



Wanjiku & Wanjikun Associates v Mutua & 3 others (As Administrators of the Estate of Fredrick Mutua) (Family Miscellaneous Application E040 of 2024) [2025] KEHC 10620 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY MISCELLANEOUS APPLICATION E040 OF 2024**

**G MUTAI, J
JULY 18, 2025**

BETWEEN

WANJIKU & WANJIKUN ASSOCIATES APPLICANT

AND

KEVIN MUTUA 1ST RESPONDENT

SOLOMON MUTUA 2ND RESPONDENT

PAUL MUTUA 3RD RESPONDENT

MONICA MUTUA 4TH RESPONDENT

AS ADMINISTRATORS OF THE ESTATE OF FREDRICK MUTUA

RULING

1. The applicants herein moved this court via miscellaneous cause seeking to have their advocate/client bill of costs dated 25th October 2024 for Kes 8,769,491/- taxed. In response, the respondents filed a replying affidavit sworn by Solomon Mutua on 13th December 2024, together with a notice of objection to taxation, protesting the bill of costs. When the parties appeared before the Taxing Officer of this Court, she referred the matter to the Judge for directions, as the respondent claimed that a fee agreement binding on the parties existed.
2. The applicant filed a notice of preliminary objection dated 13th January 2025, to be heard and determined in limine, to the effect that the taxation cause has been irregularly and unprocedurally placed before the honourable judge and that the case should be returned to the Taxing Officer for determination.
3. The applicant listed three grounds that I will set out below. They are that: -



1. That the honourable judge lacks jurisdiction to handle interlocutory issues raised by parties before the taxing officer in this cause while the taxing officer is still seized of the taxation cause;
2. That this taxation cause has, contrary to the provisions of Rule 11 (1) and 12 of the *Advocates Remuneration Order*, been irregularly and unprocedurally been transferred to the honourable judge without the filing of a reference by the Respondents; and
3. That the transferring of this cause to the honourable judge to determine the existence of an agreement on legal fees between the Advocate and the Client is a usurpation of the exclusive jurisdiction of the taxing officer and the powers granted to the taxing officer under Rule 13A, of the *Advocates Remuneration Order* to take evidence and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before her.
4. The preliminary objection was canvassed by way of written submissions. The applicant, through her advocates, Nduati & Company Advocates, filed written submissions dated 12th February 2025. Counsel submitted that this court lacks jurisdiction to entertain this matter at this stage, as it is only seized with jurisdiction over a taxation matter after a taxing officer's decision has been delivered and upon being approached by way of reference. It was submitted that the taxing officer has the power to hear interlocutory objections and applications regarding the procedural legality of a bill and to take evidence in support of the same. In support of this position, counsel relied on Rule 10 and Rule 13A of the *Advocates Remuneration Order*.
5. Counsel urged the court to return the matter to the taxing officer for taxation and hearing of interlocutory applications/objections, or issues raised by parties.
6. On the other hand, the respondents, through their advocates, JP Ngoya & Austine Advocates LLP, filed their written submissions dated 17th February 2025.
7. Counsel submitted that the objection herein challenges the jurisdiction of the Deputy Registrar to tax the bill based wholly on Section 45 of the *Advocates Act*. Mr Omondi submitted that this court alone is seized with jurisdiction to deal with the same. In conclusion, counsel submitted that the applicant's bill of costs lacks merit and urged the court to dismiss the same with costs.
8. Does a valid preliminary objection exist? Does the judge have the jurisdiction to consider interlocutory matters, as an advocate's bill of costs is being considered by the taxing officer of the court? To answer these questions, I must first map out the scope of preliminary objections.
9. The Court of Appeal for Eastern Africa, in the celebrated case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* (1969) EA 696, held as follows: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings and which, if argued as a Preliminary point, may dispose of the suit...

It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
10. In the case of *Oraro v Mbaja* (2005) KLR 141, Ojwang J (as he then was), elaborated further on what a preliminary objection is and stated that:-

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in



any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

11. It would appear to me that the issues raised herein are pure points of law. To determine the matter, I need not consider contested issues of fact. Under the circumstances, I am satisfied that the preliminary objection was validly raised.
12. Having made the above determination, I will consider the next question, which is whether this Court has jurisdiction to consider the bill of costs when the same is pending before the taxing officer and if the court may be moved otherwise than by way of a reference. As I do, I must take into account the well-known and rather hackneyed statement that a court without jurisdiction must put down its tools the moment it becomes aware of its jurisdictional incapacity. That observation was made eloquently by the Court of Appeal in *Owners Of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR) by Nyarangi, JA, who stated that:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

13. The Supreme Court of Kenya similarly held in the case of *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR) that: -

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

14. What then is the jurisdiction of a judge in taxation proceedings? I will outline the relevant provisions of the *Advocates’ Remuneration Order* below.

Rule 10:

The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

Rule 11:



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.
3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

Rule 12:

With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court. The procedure for such reference shall follow that of a case stated, but shall be to a judge in chambers.

Rule 13A

For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.

15. The issue that the taxing officer seeks the directions of this court is on whether she has jurisdiction to tax the bill of costs, as there is an alleged fee agreement. The respondents contend that the fee agreement denies the taxing officer jurisdiction to tax the bill of costs.
16. Waweru J, held in the case of *Abincha & Co Advocates v Trident Insurance Co Ltd* [2013] eKLR as follows:-
 16. What if the Deputy Registrar heard the application as Taxing Officer of the Court? The jurisdiction of a taxing officer is to tax the bill of costs before him. His powers set out in paragraph 13A of the *Advocates (Remuneration) Order* are in connection with taxation of the bill of costs before him. That paragraph states –
 - “13A. For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other



proceedings as may be necessary for the determination of any matter in dispute before him.”

“Any matter in dispute before him” must mean any matter connected with or concerning the taxation of any item in the bill of costs. It cannot mean any issue that challenges the taxing officer’s jurisdiction to tax the bill of costs.

17. The main issues raised in the notice of motion dated 20th February 2012 were challenging the Taxing Officer’s jurisdiction to tax the bill of costs before him. Those issues were whether the Advocate’s bill of costs was statute-barred under the *Limitation of Actions Act* and whether the Advocate was estopped from claiming any further costs? Did the Taxing Officer have jurisdiction to deal with those issues?
 18. Those issues were raising one fundamental issue, to wit, whether there were any costs due to the Advocate that the Taxing Officer could tax? I hold that it was an issue that could only be determined by a Judge. It is the kind of issue that the Taxing Officer, with the consent of both parties, should have referred to the opinion of the High Court.
 19. Only after determination of that fundamental issue by the High Court, that is, whether or not there were any costs due to the Advocate that could be taxed, would the bill of costs be referred back to the Taxing Officer for taxation, if it is found that there were costs that were due to the Advocate.
 20. I therefore hold that even the Taxing Officer of the Court did not have jurisdiction to hear and determine the main prayers of the notice of motion dated 20th February 2012.”
17. Gikonyo, J, agreed with the above decision in his ruling in *Kenya Orient Insurance Limited v Oraro & Company Advocates* [2014] KEHC 6235 (KLR) where he held that:-
- “The ratio decidendi in and the thinking by Waweru J, in the above case is quite subtle and I am persuaded to adopt it. Consequently, I hold that a taxing officer in such matter as a taxing officer does not have jurisdiction to determine the issue of limitation of the bill of costs.”
18. I must point out that Gikonyo, J, found that the taxing officer could not determine the question of limitation as it was a jurisdictional question.
 19. Since the issue for determination by the court is one of jurisdiction the taxing officer was right to refer it to the judge for determination. I cannot fault the learned taxing officer for her decision which was consistent with precedent and is in my view, a correct holding. Further, I note from the court record that there was no objection on the part of the applicant at the time the decision was made by the taxing officer on 2nd December 2024 to have the judge give directions.
 20. The upshot of the foregoing is that I have not found merit in the preliminary objection. The same is bereft of merit and is for dismissal. The orders that therefore commend themselves to me are that: -
 1. The preliminary objection dated 13th January 2025 is hereby dismissed;
 2. The parties shall bear their costs.
 21. I direct that the matter preliminary objection dated 13th November 2024, raised by the Respondent, be heard before me on 28th July 2025. Parties are at liberty to file their skeleton submissions before then.
 22. It is so ordered.



DATED AND SIGNED IN MOMBASA THIS 18TH DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH THE CTS.

GREGORY MUTAI

JUDGE

