.10.21 and that a dispute on fees arose after the appeal was determined and this prompted the respondent to file HCCC no. E123 of 2020. Further that the advocate made an election to have the costs taxed under Schedule 5 of the Advocates Remuneration Order but the taxing master chose to tax the bill under schedule 6 without any clear analysis and structured reasoning and so he filed an objection "EO-1". He faulted the taxing master's determination as grossly and manifestly low as to make nonsense of legal representation seeing the level of dedication, commitment, compliance, complexity, time and expense incurred and time spent in the conduct of the client's affairs. Also that the taxing master having opted to tax the bill under a schedule not proffered to her failed to direct that a bill under schedule 6 be filed and in the process disallowed the bulk of the items charged representing services rendered to the client, a matter which was highly prejudicial to the advocate, counsel further deponed that the taxing master failed to appreciate the correct principal sum in assessing instruction fees and that the taxed determination was manifestly low, erroneous and offended all the principles of taxation law. Further that in some instances the taxing master disallowed items which were not objected to.
4. He sought setting aside of the taxation order and that the matter be taxed afresh by another taxing master.
5. The advocate submitted that the subject matter was judgment and decree in the subordinate court making an award of Kshs. 1,479,720 /= costs and interests totaling to 4,404, 688 as at 14.7.20202.
6. It was submitted that the value of the subject matter is dependant on the stage of the matter as was held in the case of Insurance Regulating Authority vs Waweru Gatonye & Co advocate which was cited by the advocate in the lower court and that the case was at the execution stage at the time of taxation. Also, that the taxing master thus erred in ignoring the principles of taxation and taxing the instruction fees at Ksh. 99,739/= as basic fees for Ksh. 1.479, 720 /= and not 4.4.04,689/= reflected in the decree.
7. On the charging scale, the advocate submitted that the taxing master erred in ignoring that the election was made vide letters dated 8.10.21, 26.11.2 served upon the client as per the affidavit of service of Esther Muthoni advocate dated 4.2.2022.



8. Further that no reason was given by the taxing master for not applying schedule 5 of the remuneration Order and thus the master acted capriciously and violated the rights of the advocate on the election made. Counsel cited the case of *ALDRIN OJIAMBO T/a OJIAMBO & CO. ADVOCATES v MOHAMEDRAZA HUSSEIN JAGANI & another* [2006] KEHC 900 (KLR)

Where it was held that; “Paragraph 22 (1) reads as follows;

“In all cases in which any other Schedule applies an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under the Schedule, his remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.”

The paragraph speaks for itself. Clearly therefore, it is not open to the taxing officer to make an election to apply Schedule V. The right to make an election vests in the advocate. Therefore, by opting to apply Schedule 5, whilst the advocate had not so elected, was an error in principle.”

9. Counsel also accused the advocate of ignoring the binding authority of *Muri Mwaniki vs Wamiti advocates vs Kenya Orient Insurance limited Nyeri Misc Application no. 125 of 2019*.
10. Donald Ochieng Mideny the respondent herein filed a replying affidavit in which vehemently opposed the reference terming it misconceive and an abuse of the process of the court. Also, that the principles for setting aside taxation are well settled in law. Further that contrary to the allegations by the Advocate herein, the taxing master properly applied the relevant applicable provisions of the Advocates Remuneration order in taxing the Bill that had been filed by the Advocate herein, and that there was no proof by the Advocate that he had made a communication to me of his election to use Schedule V as required under Paragraph 22 (1) of the Advocate’s Remuneration Order. Also, that the Advocate/Applicant herein has never made any of such communication to him. He argued that the amount that was taxed in his favour was fair and reasonable and based on the relevant provisions of the Advocate’s Remuneration order and that the Taxing master applied the correct provisions of the Law in assessing the instructions fees by basing the same on the total amount that was awarded by the Lower Court, the same being Ksh. 1, 479, 720/=only. He said he is aware that costs should always be commensurate to the services rendered by an advocate and should not be excessive and or unconscionable.
11. He went on to state that the taxing master has the discretion to increase or reduce the instruction fees and the amount of the increase or reduction, if any, is always discretionary. He deponed the argument made by the Advocate to the effect that the taxing master disallowed wholly the items not objected to is without any factual basis as the same has not specified. He told this court that for this Court to interfere with the taxing officer’s decision, it had to be shown that either her decision was based on an error of principle, or that the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle and that this has not been demonstrated. He urged this court to dismiss the application for lack of merit.
12. It is not disputed that the respondent issued instructions to the advocate to demand compensation in the sum of Ksh. 3,082,860/= from the applicant and the advocate later proceeded to file Kisii CMCC no. 720 of 2005 which was heard and determined and the respondent was awarded a sum of Ksh. 1, 479, 720/=. The advocate argues that instruction fees should be Kshs 1,400,000/= based on the fact that the decretal sum plus costs and interests stood at Ksh. 4,404,688/= as at 14.7.20. This is denied



by the client who says that the decretal sum was Ksh. 1, 479, 720/= and this is the sum rightly used in taxing the advocate client Bill of costs.

13. I have carefully considered the application the response and the submissions by the advocate. The principles for setting aside taxation by the taxing master were laid down in the case of *Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others* (Hon Justice Ojwang, (as he then was) held:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... 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 interference 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for.... The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.....”

14. In the case of *First American Bank of Kenya –vs- Shah and others* (2002) 1E.A 64. It was held that “... The high court was not entitled to upset a taxation merely because in its opinion the amount awarded was high and it would not interfere with a taxation officer’s decision unless the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.... Under the advocates remuneration order, some of the relevant factors to be considered were the nature and importance of the 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....”



15. It is thus clear from the foregoing that the High Court cannot set aside an award of taxation by a taxing master unless it is satisfied that;
- a. The award is too low or too high to amount to injustice to a party.
  - b. The award took into account irrelevant factors or omitted relevant factors.
16. The advocate said that he elected to use schedule 5 of the advocates remuneration Order due to the complexity of the matter. He said this was communicated vide letters dated 8.10.21, 26.11.21 as per the affidavit of service of Esther Muthoni advocate dated 4.2.2022. The client's case is that he was neither informed of the said election nor did he consent to it. Complexity of the matter is relevant in taxing a matter and this must be stated clearly and it can either be certified by the court or be discerned from the pleadings. I have seen the pleadings in the said Kisii CMCC No. 720 of 2005. Ksh. 1,479,720/= In any event, Hon. Lady Justice Ong'udi In her Judgment dated 7.10.21 in Millimani HCCC E123 of 2021 which is related to this matter held that "in a case of this nature the court would have expected an original copy of the said agreement to be filed so that the plaintiff is put to task over the disputed signature. In that case the advocate had argued that upon conclusion of the case before the lower court he had entered into a fees agreement with the client at 30 % of the recovered sum. In the instant file it is argued that it is clear that the court cast doubt on the propriety of the alleged election under paragraph 22. Counsel cannot be heard to rely on the "alleged election herein". That left the taxing master to tax the bill under schedule 6 and I thus find that she properly applied schedule 6 of the advocates remuneration order 2014 herein.
17. On the issue of the sum on which instruction fee is based, the advocate said it was Ksh 4,129,837/= inclusive of costs and interest while according to the client it is Ksh.1,479, 20/=. On the applicable scale, it is trite law that instruction fees of an advocate is normally based on the principal sum only and not costs and interests. The lower court matter was filed in the year 2005 and hence the applicable remuneration orders are those of 2006 and 2014. Further that instruction fees is calculated based on schedule 6 paragraph 1 (b) the advocates remuneration order and since the matter herein is an advocate client Bill of costs then Section B of the said schedule comes into play. The taxing master explained how she arrived at instruction fees in the sum of Ksh. 66,493/= in line with paragraph 1 of the said schedule and I quote "The court awarded a sum of Ksh. 1,479,720 /=. For figures upto 500,000/=the amount is 42,000/= For Figures above 500,000/= it is the amount for KSh. 500,000/= plus 2.5 % in respect of excess i.e Ksh. 42000+ 2.5/100x 979,720+ 66,493.
- The figure is increased by one half in Section B of the schedule giving a figure of Ksh. 99,739.5/= subjected VAT of 16% is applied to the total Sum giving a figure of Ksh 15,958.32/=.
- The overall sum under this head is 66,493/= + 33,246+ 15,958.32=Ksh 115,697.82 + approximately Ksh. 115,698/=." I do not see any error or fault on the part of the taxing master in taxing the instruction fees at Ksh. 115, 698/= as the same was taxed to scale as per the law.
18. On the other items, they are purely discretionary on the part of the taxing master and the taxation of the same and the court will only interfere if the award is too low, manifestly high, took into account and irrelevant factor or left out a relevant factor as was held in the said cases of *First American Bank of Kenya -vs- Shah and others* (2002) 1E.A 64 and Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others . The taxation of the other item were taxed at reasonable and as per the law. I am thus not inclined to interfere with the discretion of the taxing master on them.
19. In the upshot, I find merit in the reference and I agree with wit the client that the taxation was as per the law as argued.



20. The reference is dismissed with costs of Ksh 10,000/= to the client.

**T.A ODERA**

**JUDGE**

**15. 5.25**

Delivered Virtually Via Team Platform In The Presence Of:

Miss Theuri for the Applicant /Advocate

Donald Ochieng Mideny - Client/Respondent - Present

Oigo -court Assistant

Theuri: We seek copy of the ruling and leave to appeal of the ruling.

Donald: I request the court to note that the advocate has frustrated me and I am sick and my family is suffering at home.

Order: Copy of the ruling supplied to advocate. Leave to appeal is allowed.

**T.A ODERA**

**JUDGE**

**15. 5.25**

