



REPUBLIC OF KENYA



Damon v Wairegi Kiarie & Associates Advocates (Civil Miscellaneous Application E066 of 2023) [2025] KEHC 7696 (KLR) (3 June 2025) (Ruling)

Neutral citation: [2025] KEHC 7696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL MISCELLANEOUS APPLICATION E066 OF 2023**

GL NZIOKA, J

JUNE 3, 2025

BETWEEN

JACQUELINE MACK DAMON APPLICANT

AND

WAIREGI KIARIE & ASSOCIATES ADVOCATES RESPONDENT

RULING

1. By a chamber summons application dated 15th June, 2023 brought under the provisions of Rule 11(2) of the Advocates Remuneration Order (hereinafter “the Order”), the applicant is seeking for the following orders: -
 - a. That this Honourable Court be pleased to vary and/or get aside the decision and ruling of the taxing master delivered on 2nd June 2023 and remit the Advocate/Client Bill of Costs dated 19th May 2021 to a different taxing master for taxation.
 - b. That in the alternative this Honourable court re-asses the costs due to the Advocate/Respondent in the Advocate/Client Bill of Costs dated 19th May 2019.
 - c. That, costs of the applications be provided.
2. The application is supported by the grounds thereto and the affidavit of the even date sworn by the applicant wherein she avers that the advocate/client bill of costs (herein “the bill”) dated; 19th May, 2021 arose out of the suit, being Naivasha HCCC No. 2 of 2020, Jacqueline Mack Damon vs Jean Francois Damon & 4 others.
3. That she opposed the bill vide a replying affidavit and written submissions dated 1st December, 2021, on the issue of a retainer between her and respondent’s advocate. Consequently, the taxing master referred the matter to the High Court to determine that issue of a retainer.



4. That by a ruling delivered on 15th November, 2021, Hon. Lady Justice G. W. Ngenye (as she then was) held that the applicant had failed to prove the existence of a retainer between the parties and referred the matter back to the taxing master.
5. That on 23rd March, 2023 when the matter came up before the taxing master her advocate sought leave to file supplementary submissions and was granted seven (7) days for the same and corresponding leave to the respondent. That the ruling was reserved for 27th April, 2023.
6. That, subsequently, the supplementary submissions and list of authorities dated 4th April, 2023 was filed on 5th April, 2023 and served on the respondent on 6th April, 2023.
7. However, on 27th April 2023 the ruling was stood over to 5th May, 2023 but was not delivered. Subsequently, by an email sent on 2nd June, 2023 to her advocate's email, informed her that the ruling had been delivered.
8. That upon request and perusal of the said ruling, it was noted that the taxing master stated that her supplementary submissions had not been filed and awarded the respondent costs in the sum of Kshs. 4,943,383.
9. However, her advocate perused the trial court's file and discovered that the supplementary submissions were not in the file and one Ms. Lilian; court official informed her that she would raise the issue with the taxing master.
10. That on 14th June, 2023 the taxing master wrote an email to her advocate seeking to be supplied with the supplementary submissions which was done expeditiously.
11. The applicant avers that; it appears the supplementary submissions had been misplaced leading to their unavailability in the court file. That in that case the lack of submissions cannot be attributed to her or her advocates.
12. Further failure to consider her supplementary submissions amounts to a denial of a fair hearing and access to justice. That, had the taxing master considered the supplementary submissions he would have reached a different conclusion.
13. The applicant further avers that, the taxing master misdirected himself in law and principle by;
 - a. Using the wrong parameters in determining the instruction fees by pegging the same on amounts pleaded in the plaint notwithstanding the fact that there was no proper suit in place given that leave was yet to be granted to proceed with the suit as a derivative claim.
 - b. Awarding getting up fees despite the suit having been withdrawn at its inception, even prior to the application seeking leave to proceed with the suit as a derivative claim having been heard and determined.
14. Furthermore, the taxing master misdirected himself in finding that items 3-31 of the bill were drawn to scale and not objected to despite the same having not been drawn to scale and objected to in the supplementary submissions.
15. The applicant avers that, the award of costs of Kshs. 4,943,383 is in inconsistent with well-established principles of law and awards made in similar cases and urge the court to allow her application as prayed.
16. However, the respondent opposed the application and filed a replying affidavit dated 27th July, 2023; sworn by Davies Wairegi Kiarie, an Advocate of the High Court and managing partner of the respondent's firm.



17. He deposed that the chamber summons application dated 15th June, 2023 offends Rule 11(1) of the Advocates Remuneration Order as the applicant has failed give the mandatory notice of objection giving substantiated reasons of her objection to the items taxed by the taxing officer.
18. That, as regard this matter, despite the applicant being granted seven (7) days' leave within which to file her supplementary submissions, the applicant filed the submissions on 4th April, 2023 way beyond the period allowed and without leave of the court.
19. That there is nothing on the record to evidence filing of the alleged submissions and that the applicant exercised massive indolence by failing to comply with the court orders and/or in seeking for leave to place the submissions placed on record.
20. Further, the applicant has failed to demonstrate how the taxing master erred in principle and law by failing to consider the supplementary submissions and/or in taxing the party to party bill of costs in the sum of Kshs. 4,943,383.
21. He averred that the taxing master consider all issues raised by the applicant before arriving at his decision and gave reasons for every item of the award made including but not limited to the value of the subject matter, complexity, time and resources spent on the matter, interest of the parties, and general impact of the case on all the parties.
22. That it is trite law that the decision of the taxing master is not to be interfered with unless it is shown that the taxing master arrived at the wrong assessments of the cost payable. Further, it is not sufficient to merely allege the amount awarded is too high.
23. Furthermore, failure to file submissions on time cannot be considered an error apparent on the record. That in any event, there is no evidence that had the supplementary submissions been on record at the time of the ruling on 2nd June, 2023, the decision and reasoning of the court would substantially change and that the court would arrive at a different award.
24. The respondent termed the application as frivolous, an afterthought aimed at frustrating due process and subverting justice. Further, that it is fatally defective, bad in law and an abuse of the court process and neither does it meet the threshold for review and/or setting aside the orders of the court and should be dismissed with costs.
25. The application was disposed vide written submissions. The applicant filed submissions dated 18th September, and conceded that she did not file a notice of objection as envisaged under Rule 11 (1) of the Advocates Remuneration Order but argued that the subject provisions use the permissive term "may" in respect to the notice of objection and therefore cannot be deemed as mandatory.
26. Further, the reasons for the disputed items in the bill have been given on the face of the taxing mater's decision, consequently the notice of objection is not required.
27. The applicant relied on the case of N.W. Amolo t/a Amolo Kibanya & Co. Advocates vs Samson Keengu Nyamweya [2016] eKLR where the court cited with approval the case of Ahmednassir Abdikadir & Company Advocates vs National Bank of Kenya Ltd (2) [2006] 1 EA 5 where the court stated that where the reasons of taxation on the disputed items in the bill are already contained in the ruling there is no need to seek for further reasons as required by Rule 11 (2) of the Advocates Remuneration Order as the rue was not intended to be ritualistically observed where reasons are already contained.
28. The applicant further submitted that the suit which gave rise to the bill was in the nature of a derivative claim under the ambit of the *Companies Act* and therefore the taxing officer ought to have been guided



- by the provisions of Schedule 6 sub-paragraph 1(f) of the Advocates Remuneration Order as held in the case of; Nilkunj Ratilal Dodhia vs Shashikant Mepa Shah & 5 others [2021] eKLR.
29. That there was no suit before the trial court as the derivative action was withdrawn before the court gave a determination on the issue. That in the circumstances the taxing master erred in awarding the respondent getting up fees. The case of; Nilkunj Ratilal Dodhia vs Shashikant Mepa Shah & 5 others(supra) was cited where the court held that getting up fees under schedule 6 is only for trials or appeals.
 30. Further, the taxing master erred in pegging the instruction fees on the amounts pleaded in the plaint and awarding instruction fees of Kshs. 2,000,000. That in the case of; Nilkunj Ratilal Dodhia vs Shashikant Mepa Shah & 5 others(supra) the court substituted the instruction fees of Kshs. 600,000 with an award of Kshs. 90,000 where the subject matter was a derivative claim.
 31. The applicant further submits that the subject suit being in the nature of a derivative suit and considering the issue in dispute related to irregularities in the nature of the un-procedural calling of meetings, appointment of directors, effecting transfer of shares, and passing resolutions.
 32. Further, the relevant documents to be adduced as evidence were direct and self-explanatory. That the alleged voluminous audit reports were prepared by competent audit firm of international repute on the instruction of the respondent and included a brief and concise conclusion that guided the respondent in drafting the pleadings.
 33. That the taxing master having acknowledged the filing of the supplementary submissions without any reservation, the applicant had a legitimate expectation that the same were deemed duly filed and would be considered.
 34. Further the issues in contention having been canvassed in the supplementary submissions, the failure of the taxing master to consider them prejudiced her and amounts to an error of law. The applicant cited the case of; Muncipal Council of Thika vs Elizabeth Wambui Kamicha [2013] eKLR where the court stated that it is the duty of the trial court to consider and evaluate the entire evidence and submissions on record and that failure to consider the appellant's submissions was an error in law.
 35. However, the respondent filed response submissions dated 22nd September, 2023 and submitted that the applicant is bound by the provisions of Rule 11 of the Advocates Remuneration Order and must file a notice of objection which initiates the reference in the same manner as a notice of appeal initiates an appeal.
 36. That, the notice of objection identifies the actual items the applicant wishes to object to and cannot be waived where a taxing master offers a decision with reasons. That, in the case of; Macharia & Co. Advocates vs Arthur K. Magugu & Another [2012] eKLR the Court of Appeal stated that vague notices might force taxing masters to give reasons for their taxation on each item even those not objected to. The Court of Appeal held that the respondent's notice was fatally defective for failing to specify the items objected to and sought reasons for taxation and therefore the reference was deemed incompetent.
 37. Further, in the case of; Matiri Mburu & Chepkemboi Advocates vs Occidental Insurance Company Limited [2017] eKLR, the court explained the purposes of Paragraph 11 of the Remuneration Order as being, to narrow down the issues, and to give notice to the adverse party, the taxing master and the reference court allowing to focus on specific matter objected to rather than the entire bill of costs ensuring expeditious disposal of taxation disputes.



38. That the court held that, compliance with paragraph 11 of the Remuneration Order was not a mere technicality and that the provisions of Article 159(2)(d) of *the Constitution* was not meant to overthrow procedure or technical requirements but to guard against undue regard to procedural technicalities in the administration of justice.
39. The respondent cited the cases of; Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited & Another [1972] E.A, First American Bank of Kenya vs Shah and Others (2002) EA 64, and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92 where the courts stated that the court cannot interfere with the taxing master's decision unless it is shown that 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.
40. The respondent further submitted that the taxing master gave reasons for his decision to award instruction fees and getting up fees at page 6 paragraph 31 of the impugned ruling. Further, the taxing master explained in paragraph 32 of the ruling that he ascertained the value of the pleadings were in excess of € 1,082,000 or Kshs. 138,000,000.
41. That, the Advocate was tasked to review and scrutinize all documents including voluminous audit reports and financial documents, offer a legal opinion and thereafter prepare pleadings. As such, it is misleading for the applicant to state the task in the matter was not laborious and did not amount to a complex assignment which is contrary to the finding of the taxing master.
42. The respondent further argued that the pleadings spoke of the volumes of the work done and it did not matter whether the derivative suit was allowed or not. That in any case, the application seeking leave to proceed with the derivative suit could not stand without the plaint.
43. Further, the taxing master addressed himself on all aspects of the bill of costs and applied his discretion and in absence of any error of principle the application should be dismissed with costs to the respondent.
44. Further the applicant's responses and tendered evidence were duly considered by the taxing master in delivering his ruling.
45. Finally, the respondent cited the case of; Erastus Wade Opande vs Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007 where the court stated that, submissions simply concretise and focus on a side's case and are not evidence on which a case is decided.
46. Further reliance was placed on the case of; Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR where the Court of Appeal stated that submissions cannot take the place of evidence, that they are marketing languages with each side endeavouring to convince the court there is the better one. Further, there have been cases decided without hearing submissions and based on evidence only.
47. The reference is considered in the light of the material before the court and I note that, the principles upon which an appellate court will interfere with the exercise of discretion by a taxing master are clear. In First American Bank of Kenya vs Shah and Others [2002] E.A.L.R 64 at 69, Ringera J (as he then was) observed as follows:

“This 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 so manifestly excessive as to justify an inference that it was based on an error of principle... it would be an error of principle to take into account irrelevant factors or to omit to take into



account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...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...”

48. Further, in the case of *Kipkorir Titoo & Kiara Advocates vs. Deposit Protection Fund Board* [2005] eKLR the Court of Appeal held that:

“The appeal to this Court from the decision of a judge on reference from a taxing officer is akin to a second appeal and should be governed by Section 72(1) of the *Civil Procedure Act*. In our view, such an appeal can only be allowed on any of the three grounds specified in Section 72(1) of the *Civil Procedure Act*, that is to say, if the decision is contrary to law or some usage having the force of law; or the decision has failed to determine some issue(s) of law or usage having the force of law or where there is a substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits.”

49. To revert back to this matter, the application is brought under paragraph 11 (1) & (2) of the Advocates Remuneration Order which states as follow: -

- “(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”

50. However, before I delve into the merit of the matter I note that a key issue has arisen as to whether the supplementary submissions were filed by the applicant and/or considered in the ruling of the taxing master.
51. In that regard, the record of the proceeding before the taxing master indicates on the 23rd March 2023, the applicant sought for leave to file supplementary submissions. The taxing master allowed the applicant to file supplementary submissions within seven (7) days and the respondent was given corresponding leave for the same within 7 days. The matter was stood over to 27th April 2023, for ruling.
52. However, there is no indication as to what happened on 27th April 2023 as there are no proceedings of that date. The next proceedings were on 2nd June 2023 when the ruling was delivered in the absence of the parties.
53. The question therefore remains as to whether the applicant filed the supplementary submissions within 7 days from the date of the order thereof being, 23rd March 2023 and whether the same were considered by the taxing master in the resultant ruling.
54. From the ruling of the taxing master at paragraph 20, the taxing master states that the applicant did not file any supplementary submissions.



55. The court thus stated: -

“This honourable court did grant leave to the respondent to file supplementary submissions and by the time of drafting this ruling, there is none filed so far in the court file. The less I speak of his the better in light of the final orders that this honourable court will grant”.

56. I however note from the trial court’s file that, the applicant supplementary submissions were received at the High Court Registry and stamped received on 5th April 2023. Therefore, by the time the decision was rendered on 2nd June 2023, they were with the court.

57. It is against this background that, the applicant’s lawyer wrote to the Hon. Deputy Registrar a letter dated 5th June 2023, expressing an alarm that, the submissions were not considered yet they were received by the court.

58. In response to that, letter the Hon. Deputy Registrar wrote an email dated 14th June 2023 requesting the applicant’s lawyer to avail the submissions for further directions. By a letter dated 15th June 2023, the physical copies of supplementary submissions and list of authorities dated 4th April 2023 were forwarded as requested.

59. Subsequently, by an email dated 22nd June 2023 the applicant was notified that, the matter would be mentioned before the Hon. Deputy Registrar at 9.00am. On 22nd June 2023 when the matter was mentioned, there were no parties in court, and it was stood over to 27th July 2023, when the Hon. Deputy Registrar was informed of the reference herein.

60. Pursuant to the aforesaid, it is evidence that the applicant’s submissions were not considered although they had been received by the High Court registry. Obviously the failure to be forwarded to the taxing master was occasioned by the registry staff and the applicant cannot be blamed for the same.

61. The failure to consider those submissions prejudiced the applicant as and, on that ground alone the ruling of the taxing master cannot stand. Article 50 of *the Constitution* of Kenya, 2010 gives every person a right to a fair hearing.

62. Consequently, the ruling of the taxing master herein dated 2nd June 2023, be and is hereby set aside. It is directed that, the matter reverts back to the taxing master to be considered in light of the orders of this court. In that case the court shall not delve into the merits of the reference.

63. The file be placed before the taxing master on or before the 6th June 2025 for further direction or action.

64. The costs of the application be in the cause.

65. It is so ordered

DATED, DELIVERED AND SIGNED THIS 3RD DAY OF JUNE 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Kanyoni for the applicant

Mr Wairegi for the respondent

Hannah: Court Assistant

