

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION MISC 6 OF 2020**

**BETWEEN**

**KITHI & COMPANY ADVOCATES .....**

**ADVOCATE/APPLICANT**

**NAIROBI COUNTY GOVERNMENT .....**

**CLIENT/RESPONDENT**

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**Applicant's case;**

- 1.** The application before this court for determination is the one dated 27<sup>th</sup> March, 2024 brought under Rule 11. Rule 50A of the the Advocates (Remuneration) Order, 2014, Section 1A, 1B and 3A of the Civil Procedure Act, Article 159 of the Constitution of Kenya and all other enabling provisions of the law. The same is supported by Affidavit by George Kithi sworn on 27<sup>th</sup> March, 2024.
- 2.** The Applicant, an Advocate acting through the firm of Kithi & Company Advocates, seeks orders for the setting aside of the decision of the Taxing Officer, rendered on 19<sup>th</sup> March 2024, in relation to the Advocate/Applicant's Bill of Costs dated 13<sup>th</sup> February 2020.
- 3.** The Applicant is aggrieved by the said Ruling, particularly on the instruction fees and the final taxed amount of Kshs. 3,740,660.70, which is alleged to be manifestly low in light of the nature and complexity of the matter.
- 4.** It is contended that the Taxing Officer failed to exercise her discretion judiciously, having omitted to consider several material factors

including: the urgency and complexity of the matter; the volume and bulk of documents involved; the significant time, effort, and skill expended; and the substantial value of the subject matter estimated at Kshs. 500,000,000.00.

5. It is argued that despite objecting to the decision by letter dated 25<sup>th</sup> March 2024 and subsequently obtaining the Ruling via the judiciary's online portal, the Applicant maintains that the learned Taxing Officer erred in principle by failing to properly assess the instruction fees in accordance with the applicable principles and prevailing legal standards.
6. Consequently, the Applicant prays that this Honourable Court either assesses and taxes the Bill of Costs afresh or, in the alternative, directs that the said Bill of Costs be taxed *de novo* before a different Taxing Officer.
7. It is urged that the Application has been brought in good faith and in the interests of justice, and that no prejudice shall be occasioned to the Client/Respondent if the orders sought are granted.
8. The Applicant prays for the costs of the Application to be provided for.
9. The application was canvassed by way of written submissions dated 13<sup>th</sup> May, 2025.
10. The Applicant submits that the Taxing Officer failed to consider settled legal principles applicable in the taxation of costs, including the value of the subject matter, the complexity and importance of the proceedings, the time taken in prosecuting the matter, the interests of the parties involved, and the overall conduct of the proceedings.

11. The Applicant had sought instruction fees in the sum of Kshs. 17,270,000.00 based on the scale and significance of the matter. The proceedings were instituted as a judicial review to enforce a decree issued in **ELC No. 1144 of 2013**, in which the Environment and Land Court had awarded Kshs. 325,000,000.00 as compensation, mesne profits at Kshs. 200,000.00 per month from 1<sup>st</sup> June 2013, and other related claims. According to the applicant, these placed a heavy professional burden on the Advocate, requiring extensive legal research, review of voluminous documents, and representation in several applications over a period of approximately three years.
12. It is submitted that the Taxing Officer did not apply her discretion judiciously and failed to take into account the established criteria set out in authorities such as ***Joreth Ltd v Kigano & Associates [2002] eKLR***, which emphasize the need to assess instruction fees based on the pleadings, judgment, or settlement value, and where such is not readily ascertainable, on the basis of the nature and importance of the matter, the interest of the parties, and all other relevant circumstances.
13. Further reliance is placed in ***Onyango, Kibet & Ohaga Advocates v Adopt a Light Ltd*** and ***Orion East Africa Ltd v Permanent Secretary, Ministry of Agriculture [2013] eKLR***, which reiterate the duty of a taxing officer to properly evaluate the complexity of the case and the amount of labor involved.
14. It is further submitted that the Ruling failed to recognize the immense work and responsibility undertaken by the Advocate, the substantial value of the subject matter estimated at Kshs. 600,000,000.00 as at the date of consent judgment, and the heavy professional input required to protect the client's interests. The general conduct of the matter involved extensive preparation, court attendances, and

management of large volumes of documents, all of which were crucial to the successful resolution of the suit.

15. As regards the getting-up fees, the Taxing Officer awarded Kshs. 500,000.00. The Applicant submits that this award is disproportionately low considering the complexity of the matter and the preparation required. It is prayed that the Court allows the sum of Kshs. 5,756,666.66 as claimed in the Bill of Costs.
16. It is submitted that the failure to consider relevant legal principles and factual circumstances amounts to an error in principle warranting judicial interference. Reliance is placed in *Issa & Co. Advocates v Anhui Construction Engineering Group* [2019] eKLR and *Moronge & Co. Advocates v Kenya Airports Authority* [2014] eKLR which cases support the proposition that where a taxing officer disregards applicable legal standards or fails to consider relevant factors, the High Court is entitled to intervene. In such circumstances, the Court may either remit the matter for taxation afresh or proceed to tax the Bill itself where the interests of justice so demand.
17. The Applicant invokes Section 27 of the Civil Procedure Act provides that costs follow the event unless the Court for good reason directs otherwise.

### **The Respondent's case;**

18. The Respondent maintains that the Taxing Officer properly exercised her discretion in taxing the Bill, having duly considered all relevant legal and factual parameters applicable in matters of public law litigation.

- 19.** The Respondent in response to the Applicants Chamber Summons filed its grounds of opposition dated 11<sup>th</sup> March, 2025 wherein the objection is premised upon the following grounds:
- 1) The Applicant has not disclosed any error on the part of the Taxing Officer to warrant interference with the ruling in issue.
  - 2) The ruling embodied in it all the reasons underpinning the taxation exercise, which reasons are sound and proper application of the Applicable law.
  - 3) The Applicant has not disclosed any reason(s) to warrant this Court's interference with the discretion of the taxing officer.
  - 4) The Application is frivolous, vexatious, and abuses the Court process.
  - 5) The Application is misconceived, lacks merit and is only ripe for dismissal allowing the Application will grossly prejudice the Respondent.
- 20.** The Respondent filed written submissions dated 8<sup>th</sup> July, 2025.
- 21.** It is submitted that it is not in dispute that the Applicant acted for the Respondent in Judicial Review No. 309 of 2015. The dispute between the parties arises solely as to the quantum of legal fees payable for the said representation. The underlying Judicial Review matter was determined within one year of its filing. Following disagreement over remuneration, the Applicant filed an Advocate-Client Bill of Costs seeking taxation in the sum of Kshs. 40,531,179.11.
- 22.** It is further submitted that in Judicial Review proceedings, instruction fees are not determined solely by reference to the value of the subject matter, and therefore the Taxing Officer acted within her jurisdiction

and in accordance with the Advocates Remuneration Order by enhancing the base instruction fee from Kshs. 45,000.00 to Kshs. 1,500,000.00, having regard to the complexity of the matter, the nature of the proceedings, the time and labour involved, and the volume of documentation.

23. The Respondent contends that the Applicant has failed to establish any error of principle or misdirection on the part of the Taxing Officer to justify interference with the Ruling delivered. The legal threshold for setting aside a taxation has not been met, as affirmed in ***First American Bank of Kenya v Shah and Others [2002] 1 EA 64***, which outlines that a court may only interfere with the exercise of discretion by a taxing officer where it is shown that the officer erred in principle or awarded a manifestly excessive fee indicative of such error.
  
24. The same position was reiterated in ***Karen & Associates Advocates v Caroline Wangari Njoroge [2019] eKLR and Ochieng, Onyango, Kibet & Ohaga Advocates v Adopt-a-Light Ltd***, where the court emphasized that a taxing officer must assess fees in consideration of the nature and importance of the matter, the value of the subject matter, the interest of the client, and the complexity of the case.
  
25. Reliance is also placed in ***Tom Ojienda & Associates v Nairobi City County (Judicial Review Misc. Appl. No. 51 of 2017) [2022] KEHC 14353 (KLR)***, where the High Court declined to interfere with the Taxing Officer's discretion in a similar context, affirming that discretion must be exercised judicially, but that courts should not substitute their own views for that of the taxing officer absent demonstrable error of principle.

26. It is the Respondent's submission that the Taxing Officer grounded her decision on the applicable Advocates Remuneration Order and relevant case law, and that no extraneous or irrelevant considerations influenced the Ruling.
27. The Respondent therefore prays that the Application be dismissed for want of merit, as the impugned decision is both lawful and reasoned. While the Court retains the jurisdiction to tax the Bill afresh or remit it for re-taxation, the Respondent submits that such action is unwarranted in the present circumstances, given the sound basis of the initial taxation.
28. With respect to costs, the Respondent urges the Court to be guided by Section 27 of the Civil Procedure Act, which provides that costs shall follow the event, and prays that the Applicant's Reference be dismissed with costs to the Respondent.

### **Analysis and determination**

29. Upon per using the application, supporting and replying affidavits, the rival of submissions fronted by parties and the authority to relied upon, this court find the following issues for determination;

- 1) Whether or not the application has merit.
- 2) Whether or not the applicant is entitled to costs.

### **Whether or not the application has merit.**

30. Though the court may interfere with the exercise of discretion by a taxing officer the applicant must satisfy the court that the officer erred in principle or awarded a manifestly excessive or low fee indicative of such error.

- 31.** The applicant in this case has not demonstrated to the court how the taxing officer fell into error in the exercise of her discretion.
- 32.** From the impugned ruling, this court notes that the taxing master observed inter alia took into consideration the fact that the court has discretion to enhance instruction fees considering the complexity of the matter, responsibility by counsel, time spent, reason done and skill deployed by counsel. It considered that the court must ensure that the advocate instruction fees is to seek and has more and no less than reasonable compensation for professional work done.
- 33.** She went further to observe that ,”bearing in mind all the aforesaid factors and reasons herein and exercise of the discretion vested in me, I am fully convinced that the amount sought by the applicant is overly excessive”.
- 34.** She further observed that in public law litigation, the amount involved is not the sole determinant when it comes to costs. Judicial review suits are not money suits as they merely seek declaratory reliefs or orders. The matter was concluded within one year.
- 35.** The taxing master further observed that ,”that taking into account the time taken in this matter, scope of work done and the nature of the dispute herein, I am of the considered view that Ksh. 1,500,000/= is reasonable instruction fees under the circumstances kshs. 15,770,000/=) is hereby taxed off.”

- 36.** The court is of the informed view that the taxing master acted within the principles that guide the taxation of bills of costs.
- 37.** The court has also looked at how the taxing master determined the issue of getting up for trial.
- 38.** Schedule 6 (2) of the Advocates (Remuneration) (amendment) Order, 2014 provides that a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one third of the instruction fee allowed on taxation. She observed that the instruction fee allowed herein amounted to Kshs, 1,500,000. It is this court's finding that the taxing master exercised her discretion correctly when she taxed item no.2 at Kshs. 500,000/= taxing off Kshs, 5,256,666.00/=.
- 39.** The court is satisfied that the Taxing Officer grounded her decision on the applicable Advocates Remuneration Order and relevant case law, and that no extraneous or irrelevant considerations influenced the Ruling.
- 40.** The court is guided by the case of *Issa & Co. Advocates v Anhui Construction Engineering Group [2019] eKLR* and *Moronge & Co. Advocates v Kenya Airports Authority [2014] eKLR* which cases support the proposition that where a taxing officer disregards applicable legal standards or fails to consider relevant factors, the High Court is entitled to intervene. In such circumstances, the Court may either remit the matter for taxation afresh or proceed to tax the Bill itself where the interests of justice so demand.

**Costs;**

**41.** The Civil Procedure Act (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):  
*“Subject to such conditions and limitations’ as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:*  
*Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order” [emphases supplied].*

**42.** In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p.94]:

*“[T]he objects of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”*

**43.** In the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR [13]** it was held, to the same intent Mr. Justice (Rtd.) Kuloba thus writes in his work, *Judicial Hints on Civil Procedure*, 2nd ed. (Nairobi: Law Africa, 2011), p. 94:

*“Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise: Chamilabs v. Lalji Bhimji and ShamjiJinabhai Patel, High Court of Kenya, Civil Case No. 1062 of 1973.”*

**44.** In the instant suit it is this court's finding that the applicant is not entitled to costs.

**Disposition;**

**45.** Discretion must be exercised judicially and courts should not substitute their own views for that of the taxing officer absent demonstrable error of principle. This court finds no reason to interfere with the taxing masters decision. The application lacks merit.

**Orders;**

The application is dismissed with costs.

**Dated, Signed and Delivered at Nairobi this  
16thDay October of 2025**

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**J. CHIGITI (SC)**

**JUDGE**

JR. MISC 6 OF 2020 RULING4 | Page

**Dated, Signed and Delivered at Nairobi this 16th Day  
October of 2025**

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**J. CHIGITI (SC)  
JUDGE**