Directline Assurance Company Limited & 5 others v Aliker & 8 others (Civil Case E172 of 2021) [2025] KEHC 9765 (KLR) (Commercial & Admiralty) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9765 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

CIVIL CASE E172 OF 2021

MA OTIENO, J

JULY 3, 2025

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED ..... 1ST PLAINTIFF

ROYAL MEDIA SERVICES LIMITED ..... 2ND PLAINTIFF

ROYAL CREDIT LIMITED ..... 3RD PLAINTIFF

SAMUEL KAMAU MACHARIA ..... 4TH PLAINTIFF

PURITY GATHONI MACHARIA ..... 5TH PLAINTIFF

AKM INVESTMENT LIMITED ..... 6TH PLAINTIFF

AND

PHILLIP ALIKER ..... 1ST DEFENDANT

JANUS LIMITED ..... 2ND DEFENDANT

SUREINVEST COMPANY LIMITED ..... 3RD DEFENDANT

TRIAD NETWORKS LIMITED ..... 4TH DEFENDANT

STENNY INVESTMENTS PTY LIMITED ..... 5TH DEFENDANT

KEVIN DERMOT MCCOURT ..... 6TH DEFENDANT

JANICE TERESA WANJIKU KIARIE ..... 7TH DEFENDANT

GEOFFREY GORDON WERE RAIDER ..... 8TH DEFENDANT

JAMES KABERERE GACHOKA ..... 9TH DEFENDANT

RULING

1. Before this Court for determination are two applications seeking to challenge the taxation ruling delivered by the Honourable Taxing Officer, Hon. Noelle Kyanya, on 29th April 2024.

    i. The first to be filed is the 5th Defendant/Applicant's Chamber Summons Application dated 16th May 2024 (hereinafter "the 5th Defendant's Application").

    ii. The second is the one dated 3rd, 4th, 6th, and 9th Defendants/Applicants' Chamber Summons Application dated 13th May 2024 (hereinafter "the 3rd, 4th, 6th, and 9th Defendants' Application").

2. The 5th Defendant's Application seeks primarily:

    a. Leave to have the Application deemed as properly on record pursuant to Section 95 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, and Rule 11 of the Advocates (Remuneration) Order, effectively seeking an extension of time to file the reference.

    b. A review and/or setting aside of the taxation ruling delivered on April 29, 2024, which taxed the 5th Defendant's Bill of Costs (dated April 26, 2023) at Kshs. 143,400.00, a figure significantly lower than the Kshs. 5,265,700.00 as drawn.

    c. In the alternative, an order to remit the Bill of Costs to another Taxing Officer for fresh taxation.

3. The 3rd, 4th, 6th, and 9th Defendants' Application challenges the taxation of their Bill of Costs dated October 9, 2023. They argue that the Taxing Officer erred in her assessment, particularly on Items 1, 3, 7, 17, 21, and 37, and seek to have these items taxed as drawn, or in the alternative, to remit the Bill of Costs for fresh taxation.

4. The 1st to 5th Plaintiffs/Respondents opposes both applications by way of two sets of Grounds of Opposition, both dated 19th June 2024. Essentially arguing that the extension of time sought by the 5th Defendant is not warranted, and that this lacks the requisite jurisdiction to hear both applications. It is further the Respondents' common position that both Applications do not meet the threshold for setting aside the taxation.

5. The Applications were canvassed by way of written submissions. In support of their respective applications, the 5th Defendant filed its submissions dated 2nd October 2024, whilst the 3rd, 4th, 6th, and 9th joint submissions are dated 18th March 2025. In opposition to the Application, the 1st – 5th Plaintiffs/Respondents filed their submissions dated 6th March 2025.

    Analysis and Determination

6. I have carefully considered the two applications and the responses thereto, as well as the parties' submissions in support of their respective positions. I identify the following as issues requiring determination by this Court:

    i. Whether the 5th Defendant/Applicant ought to be granted an extension of time to file its application challenging the taxation ruling.

ii. Whether this Court has jurisdiction to entertain the references filed by both the 5th Defendant and the 3rd, 4th, 6th, and 9th Defendants due to alleged non-compliance with Rule 11 of the Advocates (Remuneration) Order.

iii. Whether the Taxing Officer erred in principle in assessing the 5th Defendant's Bill of Costs.

iv. Whether the Taxing Officer erred in principle in assessing the 3rd, 4th, 6th, and 9th Defendants' Bill of Costs.

7. I now resolve each of the issues identified above as follows:

On the application to enlarge time for the 5th Defendant

8. The 5th Defendant's Application was filed on May 29, 2024, which is fourteen (14) days outside the period stipulated under Rule 11 of the Advocates (Remuneration) Order for challenging a taxation ruling. The 5th Defendant explains this delay through the affidavits of Steve Murphy (May 14, 2024) and Joyce Wamucii (May 16, 2024), attributing it to the process of obtaining instructions and securing execution of the supporting affidavit by their director, who was on extensive travels.

9. It was further the 5th Defendant's position that, in any event, the granting of the extension of time sought would not occasion any prejudice to the 1st to 5th Plaintiffs, who had already responded to the substantive prayers in the application.

10. Citing among others Article 159(2) (d) of *the Constitution* and the case of Sunsand Dunes Limited v Raiya Construction Limited [2020] eKLR, the 5th Defendant urged this Court to allow for the prayer for extension of time pursuant to Rule 11 of the Advocates (Remuneration) Order, and deem the application as properly on record.

11. The Plaintiffs oppose this, arguing the explanation is unconvincing, lacks corroboration, and thus fails to lay a satisfactory basis as required by principles established in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR and John Mwinzi Thuva v Kasyoka Nzuka [2019] KECA 924 (KLR).

12. It is trite law that the power to enlarge time under Rule 11(4) of the Advocates (Remuneration) Order is discretionary. The burden is on the Applicant to demonstrate a reasonable and satisfactory explanation for the delay.

13. In Francis Mwanza Mulwa v Kanji Vaniian & 2 others [2018] eKLR, the court stated as follows on the discretionary powers of the Court to enlarge time:

> "It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion This being an exercise of judicial discretion, like any other judicial discretion must on (sic) fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders." [emphasis added]

14. In the present case, having considered the reasons advanced by the 5th Defendant/Applicant in support of the application, as well as those advanced by the Respondents in opposition, I agree with the Respondents' argument that the 5th Defendant has not provided sufficient evidence to substantiate the

reason for the delay. As correctly pointed out, the explanation provided in the affidavit of Ms. Wamucii, regarding the director's extensive travels and difficulty in obtaining instructions, lacks the necessary specificity and corroboration since the said director, Mr. Murphy, in his affidavit filed in support of the same application (and prayer), did not raise his unavailability due to the extensive travels, as one of the grounds for seeking the enlargement of time.

15. Without such corroboration, the explanation provided by the 5th Defendant remains largely an unsubstantiated assertion, and therefore is not reason enough to warrant the exercise of this Court's discretionary powers in its favour. Accordingly, the prayer fails in that regard.

On the Jurisdiction of this Court

16. The Plaintiffs raised a preliminary objection to the jurisdiction of this Court to entertain both applications, citing non-compliance with the mandatory procedure outlined in Rule 11(1) & (2) of the Advocates (Remuneration) Order.

17. The Plaintiffs argue that the 5th Defendant failed entirely to file a Notice of Objection as required by Rule 11(1). They contend that this is a fatal and incurable omission, rendering the subsequent application incompetent.

18. Regarding the 3rd, 4th, 6th, and 9th Defendants, the Plaintiffs contend that their reference was filed prematurely, before the Taxing Officer provided reasons for her decision under Rule 11(2). They cite Paul Gicheru T/A Gicheru & Co. Advocates v Kargua (K) Construction Co. Ltd [2008] KEHC 2942 (KLR), which held such a premature reference to be "null and void ab initio" and an incurable omission that strips the Court of jurisdiction.

19. While admitting that the application was filed late, the 5th Defendant submitted that the Court has the power to admit the same since granting the extension of time would not occasion any prejudice to the 1st to 5th Plaintiffs, who had already responded to the substantive prayers in the application.

20. Citing, among others, Article 159(2) (d) of *the Constitution* and the case of Sunsand Dunes Limited v Raiya Construction Limited [2020] eKLR, the 5th Defendant maintained that the application is properly on record.

21. The 3rd, 4th, 6th, and 9th Respondents, on their part, submitted that their application is properly on record since both the notification to the taxing master and the filing of the present reference were done within the timelines provided under Rule 11 of the Advocates (Remuneration) Order.

22. Rule 11 of the Advocates (Remuneration) Order provides that:

> "(1) Any party aggrieved by the decision of a taxing officer may, within fourteen days of the decision, give written notice 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 such reasons, apply to a judge by Chamber Summons setting out the grounds of his objection."

23. I have carefully considered the arguments and the extensive line of authorities cited by the Plaintiffs, including Twiga Motors Ltd v Dalmas Otieno Onyango (2015) eKLR, Soundd Entertainment Ltd v Anthony Burungu & Company Advocates (2014) eKLR, and Karume Investments Ltd v Kenya Shell Limited & Anor (2015) eKLR.

24. The primary purpose of Rule 11(1) and (2) is to ensure that the Taxing Officer has an opportunity to review the objections and provide specific reasons for the impugned items. This process not only clarifies the Taxing Officer's rationale but also aids the judge in effectively reviewing the taxation.

25. In the case of the 5th Defendant, there is no evidence of a written Notice of Objection having been issued to the Taxing Officer within the stipulated 14 days from April 29, 2024. The requirement for such a notice is a precondition to invoking the judge's jurisdiction under Rule 11(2). Without this initial step, the reference process cannot be said to have commenced. The reference process having not been duly commenced by the 5th Defendant in the manner provided under Rule 11, there is, in the view of this court, no competent application for consideration.

26. My findings would have been different had the 5th Defendant/Applicant demonstrated that a Notice of Objection had been properly filed with the Registrar, albeit late, and that no response had been forthcoming. As matters stand, the omission is fatal.

27. In relation to the application by the 3rd, 4th, 6th, and 9th Defendants, it is not disputed that the ruling was delivered on 29th April 2024, and a letter dated 8th May 2024 was uploaded on the e-filing system on 13th May 2024, indicating their objection. They argue that where the reasons for taxation are on the face of the ruling, there is no need to wait for a response from the taxing master before lodging a reference.

28. In the present case, it is common ground that no reasons were formally recorded and forwarded by the taxing officer in response to the Applicant's letter of Objection; it is equally not disputed that the reasons for taxation are in the ruling. The Court of Appeal decision in Kipkorir,Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] KECA 325 (KLR) cited by the Applicant, is apt in that:

> "It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference". [Emphasis added].

29. I agree with the holding in the Kipkorir,Titoo & Kiara Advocates case (supra). In the circumstances, it is the finding of this Court that where Notice of Objection has been filed under Rule 11(1), then the exercise of the option by a party not to wait for the reasons from the taxing officer should not be punished on the grounds that the reference is prematurely filed.

30. Accordingly, I find and hold that the 3rd, 4th, 6th, and 9th Defendants' application filed herein is not incompetent for having been filed before receipt of the taxing master's reasons under Rule 11(2). The Court, therefore, has the requisite jurisdiction to deal with the same.

Whether the Taxing Master erred in principle

31. The Application by the 5th Defendant having failed at the preliminary stage, it is therefore not necessary to delve into the substantive merits of whether the Taxing Officer erred in principle. Consequently, I will on this segment only consider the Application by the 3rd, 4th, 6th, and 9th Defendants.

32. The 3rd, 4th, 6th, and 9th Defendants/Applicants argue that the taxing master erred in taxing down the instructions fees from the sum of Kshs. 1,500,000/- claimed to a sum of Kshs. 100,000/-. According to the Applicants, in doing so, the taxing master erroneously ignored the Ruling in High Court Commercial and Tax Division Civil Case No. E278 of 2019 – Directline Assurance Co. Ltd & Others v Sureinvest Co. Ltd & 15 Others, which involved a similar shareholder dispute, and where instruction fees were drawn at Kshs. 7,000,000 and assessed at Kshs. 1,500,000.

33. The principles that guide the High Court when considering a reference from the decision of a taxing officer are stated in the case of Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR, where the Court of Appeal observed that: -

> " The learned judge like the taxing officer was exercising judicial discretion when he allowed the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned judge acted on the wrong principles of law. 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."

34. From the record, I note that in the primary suit, the Plaintiffs/Respondents specifically sought an order of permanent injunction restraining the Defendants from carrying out arbitration proceedings in relation to disposing of and/or dealing with the shares held in the 1st Plaintiff company. The subject matter value could not be clearly ascertained from the pleadings.

35. The Court of Appeal in the case of Joreth Ltd v Kigano And Associates (2002) 1 EA held that where the value of the subject matter of a suit cannot be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances.

36. Again, in the case of Kenya Airports Authority Vs Otieno Ragot & Company Advocates Petition No. E011 of 2023 SC) the Supreme Court approved the Court of Appeal holding in Peter Muthoka and Another v Ochieng and 3 Others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR that where the value of the subject matter cannot be determined from the pleadings, judgment, or settlement, as is the case herein, it is within the discretion of the Taxing Officer to determine such instructions as she may consider just, taking into account among other factors, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstance.

37. This Court is equally cognizant of the settled principle of law that taxation of costs is not a pure mathematical exercise, but is entirely a matter of opinion and that a court will not readily interfere with

an award of the taxing master, unless in instances where the court is of the opinion that the award is either too high or too low as to amount to injustice. See the case of Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W'Njuguna & others NRB HC Misc. Civil Appl. No. 621 of 2000 [2006] eKLR the court held as follows:

> " 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 is somewhat too high or too low; it will only interfere if it thinks the award is 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 inference 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."

38. In the present case, the 3rd, 4th, 6th and 9th Defendants claimed instruction fee of Kshs. 1,500,000/-, relying mainly on the costs assessed in a related case - Directline Assurance Co. Ltd v Sureinvest Co. Ltd & Others (HCCC E278 of 2019), which had earlier been taxed down to Kshs. 1,500,000/- from Kshs. 7,000,000/ billed. However, in the taxing officer in this case awarded Kshs. 100,000/-, reasoning that the primary suit in this case was withdrawn before it could proceed for hearing.

39. I have perused the record and established that it is indeed true that the primary suit upon which the bill of costs is premised was withdrawn before it could proceed for hearing. Further, I also establish, as the taxing master did, that the value of the subject matter could not be established from the pleadings.

40. It must be remembered that assessment of costs is within the province of the taxing master and this Court can only interfere in the limited cases where it is sufficiently demonstrated that that discretion was not properly exercised. See the case of Peter Muthoka & another (supra) where the Court of Appeal held: -

> " It is not lost to us ... 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."

41. In the present matter, the Court has considered that the primary suit was withdrawn before it proceeded to full hearing and that the value of the subject matter could not be ascertained from the pleadings. In light of these circumstances, this Court finds no justifiable reason to interfere with the Taxing Officer's assessment of costs.

42. Moreover, I concur with the Respondents' submissions that the Applicants' reliance on instruction fees awarded in HCCC E278 of 2019: Directline Assurance Company Ltd & Others v Sureinvest Company Ltd & 15 Others is misplaced. Firstly, the ruling in that matter is not binding upon the Taxing Officer in this case. Secondly, the Applicants have failed to establish any parity in the nature

or complexity of the work done in HCCC E278 of 2019 that would warrant the same measure of instruction fees in the present reference.

43. Regarding the other items, such as court attendances, instruction fees on applications, and perusals, I find that the taxing officer applied the applicable provisions of Schedule 6 of the Advocates Remuneration Order and provided plausible justification for disallowing or adjusting the claimed sums. I find no error in that regard.

44. As stated, the jurisdiction of this Court to interfere with the Taxing Officer's discretion is limited. It may only be invoked where the award is so manifestly excessive or inordinately low as to amount to a miscarriage of justice, or where there has been a misdirection on principle, as articulated in Premchand Raichand Ltd v Quarry Services of East Africa Ltd [1972] EA 162. No such grounds have been established in the present reference.

45. However, in order to forestall unnecessary escalation of costs, I make no order as to costs

Disposition

46. In light of the foregoing, the Court makes the following Orders:

    i. The 5th Defendant's Chamber Summons dated 16th May 2024 is hereby dismissed in its entirety for being incompetent and unmeritorious.

    ii. The Chamber Summons dated 13th May 2024 by the 3rd, 4th, 6th, and 9th Defendants is dismissed for being without merit.

    iii. Each party to bear their costs on this reference for the reasons already stated.

47. It is so ordered.

SIGNED, DATED, AND DELIVERED IN VIRTUAL COURT THIS 3RD DAY OF JULY 2025

ADO MOSES

JUDGE

In the Presence of

Moses C/A

.....for the Applicant

.....for the Respondent