



**Erdermann Property Limited v London Distillers (K) Limited (Constitutional
Petition 43 of 2019) [2025] KEHC 10505 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION 43 OF 2019**

RC RUTTO, J

JULY 17, 2025

BETWEEN

ERDERMANN PROPERTY LIMITED APPLICANT

AND

LONDON DISTILLERS (K) LIMITED RESPONDENT

RULING

1. The applicant has filed a reference by way of Chamber Summon dated 20th December 2023 seeking the following reliefs:
 1. THAT the Honourable court be pleased to vacate and set aside the instruction fees (item No. 1) awarded to the applicant in the ruling and reasoning of the learned taxing master, Honourable V. Ochanda (DR) dated and delivered on 7th December 2023 arising from the applicant's party to party bill of costs dated 12th May 2020 and 28th September 2023 taxed at Kshs.265,560.00 and Kshs.56,125.00 respectively;
 2. THAT the Honourable court be pleased to award the applicant instruction fees (item no. 1) as drawn in the applicant's party to party bill of costs dated 12th May 2020 and 28th September 2023;
 3. THAT the Honourable court be pleased to award the applicant getting up fees as drawn in its party to party bill of costs dated 12th May 2020;
 4. THAT in the alternative to prayer (2) above, the Honourable Court be pleased to exercise its discretion by reviewing, varying and enhancing the instruction fees (item No. 1) awarded to the applicant in the ruling and reasoning of the learned taxing master, Honourable V. Ochanda (DR) dated and delivered on 7th December 2023 arising from the applicant's party to party bill of costs dated 12th May 2020 and 28th September 2023 as it deems fit or direct that the bill of costs be taxed by any other taxing master other than the Hon. V. Ochanda;



5. THAT the costs of this application be provided for.
2. The application is premised on the grounds stated on its face and the supporting affidavit sworn by John Rajwayi, the applicant's Planning Manager, on 20th December 2023. The core of the reference is that the applicant lodged two bills of costs dated 12th May 2020 and 28th September 2023. In her ruling dated 7th December 2023, the taxing master awarded Kshs.265,560.00 and Kshs.56,125.00 for the respective bills. Additionally, in relation to the bill dated 12th May 2020, the taxing master granted instruction fees amounting to Kshs.200,000.00.
3. The applicant urged this Court to grant the orders sought on the following grounds: that the taxing master grossly undervalued the instruction fees in both bills, thereby arriving at an erroneous decision; that the awarded instruction fees were disproportionately low considering the costs incurred; and that the taxing master failed to consider the nature, significance, and potential implications of the petition.
4. The applicant further argued that the taxing master erred in exercising her discretion by taxing off the getting-up fees in the bill dated 12th May 2020. It was also submitted that the taxing master misapplied the relevant schedule for the bill dated 28th September 2023 and that the correct provision should have been Schedule 6(viii) of the Advocates (Remuneration) Order. The review application, they contended, validated the claim for instruction fees, and allowing the reference would be in the interest of justice.
5. The application was opposed by the respondent, who relied on a replying affidavit sworn by its General Manager, Mr. Pushpinder Singh Mann, on 25th January 2024. The respondent argued that although the petition underlying the bill of costs involved five respondents, the applicant chose to lodge the reference solely against the petitioner/respondent. The respondent thus urged the Court to find the reference fatally defective.
6. The respondent further argued that although the notice of objection dated 13th December 2023 explicitly objected only to the award of instruction fees, the current reference also challenges the award of getting-up fees. In its view, this was erroneous, as the applicant was not entitled to seek reconsideration of getting-up fees, which are governed by Schedule 6.2 of the Advocates (Remuneration) Order.
7. The respondent contended that the applicant misled the Court when it urged the court to apply 6(viii). It maintained that, in line with the taxing master's findings, this provision applies specifically to the institution or defence of substantive suits not otherwise provided for. Therefore, the respondent asserted that the taxing master did not improperly exercise her discretion.
8. It was further submitted that the award of instruction fees was free from error. According to the respondent, the taxing master had duly considered all pertinent facts, the parties' submissions, and the governing principles of taxation. Consequently, the amount sought by the applicant in instruction fees lacked any valid foundation and was rightly taxed off.
9. The reference was determined by way of submissions. In its written submissions and the accompanying list and bundle of authorities, all dated 20th September 2024, the applicant framed the following issues for determination; whether the taxing master misapplied her discretion in grossly undercharging the instruction fees for the bill of costs dated 12th may 2020; whether the taxing master relied on schedule 6.1 (viii) instead of the appropriate provision under schedule 6 (a)(i)(j) of the Advocates (Remuneration) Order in assessing the instruction fees in the bill of costs dated 28th September 2023; and whether the taxing master misapplied her discretion in taxing off getting up fees in the party to party bill of cost dated 12th may 2020.



10. On the first issue, the applicant submitted that although they concurred with the taxing master's application of Schedule 6(a)(i) and (j) of the Advocates (Remuneration) Order in assessing instruction fees for the bill dated 12th May 2020, she erred by placing excessive emphasis on the value of the subject matter and the fact that it was not raised in the petition. According to the applicant, the taxing master failed to adequately consider other key factors, including the nature, significance, and the parties' interests in the matter.
11. In arguing that the instruction fees were manifestly low, the applicant acknowledged that the petition neither disclosed the subject matter's value nor derived any such value from the pleadings. However, they submitted that the respondent's core concern was that the continued operations of the 3rd respondent, Kitengela International School, would inevitably result in the closure of its distillery due to the entities' close proximity.
12. The applicant further submitted that the respondent was essentially fighting for its survival, as the actions of the parties in the petition posed a substantial economic threat. Had the petition succeeded, it would likely have resulted in the closure of a multi-billion-shilling distillery, leading to significant job losses and detrimental impacts on the surrounding community.
13. In the applicant's view, the petition, if granted, would have curtailed the 3rd respondent's right to property, students' right to education, and the freedom of the parties to contract. It would also have severely affected the applicant's income and caused widespread socio-economic disruption.
14. On that basis, the applicant argued that the petition was of considerable importance and complexity, requiring the court to delicately balance competing interests. Furthermore, the economic and social implications of the case were so significant that instruction fees were grossly undervalued by basing the assessment solely on the subject matter's value.
15. The applicant also noted that the taxing master failed to take into account the fact that counsel and their clients had to work through the holiday period, sacrificing family time to comply with court directives.
16. Addressing the second issue, the applicant submitted that the taxing master erred by applying Schedule 6.1(viii) to assess instruction fees for the bill dated 28th September 2023. They argued that this provision governs taxation in appellate proceedings before the High Court, whereas the appropriate basis for assessment should have been Schedule 6(a)(i) and (j), which relates to "other matters."
17. Finally, on the third issue, the applicant contested the decision to tax off the amount claimed as getting-up fees in the bill dated 12th May 2020. In their view, getting-up fees should have been awarded irrespective of the absence of witnesses. Citing various judicial decisions, the applicant urged the Court to allow the claimed amount.
18. I have considered the reference, the response thereto and the annexures to the reference. I have had the advantage of seeing the entire record. It is evident from the bill of costs that it was filed in the names of the other respondents listed in the proceedings. Consequently, it was incumbent upon the applicant to include those respondents in the reference so that they could be accorded an opportunity to be heard. In the same vein, it is worth emphasizing that the principles of taxation dictate that costs should not be assessed at a level that restricts access to justice to only the affluent.
19. Turning to the merits of the reference, the applicant challenged the awards on instruction fees contained in both its bills of costs dated 12th May 2020 and 28th September 2023, asserting that the amounts were grossly undervalued. This Court notes that, during the assessment of costs, the applicant raised similar grounds to justify entitlement to a higher award. Those grounds have already



been summarized above and need not be repeated. Upon giving due consideration to the applicant's submissions, the taxing master held in part as follows:

“Under item 1 the instruction fees were to defend a constitutional petition and prerogative orders. The remuneration order provides for KES 100,000. There was no sum or value claimed by the respondent nor was there a counterclaim by the petitioner. The value of the subject matter was not continued (sic) in the pleadings and was not litigated upon from the court records. The court did not also pronounce itself on the value. The issue that was determined by the court was with regard to fundamental rights that had allegedly been breached by licensing of the 3rd respondent to operate right next to the petitioner's distillery and equally whether or not the decision was made in contravention of the alcoholic drink and control act (sic) as read with the basic education act (sic)...

... I have perused the pleadings and Judgement and nowhere is the value of the subject matter mentioned. In fact, the value was not even before this court for consideration. The remuneration order provides for KES 100,000 as instruction fees in such a matter. Having considered all the above, I hereby tax item 1 at KES 200,000.00.”

20. The principles for setting aside a decision of a taxing officer are well settled and have followed a well-trodden path. [See *Premchand Raichand Limited & Another vs. Quarry Services of East Africa Limited and Another* [1972] EA 162, *First American Bank of Kenya vs. Shah and Others* (2002) EA 64 and *Joreth Ltd vs. Kigano and Associates* (2002) 1 EA 92.]
21. In summary, the general rule is that this Court will not interfere with the taxing officer's award, especially where the officer possesses considerable experience, merely because the award appears too high or too low. Interference will only occur where the award is so excessive or insufficient as to amount to an injustice. This Court may only depart from the taxing officer's decision where it is demonstrated that the decision was based on an error of principle, or that the fee awarded was so manifestly excessive or inadequate as to imply such error. An error of principle may arise from the consideration of irrelevant factors or the omission of relevant ones.
22. Upon reviewing the applicant's submissions, this Court finds them speculative and largely based on hypothetical scenarios since the petition was ultimately dismissed. This Court must ground its determination in facts, not anticipations. Additionally, while the applicant contends that counsel devoted significant time to the petition, the dates referenced in support appear to be merely mention dates. The claim of undue sacrifice and effort over the holiday season remains unsubstantiated by concrete evidence and suggests an exaggerated portrayal of events.
23. It is therefore this court's finding that, the taxing master properly applied the relevant principles. There is no basis to depart from the award made. The instruction fees were reasonably enhanced to KES 200,000.00 in accordance with the guiding principles set forth by the courts namely, the nature and importance of the matter, the value of the subject matter, the parties' interest, and the overall conduct of proceedings. For these reasons, this Court finds that the reference challenging the award of instruction fees in the bill of costs dated 12th May 2020 must fail.
24. With respect to the bill of costs dated 28th September 2023, the applicant submitted that the taxing master erroneously relied on Schedule 6.1(viii) of the Advocates (Remuneration) Order in assessing the instruction fees, instead of Schedule 6(a)(i) and (j). The applicant explained that Schedule 6.1(viii) pertains to applications filed in the appellate jurisdiction of the High Court, whereas the appropriate provisions governing “other matters” are found under Schedule 6(a)(i) and (j).



25. Upon reviewing the impugned ruling, it is evident that the taxing master indeed applied Schedule 6(viii), which covers applications not otherwise provided for and sets a base rate of Kshs.5,000.00. The bill of costs dated 28th September 2023 described the instruction fees sought—amounting to Kshs.500,000.00 as follows:

“Instruction fees to defend a notice of motion filed under certificate of urgency and dated 3rd June 2025 wherein the applicant sought orders for review.”

26. The applicant argued that the taxing master ought to have applied Schedule 6(j), which provides in part;

“To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate.”

27. It is undisputed that the application arose from proceedings within a constitutional petition, and the applicant sought to review orders made therein. In light of this context, the Court concurs with the applicant’s assessment that Schedule 6(j) was the correct provision for assessing instruction fees. Under part (i), where a matter is neither opposed nor complex, the minimum award should be no less than Kshs.45,000.00.

28. However, the applicant has not demonstrated that the application was complex or raised any novel legal questions to justify an enhancement to Kshs.500,000.00. Given its straightforward nature, this Court exercises its discretion to set aside the awarded sum of Kshs.20,000.00 and substitutes it with a reasonable award of Kshs.50,000.00.

29. Lastly, the applicant challenged the taxing master’s decision to disallow getting-up fees, arguing that such fees may be awarded even in the absence of witnesses. However, a review of the notice of objection dated 13th December 2023 reveals that the applicant specifically indicated its intention to appeal only with respect to item one in both bills of costs dated 12th May 2020 and 28th September 2023.

30. It is trite law that parties are bound by their pleadings and cannot depart from them even if the result is unfavourable. In this case, the applicant expressly limited its objection to two items and has attempted to expand the scope through craft to include other prayers that were not contemplated in the notice of objection. Such actions amount to an improper attempt to amend the reference outside the bounds of the initial objection. Accordingly, the Court finds no merit in the reference with respect to the claim for getting-up fees, which must therefore fail.

31. Based on the foregoing analysis, the Court finds that the reference partially succeeds with respect to prayer two. Specifically, the award of instruction fees assessed at Kshs.20,000.00 in the applicant’s party-to-party bill of costs dated 28th September 2023 is hereby set aside and replaced with an award of Kshs.50,000.00. Given the partial success of the reference, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED, DELIVERED AT MACHAKOS THIS 17TH DAY OF JULY, 2025.

RHODA RUTTO

JUDGE



In the presence;

.....Applicant

.....Respondent

Selina Court Assistant

