



Tom Ojienda & Associates Advocates v County Government of Narok (Miscellaneous Application E608 of 2019) [2021] KEHC 452 (KLR) (Commercial and Tax) (16 June 2021) (Ruling)

Tom Ojienda & Associates v County Government of Narok [2021] eKLR

Neutral citation: [2021] KEHC 452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E608 OF 2019**

MW MUIGAI, J

JUNE 16, 2021

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES ADVOCATES ADVOCATE

AND

COUNTY GOVERNMENT OF NAROK CLIENT

A Deputy Registrar of the High Court had the power to tax an advocate-client bill of costs arising from Supreme Court proceedings.

Reported by Beryl Ikamari

***Civil Practice and Procedure** - costs - taxation of costs - filing a reference against a taxing officer's ruling on costs - delay in filing the reference - where parties had consented for time to start running after 30 days of the delivery of the taxing officer's ruling and the delay was explained as a technical hitch in the e-filing system - whether the delay in filing the reference would render it incompetent.*

***Civil Practice and Procedure** - costs - taxation of costs - taxation of an Advocate-Client Bill of Costs arising from proceedings at the Supreme Court - difference between Party to Party costs and an Advocate-Client Bill of Costs - where the Supreme Court Act and the Supreme Court Rules did not provide for the taxation of an Advocate-Client Bill of Costs but provided that the Supreme Court's orders were enforceable by the High Court - whether a deputy registrar of the High Court could tax an Advocate-Client Bill of Costs arising from Supreme Court proceedings - Supreme Court Act, No 7 of 2011, sections 10 and 27; Supreme Court Rules, 2012, rule 47.*

***Civil Practice and Procedure** - costs - taxation of costs - Advocate-Client Bill of Costs - where a taxing officer had awarded costs which included an additional 50% to instruction fees where Party to Party Costs had not been taxed - whether the High Court would interfere with the award of costs under the circumstances - Advocate (Remuneration)(amendment) Order, 2014, Part B Schedule 6.*



Brief facts

The applicant sought orders for an award of sixty-four million, one hundred and sixty-eight thousand, seven hundred and twenty-two shillings, and seventy cents (Kshs. 64,168,722.70) made by taxing officers to be set aside. The applicant wanted the court to assess, quantify and award the respondent the proper instruction fees and attendant costs payable under the applicable law, or in the alternative, it wanted the court to remit the applicant's bill of costs for re-taxation at an appropriate court. The grounds for the application were that the advocate-client bill of costs was taxed under Part B Schedule 6 of the Advocate (Remuneration) (Amendment) Order 2014 which was applicable to High Court proceedings while the bill of costs in question arose from Supreme Court proceedings.

Additional grounds for the application were that the taxing officer did not give due regard to Part 9 of the Supreme Court Rules, 2012, which provided guidelines on the assessment of fees and costs and therefore ultimately misdirected himself by adopting a narrow and restrictive interpretation of rule 47 of the Supreme Court Rules, 2012 which provided for the taxation of costs arising out of any proceedings before the Supreme Court as between the parties by the registrar of that court. Further grounds for the application included placing undue reliance on a valuation report valuing certain property at USD. 23,437,500 (Ksh 2, 507,512,500), failing to consider the public interest involved in the matter and taxation principles that guided public law matters, increasing instruction fees by 50% while the applicable rules did not allow for such an increase and awarding the respondent costs based in unsupported claims and unproven disbursements.

Issues

- i. Whether a delay in filing a reference, arising from a ruling of a taxing officer, would render the reference incompetent.
- ii. Whether a deputy registrar of the High Court could tax an advocate-client bill of costs arising from a Supreme Court appeal.
- iii. When would the High Court interfere with a taxing officer's decision on the taxation of costs?

Held

1. Paragraph 11(2) of the Advocates Remuneration Order granted 14 days for a party to file a reference after the taxing officer made his ruling. The impugned ruling of the taxing officer was delivered on April 30, 2020, while the reference was uploaded on the e-filing system on June 17, 2020, and filing fees were assessed and paid on June 18, 2020. The 14 days granted by statute expired on May 21, 2020. Even when public holidays and weekends were taken into account when assessing how time ran, there was a delay in filing the reference. However, by consent, the parties had agreed that the statutory period allowed for the filing of the reference would begin to run after 30 days and the taxing officer obliged. Therefore the 14 days began to run from the beginning of June 2020.

2. There was a delay in filing the reference which was explained as a technical hitch in the e-filing system which had just been launched. The applicant had provided a justification for the delay and the court was inclined to allow the reference in order to ensure justice.

3. The Registrar of the Supreme Court taxed party-to-party costs arising from the trial court's award of costs in the specific matter. The advocate-client bill of costs was considered a commercial contract between the parties; the advocate and client(s) entered into an agreement; for the advocate to offer legal services and the client (s) to pay for the services rendered by the advocate and thus such a contract was enforced and taxed by taxing officers within the Commercial and Tax Division of the High Court.

4. Section 10 of the Supreme Court Act set out the functions of the Registrar and the taxation of an advocate-client bill of costs was not included except for taxation of costs as awarded by the Supreme Court. Under section 27 of the Supreme Court Act, the decisions of the Supreme Court could be enforced by the High Court. The two provisions validated the taxing officer's taxation of the advocate-client bill of costs based on the Advocates Remuneration Orders as the Supreme Court Rules did not provide for an advocate-client bill of costs. The



Advocates Remuneration Order was applicable because the Third Schedule of the Supreme Court Rules only provided for party-to-party costs and not the advocate-client bill of costs.

5. A court would be hesitant to interfere with an award of a taxing officer merely because it thought that the award was somewhat too high or too low. It would only interfere if it thought that the award was so high or so low as to amount to an injustice to one party or the other.

6. The value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement but if the same was not ascertainable the taxing officer was entitled to use his discretion to assess such instruction fee as he considered just, taking into account amongst other matters: -

1. the nature and the importance of the cause;
2. the interest of the parties;
3. the general conduct of the proceedings;
4. any direction by the trial judge; and
5. all other relevant circumstances.

7. A lot of industry went into ploughing through documents, pleadings, proceedings, submissions and judgments of the Court of Appeal and the High Court/Environment and Land Court so as to inform the preparation and presentation of the appeal in the Supreme Court. The value of the subject matter of the appeal, which was a parcel of land, was not disclosed in the pleadings and the taxing master relied on a valuation report presented by the applicant. The value of the land (a park) was said to be Ksh 2,507,812,500 and the taxing officer took the figure of Ksh 35,000,000 as a reasonable and just assessment of the instruction fees payable. Considering that the applicant did not contest the valuation or offer an alternative valuation report, the valuation report relied on was a reasonable assessment.

8. Considering the instruction fees of Ksh 35,000,000 with cumulative costs of all services rendered of Ksh 1,821,105 and disbursement of Ksh 100,000 and taxed off Ksh 400,000 and considering that receipts were not presented to prove payment, to add 50% would be going over the top, especially where party-to-party costs had not been taxed.

Reference dismissed, upheld only in relation to the addition of 50% to instruction fees where party to party costs had not been taxed.

Citations

Cases

Kenya

1. *First American Bank of Kenya Ltd v Gulab P Shah & 2 others* Civil Suit 2255 of 2000; [2002] KEHC 1277 (KLR); [2002] 1 EA 64 - (Explained)
2. *Joreth Limited v Kigano & Associates* Civil Appeal 66 of 1999; [2002] KECA 153 (KLR); [2002] 1 EA 92 - (Explained)
3. *Masore Nyang'au & Co Advocates v Kensalt Limited* Miscellaneous Application 196 of 2015; [2019] KEELC 2712 (KLR) - (Explained)
4. *Mumias Sugar Company Limited v Professor Tom Ojienda & Associates* Miscellaneous Application 31 of 2019; [2019] KEHC 9672 (KLR) - (Explained)
5. *Muri Mwaniki & Wamiti Advocates v African Banking Corporation Limited* Civil Case 405 of 2017; [2020] KEHC 4794 (KLR) - (Explained)
6. *Narok County Government v Ntutu & 2 others* Petition 3 of 2015; [2018] KESC 11 (KLR) - (Explained)
7. *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd* Miscellaneous Case 843 of 2013; [2014] KEHC 5481 (KLR) - (Explained)
8. *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others* Miscellaneous Civil Application 621 of 2000; [2006] KEHC 3504 (KLR) - (Explained)
9. *Salat v Independent Electoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014] KESC 12 (KLR) - (Explained)



10. *Selestica Limited v Gold Rock Development Ltd* Civil Appeal 48 of 2015; [2015] KEHC 7450 (KLR) - (Explained)
11. *SG Mbaabu & Co Advocates v Joseph Muoki Kakenyi & 2 others (Sued on their own behalf and as administrators of the Estate of Peter Mwikya Kakenyi (Deceased))* Environment and Land Miscellaneous Application 34 of 2017; [2018] KEELC 1356 (KLR) - (Explained)

Regional Court

Premchand Raichand v Quarry Services [1992] EA 162 - (Explained)

Statutes

Kenya

1. Advocate (Remuneration) (Amendment) Order, 2014 (cap 16 Sub Leg) part B; Schedule 6 - (Interpreted)
2. Advocates Act (cap 16) In general - (Cited)
3. Advocates Remuneration Order, 2009 (cap 16 Sub Leg) paragraph 11(2)- (Interpreted)
4. Constitution of Kenya In general - (Cited)
5. Evidence Act (cap 80) section 107 - (Interpreted)
6. Supreme Court Act (cap 9B) sections 10, 27 - (Interpreted)
7. Supreme Court Rules, 2012 (Repealed) (cap 9B Sub Leg) rules 2, 47; part 9 - (Interpreted)
8. Supreme Court Rules, 2020 (Repealed) (cap 9B Sub Leg) rule 60 - (Interpreted)

Advocates

Mr Tore h/b Mrs Okina for the applicant

Prof Tom Ojienda and Associates for the respondent

RULING

1. By chamber summons application dated June 16, 2020, pursuant to rule 11(2) of the *Advocates (Remuneration) Order, Advocates Act* cap 16, the applicant, County Government of Narok, sought orders on the following grounds;
 - a. That the ruling of Hon SA Opande (Dr) as Taxing Officer delivered on April 30, 2020 at the High Court of Kenya at Nairobi to award the respondent the sum of Kenya Shillings Sixty-Four Million, One Hundred and Sixty-Eight Thousand, seven Hundred and Twenty-Two and Seventy Cents (Ksh 64,168,722.70) being instruction fees; cumulative cost of all other services rendered; 50% increase Advocate – client fee; disbursement and 16% VAT be set aside and/or vacated.
 - b. That this court assesses, quantifies and awards the respondent the proper instruction fees and attendant costs payable under the relevant law.
 - c. That in the alternative, the court remits the applicant’s bill of costs for re-taxation before the appropriate court.
2. The application is based on grounds that the learned Taxing Officer erred in law and in principle as follows;
 - a. By resorting to tax the Advocate-Client Bill of costs dated October 23, 2019 under part B of schedule 6 of the *Advocate (Remuneration) (Amendment) Order, 2014* which provides for the assessment of costs with respect to proceedings in the High Court, whilst the instant Bill of Costs arose from proceedings in Supreme Court; Supreme Court Petition No 3 of 2015 between the *County Government of Narok and Livingstone Kunini Ntutu & 2 others*. The



applicant sought the services of the respondent to represent it in appealing against the entire Judgment and order of the Court of Appeal sitting at Nairobi.

- b. In purporting to expand the scope of application of paragraph 2 of the Advocates (Remuneration) Order, 2009 to include the Supreme Court of Kenya when the same provided that the scope of application of the order was limited to proceedings in the High Court, subordinate courts and the Tribunals listed thereunder.
- c. The learned Taxing Officer did not sufficiently apply his mind to the impact of the provisions laid out under part 9 of the *Supreme Court Rules, 2012* which provides for the guidelines on the assessment of fees and costs and therefore ultimately misdirected himself by adopting a narrow and restrictive interpretation of rule 47 of the *Supreme Court Rules, 2012* which provides for the taxation of costs arising out of any proceedings before the Supreme Court as between the parties by the Registrar of that court.
- d. The learned Taxing Officer, as a result of the foregoing error, did not only arrogate to himself powers he did not have, to assess the Bill of Costs arising from the proceedings in the Supreme Court but also ultimately ignored the rules and scale guiding the assessment of such costs as set out under schedule 3 to the rules of the Supreme Court.
- e. The learned Taxing Officer misdirected himself in placing undue reliance on the Valuation Report of July 9, 2010 produced by the applicant valuing LR No CIS/Mara/talek/155 at USD 23,437,500 (Ksh 2, 507,512,500/-) when calculating the instruction fees not only in complete disregard of the public interest involved in the matter but also in total disregard of the principles of taxation that guide public law matters when it was ostensibly clear that the proceedings before the Supreme Court revolved purely on constitutional and public law matters that is, whether a consent order that offends the *Constitution* and Statutory provisions can be upheld by courts and whether title to the suit land is unconstitutional and illegal.
- f. In purporting to increase the instruction fees by 50% when such allocation is alien to the rules provided for the Taxation of Bills emanating from matters presided over at the Supreme Court.
- g. In awarding the respondent costs which were based on unsupported claims and unproved disbursements contrary to the provisions of section 107 of the *Evidence Act*, cap 80, Laws of Kenya.
- h. In failing to supply reasons for the award on each item on the bill of costs upon request by the applicant herein but rather proceeded to rely on the generality of the awards made in the ruling of April 30, 2020.

Replying Affidavit

3. The application was opposed vide an affidavit dated October 16, 2020, sworn by Prof Tom Ojienda, SC the advocate/respondent herein, stated that the respondent filed a Bill of Costs dated October 28, 2019, both the applicants and respondents put in their submissions and a ruling was delivered on April 30, 2020 by the Deputy Registrar, Hon SA Opande.
4. The respondent stated that their Bill was taxed at Kenya Shillings Sixty-four Million, One Hundred and Sixty-Eight Thousand, seven Hundred and Twenty-Two and Seventy Cents (Ksh 64, 168, 722.70). The Applicant being aggrieved by the decision of the Taxing Master proceeded to file a reference to challenge the same which reference was filed out of time.



5. The respondent asserted that the applicant was present on April 30, 2020, when the Taxing Master delivered the ruling. Subsequent to that was the agreement between the parties to have the court issue a thirty-day stay to which time would start running for reference to be filed by the disgruntled Applicant.
6. The respondent stated that paragraph 11(2) of the Advocate (Remuneration) Order provides that a reference in opposition to the decision of the Taxing Master must be put forward with 14 days. The applicant having filed their reference two days out of time clearly offends the law. The reference was to be filed by the June 14, 2020 as per the court directives and not June 16, 2020.
7. The respondent averred that the applicant failed to attach evidence to show why they filed their reference out of time while they requested a stay of the ruling and the court granted them the same at the expense of the respondent.
8. The respondent stated that the court should not rewrite the law to promote what it sentimentally decrees to be decent, tolerant and progressive but rather accord the law the ordinary meaning that would have made sense to those that passed the law and to the people who would have been subjected to it.
9. On the issue whether the Supreme Court Rules apply to the Advocate-client Bill of cost, the respondent stated that rule 47 of the Supreme Court Rules indicates that the bill to be filed before the said court should be party and party bill of costs.
10. The respondent stated that the Deputy Registrar was within his authority to proceed and tax the said Bill of Cost as it was as a cumulative fee charged for the proceeding from the High Court to the superior court. This is well addressed by paragraph 13A of the Remuneration Order as the powers of the Taxing Officer.
11. The respondent further stated that the bill being an Advocate-Client Bill warrants the instruction fees to be raised by 50% which has been the norm as opposed to party and party bill which does not adopt the same principle. Therefore, had the bill been a party and party then the arguments made by the Client/Applicant would suffice this possession is espoused in schedule 6 part B of the Remuneration Order.

Applicant's Submissions

12. It was the applicant's submission that the respondent contested that the application offends the law for having been filed on June 23, 2020 which by its calculation is nine (9) days beyond the statutory timeline of fourteen (14) days. The respondent proposes that the same ought to have been filed on or before June 14, 2020.
13. The applicant submitted that the entire period of 44 days between delivery of ruling on Taxation on April 30, 2020 and the June 14, 2020 has a total of three Public Holidays namely Labour Day – May 1, 2020; Eid-al-fitr – May 25, 2020 and Madaraka Day on June 1, 2020 which days impact on the strict computation of the days proposed by the respondent.
14. It was the applicant's submission that the court record and email correspondences between the applicant's advocates and the Court Registries bears witness to the fact that the application was received on the night of June 17, 2020 after an unsuccessful day-long attempt by the advocate for the applicant to file the same through the e-filing platform. The filing fee was subsequently assessed and paid on June 18, 2020. The assertion that the application was filed on June 23, 2020 is untrue.
15. The applicant submitted that the application was filed within time and that the delay occasioned by the technical hitch attendant to the novel procedure of the e-filing system which resulted in the processing



of the documents and payment of the filing fees on June 18, 2020 ought not be used to drive the applicant away from the judgment seat.

16. The applicant further submitted that the even if the enumerated public holidays were included in the computation of time., the delay would be three (3) days and not nine (9) days as averred by the respondent. That the delay of three (3) days is not inordinate and there is no demonstrable prejudice that has been occasioned on the respondent. Further there is nothing to illustrate that the applicant's intention was or is to overreach or steal a match on the respondent.
17. The applicant submitted, the applicant's advocate on record honestly believed that it was filing the reference application on the very last day of the statutory fourteen (14) days having discounted the three public holidays enumerated above and hence the belief that the same was filed within time.
18. The applicant submitted that if the court was to hearken to the respondent's plea that the application is incompetent, then the court do exercise the unfettered discretion granted to it by statute to determine the application on its merits in the wider interests of justice.
19. In the case of *Muri Mwaniki & Wamiti Advocates v African Banking Corporation Ltd* [2020]eKLR, wherein Hon LJ Maureen Odero, faced with a similar situation rendered herself thus;

“I find that applicants herein failed to file their reference within 14 days as provided by paragraph II. Further no reasons have been advanced for said delay and no application for enlargement of time as envisaged by paragraph 11(4) of the Advocates Remuneration Order was made. Accordingly, I find that the reference herein is incompetent for having been filed out of time... notwithstanding the above finding for completeness I will proceed to consider the merits of the present reference...”

20. The applicant relied on *Selestica v Gold Rock Development Ltd* [2015]eKLR, to support the assertion that a delay of a day could be unreasonable. Hon L Justice R Aburili in the said case exercised her discretion in the interest of justice and allowed the filing of appeal out of time. To that effect, the learned judge rendered herself thus;

“Even where there is delay in bringing the application due to the blunders made by its counsel, this court can exercise its discretion in favour of a party, for as long as the interests of justice can still be served, and the respondent compensated by an award of costs. The only prejudice in this case, in my view is that the respondent would suffer some delay, which can be compensated by an award of costs...”

21. It was the applicant's submission that the Taxing Officer misdirected himself when he proceeded, at the urging of the respondent, to place undue reliance on a Valuation Report dated July 9, 2010 which values LR No CIS/Mara/talel/155, the subject of the suit in the High Court, at USD 23,437,500 equivalent to Ksh 2,507,512,500 annexed to the respondent's Submissions. The applicant relied on the case of *SG Mbaabu & Co Advocates v Joseph Muoki Kakenyi & 2 others* [2018] eKLR, Where Hon Justice AO Angote observed;

“indeed the filing of valuation reports for the purpose of guiding the taxing officer in taxation ought to be discouraged for the simple reason that such a value was never the basis of the suit in the first place. If the value of a suit property is so important to a litigant, then it should form the basis of his claim and should be specifically pleaded.”



22. The applicant submitted that it was evident that the Taxing Master disregarded the Principles enunciated in *Republic v Minister of Agriculture & 2 others ex-parte Samuel Muchiri W’Njuguna & 6 others* [2006]eKLR with respect to public law matters, which postulates that;

“the instruction fees allowable should not in principle, be extrapolated from practices obtaining from practices in the private law domain which may involve business claims and profit calculations.”

In *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd* [2014]eKLR, Justice GV Odunga stated that;

“With respect to the increase under part B of schedule VI my understanding is that such increase is only applicable where there has been a determination of the party and party fees under Part A of the said schedule in which case instead of taxing the Advocate/Client bill the court may simply decide to increase the amount of party and party costs under part A as provided under part B. In this case there is no evidence that there was a determination on party and party costs in order for part b to be invoked.”

24. In Kisumu Misc App 31 of 2017 *Mumias Sugar Company Limited v Tom Ojienda & Associates* [2019]eKLR, Justice Fred Ochieng rendered himself as follows;

“... I feel obliged to point out that the taxing officer must bear in mind the fact that this is an Advocate/Client Bill of Costs. There has not been any party and party Bill of Costs taxed in the parent case. If there had been a taxation of the party and party Bill of Costs, the taxing Officer could have had the option of awarding the Advocate/Client costs by ordering that there be an increase of the party and party costs by one-half. There is no justification whatsoever, in my considered opinion, for taxing an Advocate/Client Bill of Costs, and then increasing it by 50%. If the taxing officer has good reason for increasing the Instruction Fee, he or she may do so during the process of taxing the Bill. If the reason for increasing the Instruction fee was; “...the nature and the importance of the cause or the matter; the interest of the parties; the general conduct of the proceedings, or any direction by the trial judge or any other relevant factors,” the taxing officer would have to specifically indicate the factors which he or she relied upon. In this case, the taxing officer did not give any reasons to warrant an increase in the Instruction Fee. I find that by increasing the Instruction Fee without giving any legally sound reason, is an error in principle.”

Respondent’s Submissions

25. On the issue whether rule 47 of the *Supreme Court Rules* is applicable in this taxation the respondent submitted that rule 47 indicates that the bill to be filed before the said court should be party and party Bill of Costs. The third schedule as referred to by the said rule further indicates that party and party bills may be filed only in instances that the court awards costs in the said matter.

2 (1) where costs are to be taxed, the advocate for the party to whom the costs were awarded shall lodge his or her bill with the taxing officer and shall before or within seven days after lodging it, serve a copy of it on the advocate for the party liable to pay it.

26. On whether the client/applicant application is incompetent, misconceived, bad in law and an abuse of the court process, the respondent submitted that paragraph 11(2) of the Advocate (Remuneration) Order clearly provides that a reference in opposition to the decision of the Taxing Master should be



put forward within 14 days. The client/applicant having filed their reference nine days out of time clearly offends the law.

27. On whether this court should grant the client/applicant audience after filing their reference within such enlarged time, the respondent submitted that even if this court was to consider hearing this application, it cannot go against the precedential grounds established for a litigant seeking an extension of time as espoused in the case of *Nick Salat* where it was held that;

“The under-lying principles that a court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, us a consideration to be made on a case-to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

28. On whether the amount awarded by the Taxing Master sufficiently warrants a re-taxation, the respondent relied on the case of *Joreth Limited v Kigano & Associates* [2002] 1 EA 92 at 99, the Court of Appeal held that,

“the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the 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 circumstances.”

29. The respondent submitted that he attached and referred to the Valuation Report dated July 9, 2010 which valued the Suit Land LR No CIS/Mara/talek/155 at USD 23,437,500 equivalent to Ksh 2,507,512,500/- This valuation report was done by an accredited valuer hence it cannot be some figure made up by the advocate/respondent.

Determination

30. The issues for determination that arise from the pleadings and submissions are as follows;
- a. Is there a competent reference in light of non-compliance of the statutory timelines?
 - b. Did the Deputy Registrar have requisite jurisdiction to tax the Bill of Costs as the matter relates to an appeal in the Supreme Court?



- c. Did the Taxing Officer err in assessment/taxation of the Bil of Costs?
31. Is there a competent reference in light of non-compliance of the statutory timelines?
- The respondent raised the issue of timelines, that the applicant failed to adhere to filing the Reference within the requisite period.
- The applicant was present when the impugned ruling was delivered on April 30, 2020 by the Taxing Officer.
- Paragraph 11(2) of *Advocates Remuneration Order* grants 14 days for a party to file reference after the Taxing Officer's Ruling.
32. The applicant, reiterated that the Reference was not filed on 23rd June as alleged. Between April 30, 2020 -June 14, 2020 had 3 public holidays; May 1, 2020-Labour Day, May 25, 2020- Eid-al -Fitr and June 1, 2020- Madaraka Day which impacted on strict compliance of the statutory period.
33. The application was uploaded on the e-filing system on June 17, 2020 after unsuccessful day long attempt and filing Fees were assessed and paid on June 18, 2020.
34. The delay was occasioned by technical hitch and the novel procedure of the e- filing system.
35. This court finds that since the ruling was delivered on April 30, 2020, the reference in compliance with the 14 days period granted by statute expired on May 21, 2020.Yet even taking the public holidays into account and the weekends the reference dated June 16, 2020 was filed more than 14 days later.
36. This court takes judicial notice of the implosion of the Corvid 19 pandemic in March 2020, that disrupted normal judicial processes with closure of court in March- April 2020. Later, on minimal function of courts, the pandemic resulted in implementation of e- filing system on line and virtual hearing to reduce human contact and spread of the pandemic.
37. This court also noted that after delivery of the ruling by Taxing Officer on April 30, 2020, parties by consent agreed that the statutory period begun to run after 30 days and the Taxing Officer obliged. The 14 days ran from beginning of June 2020 minus weekend and public holiday the delay which was due to technical hitch through e – filing which was just launched and the applicant justified the delay.
38. Therefore, whereas it is incumbent to adhere to strict timelines as stipulated in *Nick Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR *supra* with the unfolding events of the pandemic it may have hindered efforts to file the Reference on time. The applicant outlined plausible cause for delay. As in the above case, this court is inclined to allow the reference to ensure justice of the case.
- See Also; *Muri Mwaniki & Wamiti Advocates v African Banking Corporation Ltd* [2020]eKLR & *Selestica v Gold Rock Development Ltd* [2015] e KLR *supra*
39. Did the Deputy Registrar have requisite jurisdiction to tax the Bill of Costs as the matter relates to an appeal in the Supreme Court?
40. The applicant submitted that the Bill of Costs before the Taxing Officer arose from proceedings in Supreme Court Petition No 3 of 2015 *Narok County Government v Livingstone Kunini Ntutu; Ol Kiombo Ltd & AG* [2018]eKLR that culminated with the ruling of December 11, 2018.The appellant sought legal services from the respondent to represent it on appeal.
41. The appellant submitted that Taxing Officer arrogated himself the powers that are only conferred to the Registrar of Supreme Court as described by rule 2 of the *Supreme Court Rules*, the term Registrar is



- Registrar of the court, and includes Deputy and/or Assistant Registrar and court is defined as Supreme Court.
42. Secondly, the appellant took the view, that if part B of schedule 6 of [ARO](#) applies to proceedings in the High Court included proceedings in Court of Appeal and Supreme nothing would have been easier than the drafters to state so.
 43. Thirdly, the Taxing Officer ought to have applied schedule 3 of Supreme Court Rules 2012 and not part B of schedule 6 of [ARO](#).
 44. To the issue of why the Deputy Registrar/Taxing Officer of the High Court taxed the Advocate-Client Bill of Costs, the respondent explained as follows;

“It is evident that one cannot file Miscellaneous Application before apex court be it the Court of Appeal or the Supreme Court. The advocate/respondent has had a first- hand experience of the same as the said Registries of the apex courts do not tax Advocate-Client Bill of Costs but rather party and party bills that emanate from the court themselves awarding costs.”
 45. The applicant did not controvert the view and experience of the respondent in matters conducted in the apex court and whether or not The Registrar of the Supreme Court as rightly described by Supreme Court Rules conducts taxation on Advocate -Client Bills of Costs.
 46. Secondly, if the Taxing Officer lacked requisite jurisdiction, the appellant ought to have raised a preliminary objection before or during taxation proceedings and/or made an application seeking stay of proceedings to have the Taxing Officer determine the question of jurisdiction which goes to the root of any court proceedings and whether these proceedings and outcome are valid orders of the court or they are void *ab initio*.
 47. Be that as it may, this court takes the view, that the Registrar of Supreme Court taxes party to party costs arising from the trial court’s award of Costs in the specific matter. The Advocate- Client Bill of Costs is considered a commercial contract between the parties; advocate and client(s) enter into an Agreement; for the advocate to offer legal services and the client (s) to pay for those services rendered by the Advocate and thus such a contract is enforced & taxed by Taxing Officers within the Commercial & Tax Division of the High Court.
 48. Did the Taxing Officer err in assessment/taxation of the Bill of Costs?
 49. The appellant submitted that the Taxing Officer erred by applying part B of schedule 6 of the [Advocate \(Remuneration\) \(Amendment\) Order, 2014](#) in taxing the Advocate-Client Bill of Costs which provides for the assessment of costs with respect to proceedings in the High Court, whilst the instant Bill of Costs arose from proceedings in Supreme Court; Supreme Court Petition No 3 of 2015 between the [County Government of Narok and Livingstone Kunini Ntutu & 2 others](#).
 50. In so doing, the Taxing Officer purported to expand the scope of application of paragraph 2 of the Advocates (Remuneration) Order, 2009 to include the Supreme Court of Kenya when the same provided that the scope of application of the Order was limited to proceedings in the High Court, subordinate courts and the Tribunals listed thereunder.
 51. The appellant took the view that the Learned Taxing Officer did not sufficiently apply his mind to the impact of the provisions laid out under part 9 of the [Supreme Court Rules, 2012](#) which provides for the guidelines on the assessment of fees and costs and therefore ultimately misdirected himself by adopting a narrow and restrictive interpretation of rule 47 of the [Supreme Court Rules, 2012](#) which provides for



the taxation of costs arising out of any proceedings before the Supreme Court as between the parties by the Registrar of that court.

52. The respondent submitted on the issue of whether the *Supreme Court Rules* apply to the Advocate-client Bill of Cost, the respondent stated that rule 47 of the *Supreme Court Rules* indicates that the bill to be filed before the Supreme court should be party and party bill of costs.
53. The respondent averred that the Deputy Registrar was within his authority to proceed and tax the said Bill of Cost as it was as a cumulative fee charged for legal representation of the Appellant in Supreme Court from proceedings and Judgment of ELC Civil Suit 1565 of 2000 delivered on 19th March 2014; to the superior court; Court of Appeal; Civil Appeal No 25 of 2015, proceedings and judgment of November 28, 2014. This is well addressed by paragraph 13A of the Remuneration Order as the powers of the Taxing officer.
54. The respondent further stated that the bill being an Advocate-Client Bill warrants the instruction fees to be raised by 50% which has been the norm as opposed to party and party bill which does not adopt the same principle. Therefore, had the bill been a party and party then the arguments made by the client/applicant would suffice this plight is espoused in schedule 6 part B of the Remuneration Order.
55. The *Supreme Court Act*; No 7 of 2011 at section 10 of the *Act* spells out the functions of the Registrar and the taxation of Advocate-Client Bills of Costs is not included except taxation of costs as awarded by the Supreme Court.

Section 27 of the said *Act* prescribes that decisions of the court (SC) may be enforced by the High Court. A judgment, decree, or order of the Supreme Court may be enforced by the High Court as if it had been given or made by the High Court. These 2 provisions validate the Taxing Officer Taxing Advocate Client Bill of Costs based on Advocates Remuneration Order where the Supreme Court Rules do not provide for Advocate-Client Bill of Costs as in the instant case.

56. Rule 60 of *Supreme Court Rules 2020* provides as follows;

Taxation of costs

- (1) The registrar has powers to tax costs arising out of any proceedings before the court, between the parties.
- (2) The party-to-party costs shall be taxed in accordance with the scale set out in the third schedule to these rules.

3rd Schedule refers to taxation of Costs as prescribed under clause 60(2) of Supreme Court Rules; as follows;

57. Rule 9. Quantum of costs

- “(1) The fee to be allowed for instruction to make, support or oppose any application shall be such sum as the taxing officer shall consider reasonable but shall not be less than one thousand shillings.
- (2) The fees to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.



- (3) The sum allowed under sub-paragraph (2) shall include all works necessary and properly done in connection with the appeal and not otherwise chargeable, including attendances, correspondence, perusals, and consulting authorities.”

58. It is confirmed that the Supreme Court Rules do not envisage Advocate -Client Bill of Costs and the 3rd schedule would therefore not be applicable in the circumstances.
59. Since section 27 of Supreme Court Act allows the High Court to enforce Supreme decision, court’s decree, judgment or order in the same vein, the High Court may tax its Advocate-Client Bill of Costs as it is not provided for in the Supreme Court Act & Rules and it is deemed to be a commercial contract to be enforced and taxed by the High Court. The Advocates Remuneration Order would apply in the absence of 3rd schedule of Supreme Court Rules providing for Advocate-Client Fees but only party to party Costs. This court upholds the application of Advocates Remuneration Order (ARO) as per clause 13 of ARO as rule 47 of Supreme Court Rules and 3rd schedule provide for only party to party costs.
60. With regard to Objection to Instruction Fees Assessment by Taxing Officer, this court shall rely on the cases of Premchand Raichand v Quarry Services [1992] EA 162 which held that a court will not interfere with the award of Taxing Officer merely because it thinks the award was somewhat too high or too low. It will only interfere if it thinks the award was too high or so low as to amount to an injustice to one party or the other.

First American Bank of Kenya v Shah & others [2002] EA LR.

Where the court held that the applicant has to show that the award of the Taxing Officer was based on an error of principle or the award was made so manifestly excessive as to justify an influence that it was based on the error of principle.

Joreth Ltd v Kigano & Associates [2002] 1 EA 92

Court of Appeal stated that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account amongst other matters:-

- a. The nature and the importance of the cause;
 - b. The interest of the parties;
 - c. The general conduct of the proceedings;
 - d. Any direction by the trial judge; and
 - e. All other relevant circumstances.
61. The respondent submitted that the matter /appeal was complex litigation where a Consent between parties awarded 4,000-acre National Park, animals in Masai Mara and Gate Collection Fees to 1 individual. There was a contest on the Consent in the High Court and the title was nullified.
62. In the Court of Appeal the consent was reinstated. The respondent was instructed to pursue the appeal to/in the Supreme Court to have the Masai Mara Park returned to the public. Given the gravity of the matter, there were other counsel and it was not a mean feat. The respondent was successful in Supreme Court and reinstated ownership of the Park to the appellant on behalf of the public.
63. The task involved voluminous documents, pleadings, proceedings and judgment of ELC Court, Court of Appeal and pleadings, submissions and documents filed in Supreme Court. The Bill of Costs was/



is for instructions in the Supreme Court only but clearly dealt with matter as was in the High Court & Court of Appeal so as to inform the matter in the Supreme Court.

The respondent confirmed that all the paperwork formed Vol 1 & 2 of 1,409 pages each, a total of 2,742 pages which were produced in court.

The respondent further submitted that the exercise entailed legal research and they had research teams and team of lawyers involved in the matter. There were site visits and photographs were taken and filed in court. The Appeal was a precedent setting matter as the annexed Judgment of Supreme Court of December 11, 2018 confirms.

64. The respondent averred that Masai Mara was restored to the appellant County Government, inform of animals in the Park, management of the Park, collection of revenue from the Park Gates, Hotels & Camps in the Park and from Tour Vans.
65. The appellant held the view, that although it may be complex litigation, the legal Fees are exorbitant to be paid by a public entity utilizing public funds. Secondly, the appeal in Supreme Court was not about collection of revenue but the issue of the consent. Thirdly, the respondent was/is not entitled to such Fees where it is deemed to have been for litigation in High Court/ELC all the way to Supreme Court; the respondent was instructed and represented the appellant only in the Supreme Court.
66. This court in taking into account the activities and processes that culminate to instruction Fees sought and taking into account the subject matter, its value, nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances, this court finds that a lot of industry went into ploughing through documents, pleadings, proceedings, submissions and judgments of the 2 courts so as to inform the preparation and presentation of the appeal in Supreme Court. Clearly, legal teams to conduct research were involved in compiling lodging in court and serving parties with the documents and pleadings and that entailed effort. The Judgment Supreme Court Petition No 3 of 2015 confirms that presentation of the appeal entailed what transpired in the High Court/ELC, Court of Appeal and hence the appeal. There is also confirmation of pleadings filed by parties to the Appeal that the Supreme Court considered the matter as was heard and determined in ELC & Court of Appeal.
67. The Taxing Master also considered the value of the subject-matter which was not disclosed in the pleadings but relied on a Valuation Report by presented to the Defunct County Council of Narok in 2010 on LR CIS/Mara/talek/155 to reach a just figure as opposed to plucking unjustified figures. The value of the Park was at USD 23,437,500 converted to Ksh 2,507,812,500/- and the Taxing Officer took the figure of Ksh 35,000,000/- as reasonable and just assessment of the instruction Fees payable.
68. In *Masore Nyangau & Co Advocates v Kensalt Ltd* ELC Nakuru MiscApp 196 of 2015 it was held that the value of the subject-matter could be ascertained from documents other than the pleadings. The reference to the Valuation Report as an aid to assessment of instruction fees was legal.
69. The subject-matter entailed the suit property LR Cis/mara/ Talek/155 whose ownership and land use was in contest.

The appellant did not contest validity or expert assessment /valuation of the subject matter from the Valuation Report relied on. The appellant did not offer alternative Valuation to be considered. This court takes the view that the Valuation Report was/is reasonable assessment as land appreciates in value over time and development. So a 2010 valuation; taking the value then 10 years later is a conservative figure. The Taxing Officer did not error in reliance of the Valuation Report and assessment of Instruction Fees.



70. The appellant took issue with an Advocate-Client Bill which is taxed on the instruction fees and thereafter raised by 50% where party to party costs have not been taxed. The respondent on the other hand, submitted that, had the bill been a party and party then the arguments made by the Client/Applicant would suffice this plight is espoused in schedule 6 Part B of the Remuneration Order.
71. In *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR & Kisumu Misc App 31 of 2017 *Mumias Sugar Company Limited v Tom Ojienda & Associates* [2019]eKLR *supra*; The court found That there was no justification whatsoever, for taxing an Advocate/Client Bill of Costs, and then increasing it by 50% where party to party costs had not been taxed.
72. Considering the Instruction Fees Ksh 35,000,000 with cumulative costs of all services rendered of Ksh 1,821,105 and disbursement of Ksh 100,000 and taxed off Ksh 400,000 More so because receipts were not presented to prove payment, to add 50% would be going over the top especially where party to party costs have not been taxed.
- The claim for 50 % at Ksh 18,410,552/- is taxed off.
73. Drawing is confirmed by the Voluminous bundles presented to the court totaling to 2 Volumes of 3,271 pages. Disbursements which comprise of phone calls, printing, photocopying, binding, transport and any other costs incurred in furtherance of clients interests. These factors are difficult to categorize and raise invoices/receipts. Suffice is to consider, that the appellant and respondent and other counsel were in constant communication over the matter on appeal. The form of communication would entail and include, driving to meet in advocates office(s), telephone or mobile conversations, correspondence or emails etc, it is difficult to raise receipts on bundles/internet connections, telephone/mobile use of transport to specific bills, to the communication attendant, to processing hearing and determination of the matter. That is why a global tidy sum is sufficient in the circumstances, where work done is not contested and the issue is one of assessment on cost of the work done. The estimates are sufficient disbursement where proof of work done is not in issue. The Ksh 100,000/- is reasonable in the circumstances.
74. The Taxing Officer found correctly the taxation of Advocate-Client Bill of Costs based on *Advocates Remuneration Order* to the appeal in the Supreme Court as the *Supreme Court Rules* do not provide for Advocate -Client Bill of Costs Fee Scale but only party to party costs.
75. However, on the 50% addition on instruction fees where party to party costs have not been taxed, the amount is reduced/removed.
76. The reference is dismissed on all other grounds and upheld only on the 50% addition to Instruction Fees where party to party costs have not been taxed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH JUNE 2021

(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

In the presence of;

Mr. Tore H/B Mrs Okina For Applicant

Prof. Tom Ojienda and Associates for the Respondent-n/a

Court Assistant – Tupet



Mr. Tore: In view of the ruling of the court, I wish to apply for leave to appeal.

Court:

1. The leave to appeal is granted and the applicant shall obtain certified copies of the proceedings and ruling upon payment of requisite fees.
2. There is stay of execution for 30 days for pending formal application.

M.W. MUIGAI

JUDGE

