



Muthoga Gaturu & Co Advocates v M'Barine & 2 others (Miscellaneous Application 147 of 2017) [2025] KEHC 9745 (KLR) (Commercial and Tax) (20 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 147 OF 2017
DO CHEPKWONY, J
JUNE 20, 2025**

BETWEEN

MUTHOGA GATURU & CO ADVOCATES APPLICANT

AND

ERIC MUGENDI M'BARINE 1ST RESPONDENT

MIKE T THEURI 2ND RESPONDENT

WALLACE MUGENDI 3RD RESPONDENT

RULING

1. The Matter pending before this Court for determination is the Applicant's reference, which was filed under a Chamber Summons Application dated 8th June, 2018. Through this application, the Applicant seeks the following orders:-
 - a. Spent;
 - b. That the Honourable Judge be pleased to vary or set aside the assessment of the Honourable Taxing Master on the Bill of Costs dated 14th May 2018.
 - c. That the Bill of Cost dated 20th March 2017 be taxed afresh.
 - d. That the Costs of this application be provided.
2. Applicant's case, as set out in the grounds on the face of the application and further elaborated in the Supporting Affidavit sworn by R. Paul Mugambi on even date, is that the Honourable Taxing Master committed fundamental errors in the taxation of the Advocate-Client Bill of Costs dated 20th March, 2017. The primary grievance advanced by the Applicant is that the Taxing Master failed to apply the



correct legal principles that govern the taxation of such bills, thereby leading to an erroneous and unfair assessment of costs.

3. Specifically, the Applicant contends that the Taxing Master miscalculated the instruction fees by failing to consider the nature and complexity of the legal instructions executed by the Applicant-Advocate, as well as the substantial amount of work undertaken in the course of legal representation. As a result, the assessment of fees was unjustifiably low, leading to an inadequate compensation for the services rendered.
4. Furthermore, the Applicant asserts that, upon receiving the taxation ruling, he wrote to the Honourable Taxing Master seeking detailed reasons for the assessment on various contested items in the Bill of Costs. However, the Taxing Master has not provided any response to the said request to date. Consequently, the Applicant believes that the taxation process was flawed due to the application of incorrect legal principles and a misinterpretation of Schedule 6 of the *Advocates (Remuneration) Order*. In turn, the erroneous assessment, resulted in an unfairly low taxation of the Bill of Costs, thereby causing substantial prejudice to the Applicant. In light of the foregoing, the Applicant urges this Honourable Court to remit the matter for reconsideration by a different Taxing Master to ensure a fair and just determination of the Bill of Costs.
5. In response to the reference application, the Respondents filed two affidavits, which were sworn by Eric Mugendi M'Barine and Michael T. Maina on 28th August, 2018.
6. By consent of the parties, the court directed that the reference be canvassed by way of written submissions. The court record indicates that both parties fully complied with this directive. The Applicant filed two sets of submissions, dated 24th April, 2020 and 15th May, 2020 respectively, while the Respondents filed a set of submissions dated the 5th May, 2020.

Applicant's Submissions

7. In his submissions, the Applicant contends that the taxation of the bill of costs arose from legal proceedings in Nairobi High Court Winding Up Cause No. 32 of 2014. The Applicant had formally requested the Taxing Master to call for the court file related to this matter to enable her fully appreciate the extent and complexity of the work undertaken. However, despite this request, the Taxing Master failed to call for the file, which, according to the Applicant, resulted in an undervaluation of the bill of costs, leading to a significantly low taxation amount of Kshs.1,442,190.00.
8. Nonetheless, The Applicant identified the following five key issues for determination by the court:-
 - a. Whether the reference application was filed out of time.
 - b. Whether the Taxing Master erred in the application of the principles relevant to the taxation of advocate-client costs.
 - c. Whether the Taxing Master wrongly assessed instruction fees under Schedule 6, Paragraph 1(f) of the Advocates Remuneration Order.
 - d. Whether an agreement existed between the parties stipulating a legal fee of Kshs.300,000 as full payment for the entire Winding Up Cause No. 32 of 2014.
 - e. Whether the specific items objected to in the bill of costs were properly considered in submissions before the Taxing Master.
9. Regarding the first issue, whether the reference application was filed out of time, the Applicant submitted that the ruling by the Taxing Master was delivered on 14th May, 2018, and the reference



application was subsequently filed on 8th June, 2018. Additionally, a Notice of Objection to Taxation was filed on 25th May, 2018.

10. It is the Applicant's argument that, pursuant to Rule 11(1) and (2) of the [Advocates Remuneration Order](#), a Notice of Objection must be filed within fourteen (14) days of the delivery of the Taxing Master's ruling. In this case, the notice was filed eleven (11) days after the ruling was delivered. Furthermore, the reference application itself was filed within fourteen days after the filing of the notice of objection. The Applicant therefore contends that the Respondents' argument that the reference was filed out of time is misplaced and without merit.
11. On the second issue, whether the Taxing Master erred in applying the principles governing taxation of advocate-client costs, the Applicant has urged the court to consider the complexity of the subject matter in justifying instruction fee of Kshs.5,000,000.00. The Applicant has referenced submissions previously made in support of the bill of costs, wherein the Taxing Master was urged to consider Paragraphs 4 and 5 of the [Advocates \(Remuneration\) Order](#), which outline factors that constitute exceptional circumstances justifying higher legal fees. It is emphasized that the pleadings drafted and filed in this matter totalled over 1,500 pages, further underscoring the volume and complexity of the work undertaken.
12. The Applicant has also submitted that, since the Taxing Master failed to call for the primary court file, she was unable to fully appreciate the nature of the legal work done. In the Applicant's view, this failure impaired the Taxing Master's ability to exercise her discretion judiciously. Consequently, the assessment of instruction fees should be set aside for failing to take into account the complexity of the case, the significance of the subject matter, and the fact that the value of the dispute was approximately Kshs.1.5 billion.
13. On the Third issue of whether the Taxing Master erred in assessing instruction fees under Schedule 6, paragraph 1(f) of the [Advocates Remuneration Order](#), the Applicant reiterates that complexity and importance are critical factors that must be considered when determining instruction fees. In the present case, the Respondents were seeking to protect up to 80% of their shareholding interests, a matter of high financial and legal significance. The Applicant has argued that the Taxing Master ought to have determined the value of the shares in question as a basis for assessing the appropriate instruction fees. Given the substantial value and critical nature of the case to the Respondents, the Applicant has urged the court to revise the instruction fees upwards to a sum of Kshs.5,000,000.
14. With respect to the fourth issue—whether there was a retainer agreement limiting legal fees to Kshs. 300,000/= the Applicant has submitted that no such agreement was ever produced by the Respondents. The Applicant has thus dismissed the Respondents' claim as false and unsubstantiated. Moreover, even if such an agreement had existed, the Respondents had already made a partial payment of Kshs.1,005,000, which contradicted their assertion that the total legal fees were capped at Kshs.300,000.00.
15. Finally, on the fifth issue of whether the Taxing Master properly considered the individual items in the bill of costs, the Applicant has submitted that, although the Respondents did not contest items numbered 2 to 265, the Taxing Master still had a legal obligation to evaluate each item fairly and reasonably. The Applicant has argued that this assessment would have been more thorough if the primary suit record had been called for, for consideration.

Respondent's Submissions

16. In their submissions, the Respondents raised the following six key issues for determination:-



- a. Whether the Taxing Master exercised her discretion correctly in assessing the Applicant's advocate-client bill of costs.
 - b. Whether the Applicant was unjustifiably inflated the instruction fees.
 - c. Whether the Applicant overcharged the Respondents in the bill of costs.
 - d. Whether the Taxing Master correctly applied Schedule 6, Part B of the [Advocates Remuneration Order](#).
 - e. Whether the reference by the Applicant was filed out of time.
 - f. Whether the court should interfere with the Taxing Master's assessment of costs as certified on 14th May 2018.
17. On the second issue of whether the Taxing Master exercised her discretion correctly, the Respondents have opposed the Applicant's argument that the complexity of the case could not be appreciated without the primary suit record. They have contended that the parties, while making submissions before the Taxing Master, fully understood the nature of the case. The Respondents have pointed out that, although the Applicant represented them, the matter never proceeded to a full hearing for the determination of the main petition. They have further argued that the volume of the court file does not necessarily equate to complexity, nor does it justify higher instruction fees. The Respondents have accused the Applicant of attempting to use the bulkiness of the documents as a means to justify exorbitant legal fees, amounting to an unfair financial burden on the Respondents.
18. On the issue of fees, the Respondents have maintained that there was an express agreement between them and the Applicant Advocate, under which the total agreed legal fees for the entire scope of representation was Kshs. 150,000. They have further alleged that despite this agreement, they were coerced into making additional payments due to persistent demands from the Applicant, who repeatedly threatened to withdraw from the matter unless further fees were paid. The Respondents have argued that this conduct placed them in a position of undue pressure, as they had already engaged the Applicant and depended on his legal representation for the protection of their interests in the matter.
19. In addition, the Respondents have contended that it was the Advocate's duty, not the Client's, to draft and present a formal retainer agreement outlining the agreed legal fees and the terms of engagement. They have asserted that the absence of such an agreement should not be used to the Applicant's advantage to claim exorbitant legal fees that were not initially agreed upon. Furthermore, the Respondents strongly disputed the Applicant's claim that the company involved in the matter had substantial assets worth more than USD 1.5 million. They have clarified that, at the time the Applicant was retained, the nominal company's only asset was a geothermal license valued at Kshs.600,000. They have asserted that any claim suggesting that the company possessed assets exceeding USD 1.5 million was a misrepresentation of facts, intended to justify an excessive legal fee claim.
20. Further, the Respondents explained that the USD 1.5 million referred to by the Applicant was not an asset of the nominal company but rather a loan acquired by a separate entity affiliated with the nominal company. They have contended that the Applicant erroneously sought to base his legal fees on the financial liabilities of a different company, which was not the subject of the legal proceedings. According to the Respondents, this approach was legally flawed and lacked merit, as an advocate's remuneration should be based on the nature and value of the subject matter of the dispute, rather than unrelated financial obligations of third-party entities.



21. On these grounds, the Respondents firmly maintains that the Applicant had not provided sufficient justification to warrant any interference with the Taxing Master's discretion in assessing the legal fees. They have argued that revising the instruction fees upwards, as sought by the Applicant, would amount to unjust enrichment and an unwarranted financial burden on the Respondents. They have urged the court to uphold the Taxing Master's decision and dismiss the Applicant's claims. On whether the taxing master correctly applied Schedule VI of part 8 of the *Advocates Remuneration Order*, the Respondents have submitted that the Taxing Master properly exercised her discretion when assessing legal fees in accordance with the Advocates Remuneration Order. They have emphasized that under Schedule VI, Part 8 of the said Order, an advocate's instruction fees may only be increased by a maximum of 50%. However, in the present case, the Respondents have contended that the instruction fees awarded to the Applicant had been increased by more than 50%, far exceeding the allowable limit. Thus, they submit that the Taxing Master had correctly exercised her discretion while assessing the instruction fees, and they have urged the court to uphold her determination as fair and reasonable. They have further argued that, contrary to the Applicant's assertions, the bulkiness of a court file does not automatically translate into legal complexity, nor does it justify excessive instruction fees. They have urged the court to reject the Applicant's reference and to uphold the Taxing Master's original assessment on instruction fees as being reasonable and within the confines of the Advocates Remuneration Order.
22. On the issue of whether the Reference Application was filed within the prescribed timeline, the Respondents have submitted that the application was filed on 25th May, 2018 and no efforts were ever made to obtain the reasons for the Taxing Master's decision within the stipulated timelines. According to the Respondents, an advocate who wishes to object to a taxation ruling is required to file a Notice of Objection within fourteen (14) days from the date of the ruling and to request the Taxing Master to provide reasons for her decision. That the failure to follow up on the proceedings was a procedural lapse which rendered the reference application defective and improperly before the court for having been filed out of time.
23. In conclusion, the Respondents have submitted that the Applicant has failed to demonstrate any valid grounds to warrant any interference with the Taxing Master's ruling. They have maintained that the fees assessed were fair, lawful, and within the prescribed legal framework, and they have urged the court to dismiss the reference application with costs to the Respondents.

Analysis and Determination

24. Having considered the reference application dated 8th June, 2018, the Affidavits sworn in support and in rebuttal of the same and submissions filed on behalf of the parties together with the legal authorities relied upon, this Court is of the view that the following issues arise for determination: -
 - a. Whether the reference application was filed out of time.
 - b. Whether there was a retainer agreement between the parties; and
 - c. Whether the taxing master erred in principle in assessing the Advocate-Client Bill of costs dated 20th march 2017 so as to warrant this court's interreference.

Whether the Reference was filed Out of Time

25. The law governing objections and references against taxation rulings is found in Rule 11 of the *Advocates (Remuneration) Order*, which provides as follows:-

Rule 11(1):



"Should any party object to the decision of the Taxing Officer, he may, within fourteen (14) days after the decision, give notice in writing to the taxing officer of the items of taxation to which he objects."

Rule 11(2):

"The Taxing Officer shall forthwith record and forward to the objector the reasons for his decision. The objector may, within fourteen (14) days from the date of receipt of the reasons, apply to a Judge by Chamber Summons, which application shall be served on all parties concerned, setting out the grounds of his objection."

26. The primary issue for determination is whether the Applicant complied with the requirements and timelines prescribed under Rule 11 of the *Advocates (Remuneration) Order* when filing the present Reference. Upon reviewing the court record, it is evident that the Applicant filed the Reference by way of a Chamber Summons application dated 8th June, 2018, and the same was lodged in court on the very same date, 8th June, 2018. The Taxing Master had delivered the ruling on taxation on 14th May, 2018, meaning that the Reference was filed approximately twenty-four (24) days after the delivery of the ruling.
27. Under Rule 11(1) of the *Advocates (Remuneration) Order*, an aggrieved party must, within fourteen (14) days from the date of the ruling on taxation, serve the Taxing Officer with a written notice specifying the items of taxation being objected to.
28. In the present case, the Applicant complied with this requirement by filing a Notice of Objection on 25th May, 2018, which was well within the stipulated timeframe. However, the record does not indicate that the Taxing Master ever provided reasons for the taxation ruling despite the Applicant's formal request. It is well established in law that where reasons are not furnished by the Taxing Master, an applicant cannot be expected to comply with statutory timelines that are contingent upon the receipt of such reasons.
29. The Respondent argues that the Reference was filed out of time because the Applicant never followed up to get the reasons for taxation within the fourteen (14) days statutory timelines. Well, in this Court's view, Rule 11 (1) and (2) as reproduced above does not envisage a situation where after filing the objection, an Applicant will be duty bound to follow up for the reasons to be supplied within fourteen days thereafter. The Taxing Master is expected to provide these reasons within a reasonable period of receiving the request and where no reasons are given, courts have held that time does not start running until a party receives them or is otherwise compelled to file the Reference without them as the Applicant did in this case.
30. In the case of *Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited* [2012] eKLR, the Court held that an Applicant must first seek reasons from the Taxing Master before filing a Reference. If no reasons are given, time does not begin to run, as requiring an Applicant to act in the absence of reasons would be procedurally unfair.
31. Similarly, in the case of *Lubullellah & Associates Advocates -vs- N. K. Brothers Limited* [2014] eKLR, the Court of Appeal reiterated that a Reference is deemed to be filed within time if the Notice of Objection was properly lodged and the Reference was filed after receiving reasons from the Taxing Master. Where no reasons are given, the applicant cannot be penalized for delay.
32. In light of the foregoing decisions, it is clear that while statutory timelines under the *Advocates (Remuneration) Order* must be adhered to, procedural fairness dictates that an applicant should be provided with reasons before being expected to file a Reference challenging taxation.



33. In the present matter, the Applicant filed a Notice of Objection on 14th December 2021, formally requesting the Taxing Master's reasons for the taxation ruling but the Deputy Registrar failed to provide the requested reasons. Given the legal principles outlined above, the Applicant could not reasonably be expected to file a proper Reference in the absence of these reasons. As such, the contention by the Respondent that the Reference was filed out of time is misplaced and without legal basis.

Whether there was a retainer agreement between the parties

34. The Respondents contend that there was an agreement between the parties that capped legal fees at Kshs.300,000/=. However, they have not produced any documentary evidence to substantiate this claim but assert that they ended up paying more than this owing to pressure by the Applicant who threatened to withdraw instructions if not paid. On the other hand, the Applicant disputes the existence of such an agreement, emphasizing that payments amounting to Kshs.1,005,000/= have already been made thus directly contradicting the Respondents' assertion that legal fees were limited to Kshs.300,000/=.

35. Under Section 45(1) of the *Advocates Act* (Cap 16, Laws of Kenya), an agreement relating to an advocate's remuneration must be in writing and duly executed by both parties. The provision states:-

“Subject to this section, an advocate and his client may—

- a. before, after or in the course of any contentious business, make an agreement as to the amount and manner of payment of advocate's fees;
- b. before or after or in the course of any non-contentious business, make an agreement as to the amount and manner of payment of advocate's fees:

Provided that such agreement shall be in writing and signed by the client or his agent duly authorized in that behalf.”

36. In the present case, the Respondents have failed to provide any written agreement confirming that legal fees were capped at Kshs.300,000.00 or Kshs.150,000.00 as argued in their submissions. Given this omission, the court cannot uphold their claim, as it does not meet the statutory requirement under Section 45(1) of the *Advocates Act*.

Whether the taxing master erred in principle in assessing the Advocate-Client Bill of costs dated 20th March, 2017 so as to warrant this court's interference.

37. The Applicant's primary contention concerns the assessment of instruction fees by the taxing master. According to the Applicant, the primary suit in which they represented the Respondents was highly complex, as it involved a nominal company in which the Respondents sought to protect approximately 80% of the nominal company's assets as their stakes and rights. To illustrate the complexity of the matter, the Applicant highlighted that the pleadings filed in the case exceeded 500 pages. The Applicant further contended that despite requesting the taxing master to call for the primary suit in order to fully appreciate its intricate nature, the taxing master failed to do so. As a result, the instruction fees were significantly undervalued and set at Kshs.500,000.00. The Applicant now seeks this Court's intervention to revise the awarded fees, arguing that the sum assessed was inordinately low. They urge the court to uphold their claim for instruction fees in the amount of Kshs.5,000,000.00 arguing that the matter was of high importance to the Respondents. With respect to the other items in the bill, the Applicant maintains that had the taxing master examined the primary suit and acknowledged its



complexity, she would have exercised her discretion differently, particularly given that the Respondents did not object to these items yet the taxing master taxed them off.

38. The Respondents, on the other hand, argue that the mere existence of voluminous filings and multiple pleadings is not uncommon in legal practice and should not, in itself, be used as a justification to unduly inflate legal fees or to infer the complexity of the case. They contend that the suit in which the Applicant represented them had not yet proceeded to hearing and was still at a preliminary stage. Furthermore, they assert that the instruction fees awarded to the Applicant had already been increased by more than 50%, thereby negating any basis for interfering with the taxing master's discretion.
39. At the outset, it is imperative to highlight the well-established legal principles that guide the taxation of an Advocate-Client Bill of Costs. These principles were enunciated in the landmark case of *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Others* [1972] E.A 162, which set out the following considerations
- a. The nature and importance of the matter to the parties involved.
 - b. The amount of work done and the complexity of the case.
 - c. The skill and responsibility required of the advocate in handling the case.
40. The Applicant contends that the Taxing Master did not properly apply these guiding principles, arguing that there was a failure to fully evaluate the nature and complexity of the matter. Specifically, the Applicant alleges that the Taxing Master did not call for the original court file in Nairobi High Court Winding Up Cause No. 32 of 2014. As a result, the Applicant asserts that the Taxing Master did not fully appreciate the extent of the work undertaken, leading to an unfairly low taxation of instruction fees.
41. A closer examination of item number 1 in the Applicant's Bill of Costs reveals that the instruction fees were drawn as follows:-
- “For instructions to take up conduct of the matter on behalf of the Petitioners, to file petition for a declaration that the affairs of the Nominal Respondent Company were being conducted in a manner oppressive to the Petitioners and other shareholders and a set of orders including:-
- a. An order quashing Statement and Notice of Increase of Nominal Capital of the Company and a resolution dated 18th September 2011;
 - b. Declarations against the Respondent,
 - c. A permanent injunction against the Respondent
 - d. An order for correction/retraction of minutes of the Board of the Company;
 - e. An order for inspection/Audit of the financial accounts and reports from the year 2011;
 - f. An order of indemnity by the Respondent,
42. The Applicant further justified the claim by asserting the complexity of the matter, citing the substantial documentary evidence reviewed, the extensive legal research conducted, and the high financial value of the project, estimated at over Kshs.132,000,000/= and went on to rely on Schedule 6, Paragraph 1(b) of the *Advocates (Remuneration) Order* in support of their claim for enhanced instruction fees.



43. Upon assessing the Bill of Costs, the Taxing Master determined the instruction fees as follows: -

“Item 1 the instruction fees is provided for under paragraph 1(f)(i) of the Remuneration Order “to present or oppose proceedings under Rule 5(1) of the Companies (Winding-up” rules Kshs.25,200.00.” From the proceedings, the Petition did not seek winding up of the Company but order for declaration that the rights of the shareholders had been violated by oppressive conduct of the Respondent in the winding up Petition among other six prayers. 1(f)(iii) of the remuneration order “to present or oppose any other proceedings under the Companies Act Kshs.15,000.00. This paragraph is clear and does not peg the instruction fees on the value of the Project. I have considered the nature of the case and the interest of the parties and award Kshs.500,000.00 as instruction fees.” (Emphasis Mine)

44. From the foregoing, it is evident that the Taxing Master expressly acknowledged and familiarized herself with the primary suit proceedings before arriving at the taxed instruction fees. Therefore, the Applicant’s argument that the Taxing Master failed to call for the original trial court record appears to be misplaced and without merit. Additionally, a close examination of item number 1 in the Applicant’s Bill of Costs demonstrates that the instructions given were primarily for filing a petition under the Companies Act so as to safeguard shareholders’ rights. It goes without saying that the Taxing Master appropriately applied Schedule 6, Paragraph 1(f)(iii) of the Advocates (Remuneration) (Amendment) Order, 2014, which specifically provides for instruction fees in such proceedings.

45. If the Applicant sought a higher taxation amount based on the complexity of the case, a more compelling justification should have been advanced beyond merely alleging that the pleadings were voluminous. The mere length or bulkiness of pleadings does not, in itself, equate to complexity. Instead, the Applicant ought to have provided specific details of the intricate legal arguments, the novel points of law addressed, or any extraordinary work undertaken that would warrant a higher assessment of instruction fees.

46. Otherwise, the general rule in taxation matters is that courts should not interfere with a Taxing Master’s decision unless it is based on an error of principle or is manifestly excessive or inadequate. This principle was well articulated in the case of *Bank of Uganda v Banco Arabe Espanol* [1999] 2 EA 22, where the court held: -

“ A court will not interfere with a taxation decision unless the Taxing Officer has misdirected themselves on a matter of principle or has made an award that is so excessive or so low as to indicate an error.”

47. In the present case, no such error of principle has been demonstrated by the Applicant. The Taxing Master correctly identified the applicable provision under the Advocates (Remuneration) Order and awarded a reasonable sum of Kshs.500,000.00 as instruction fees. In the absence of any demonstrated error of principle or misapplication of the law, this court finds no basis to warrant it interfere with the Taxing Master’s assessment both on the instruction fees and the instruction fees or the other items in the bill as taxed.

48. Consequently, the applicant’s reference in the Chamber Summons application dated 8th June, 2018 is found to be without merit and the Court proceeds to dismiss it with no orders as to costs. Each party shall bear its own costs for the reference.

It is so ordered.

JUDGMENT DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF MAY, 2025.



D. O. CHEPKWONY

JUDGE

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 20TH DAY
OF JUNE, 2025.**

F. GIKONYO

JUDGE

