Mwirebua v Mutonga (Environment and Land Miscellaneous Application E023 of 2024) [2025] KEELC 7064 (KLR) (13 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7064 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E023 OF 2024

JO MBOYA, J

OCTOBER 13, 2025

BETWEEN

SAMSON MURIUNGI MWIREBUA ..... APPELLANT

AND

SILAS KIMATHI MUTONGA ..... RESPONDENT

RULING

1. What is before me is the Chamber Summons application [reference] dated 15th September 2025; brought pursuant to the provisions of section 1A, 1B and 3A of the *Civil Procedure Act* Cap 21, Laws of Kenya and Rule 11 (2) of the Advocates Remuneration Order and all enabling provisions of the law and wherein the applicant has sought the following reliefs:

    i. That this Honourable court be pleased to set aside and review and or revise the decision of the taxing master dated 28th August 2025.

    ii. That the applicant/respondent's party and party bill of costs be taxed afresh with respect to items 1 and 2 on instruction and getting up fees and tax the item afresh.

    iii. That in the alternative, this Honourable court be pleased to order that the respondent's party and party bill of costs dated 3rd April 2025 be taxed by a different taxing master.

    iv. That consequent upon the foregoing, this court be pleased to issue a certificate of costs reflecting the correct costs payable to the respondent/applicant.

    v. That this Honourable court be pleased to make any further orders in the interest of justice as it may deem just and fit.

    vi. That the costs of this reference be provided for.

2. The subject application is premised on the various grounds enumerated in the body thereof. In particular, the applicant has contended that the Honourable Deputy Registrar (taxing officer) erred in law in taxing the party and party bill of costs dated 3rd April 2025 and in particular, items 1 & 2 thereof. Furthermore, it has been contended that the taxing officer disregarded the values that were captured in the face of the plaint and thus arrived at an erroneous figure on account of instruction fees.

3. Additionally, it has been contended that the taxing officer also misapprehended and misconceived the provisions of the advocate's remuneration order in failing to award getting up fees to the applicant. To this end, it has been posited that the certificate of taxation is therefore wrought with grave mis-directions and errors; and thus same ought to be set aside/varied.

4. The subject application is supported by the affidavit sworn by faith Kerubo [learned counsel] and to which the deponent has annexed assorted documents including a copy of the judgment rendered on appeal; the party and party bill of costs; the ruling of the taxing officer; the certificate of taxation and the notice of objection to taxation dated 8th September 2025.

5. The respondent filed a replying affidavit sworn on 29th September 2025; and wherein it has been averred that the subject application vide miscellaneous cause is improperly before the court. Moreover, it has been averred that the reference challenging the certificate of taxation ought to have been filed in the main/parent appeal file and not otherwise. In addition, it has been posited that the learned taxing officer applied and deployed the correct legal principle in taxing/awarding instruction fees. In this regard, the respondent has invited the court to find and hold that the application is premature, misconceived and otherwise constitutes an abuse of the due process of the court.

6. The instant application came up for hearing today [13th October 2025], whereupon the advocate for the parties covenanted to canvass and dispose of the application by way of oral submissions. To this end, the court issued directions and the application proceeded for hearing.

7. Learned counsel for the applicant adopted the grounds enumerated at the foot of the application; the contents of the supporting affidavit and thereafter highlighted three [3] key issues for consideration by the court. The issues highlighted by the applicant are namely; whether the court should set aside or vary the certificate of taxation; whether the applicant's bill of costs ought to be re-taxed/taxed afresh in terms of items 1 & 2; and whether the subject application is incurably defective or otherwise.

8. Regarding the first issue, learned counsel for the applicant has submitted that the learned taxing officer failed to apprehend the correct legal principle relative to the taxation of the party and party bill of costs. In particular, it has been submitted that the learned taxing officer failed to appreciate and take into account the monetary value contained in the body of the Plaint. Furthermore, it was submitted that the Plaint which has been filed in the subordinate court alluded to monetary figures amounting to an aggregate of Kshs.2,399,000/= only; which figure it has been contended ought to have been taken into account in determining the applicable instruction fees.

9. Despite the fact that the plaint referenced the monetary sum of Kshs.2,399,000/= only, it has been submitted that the learned taxing officer disregarded the ascertainable value and proceeded to tax instruction fees on the basis of discretion. To this end, it has been posited that the taxation of the instruction fees is therefore vitiated by an error of principle.

10. In respect of the second issue, learned counsel for the applicant has submitted that the learned taxing officer failed to decree and award getting up fees for the appeal. Nevertheless, it was submitted that the appeal beforehand, touched on and concerned complex issues pertaining to ownership of land and by

extension the application of article 40 of *the constitution*. In this regard, it has been posited that getting up fees ought to have been awarded.

11. Flowing from the foregoing contention, learned counsel for the applicant has submitted that the applicant has laid before the court a proper basis to warrant the setting aside of the certificate of taxation and the fresh taxation of items 1 & 2, namely; instruction fees on the appeal and getting up fees, respectively.

12. Turning to the third issue, learned counsel for the applicant has submitted that it is true that the certificate of taxation sought to be impeached was rendered in the substantive appeal file, namely; ELC appeal E023 of 2024. Furthermore, learned counsel for the applicant has conceded that the reference before the court ought to have been filed in the main appeal file and not vide a miscellaneous file. However, learned counsel posited that the filing of the miscellaneous application is a procedural technicality and thus the same is curable by provisions of Article 159 (2d) of *the Constitution* 2010. In this regard, learned counsel has invited the court to find and hold that the current application is properly before the court despite being filed vide a miscellaneous application.

13. Learned counsel for the respondent adopted the replying affidavit sworn on 29th September 2025; and thereafter highlighted three [3] key issues, namely: the application before the court is fatally incompetent and thus legally untenable; the taxing officer deployed and applied the correct legal principle in taxing the instruction fees; and that the getting up fees were correctly taxed off.

14. Regarding the first issue, learned counsel for the respondent has submitted that the certificate of costs, which is sought to be challenged/impeached was issued in the main appeal file, namely; ELC Appeal No. E023 of 2024. To this end, it has been submitted that if the applicant was keen to challenge the certificate of taxation then same was obligated to file the reference in the appeal file and not by way of a miscellaneous application. In this regard, it has been submitted that the filing of the miscellaneous application renders the application defective and irredeemably bad. Learned counsel for the respondent has thereafter invoked and referenced the provisions of Rule 11 of the Advocates Remuneration Order.

15. Additionally, learned counsel for the respondent has submitted that the filing of the miscellaneous application beforehand cannot be deemed as a procedural mistake. Moreover, it has been posited that the mode/mechanism deployed to invoke the jurisdiction of the court goes to the root of the jurisdiction and thus same cannot be deemed as a procedural technicality. On the contrary, learned counsel has submitted that the subject matter goes to the root of the jurisdiction and renders the application bad in law. Simply put, it has been submitted that the defect under reference is not curable by the invocation of Article 159 (2d) of *the Constitution*.

16. Turning to the second issue, learned counsel for the respondent has submitted that the learned taxing officer deployed and applied the correct legal principle in taxing and ascertaining the instruction fees. In particular, it has been submitted that the appeal before the court and which underpins the taxation of the party and party costs, concerned the question of constructive trust. Moreover, it was submitted that the appeal and the resultant judgment did not reference any monetary value or otherwise.

17. Furthermore, it has been submitted that the monetary value which the applicant has alluded to were captured in the body of plaint. However, it has been posited that the monetary values were declined by the trial court. Further, and in any event, it was submitted that in determining the instruction fees for purposes of the appeal, the taxing officer is only guided by the judgment of the court; and not the pleadings that were filed in the subordinate court.

18. Arising from the foregoing, learned counsel for the respondent has submitted that in the absence of any monetary value, alluded to and discernible from the judgment of the court, the learned taxing officer was right to deploy and exercise discretion in ascertaining and awarding instruction fees.

19. Finally, learned counsel for the respondent has submitted that getting up fees for the appeal can only be awarded if the judge issues a certificate confirming that the appeal was complex and worthy of getting up fees. Moreover, it has been submitted that the learned taxing officer could only tax and award getting up fees subject to a certificate by the judge, issued at the conclusion of the appeal. In the absence of a certificate certifying the matter to be one where getting up fees is claimable; learned counsel for the respondent has contended that the learned taxing officer was right in taxing off the item pertaining to getting up fees.

20. In the premises, learned counsel for the respondent has implored the court to find and hold that the application beforehand is premature and misconceived; and same is equally devoid of merits. In this regard, the court has been invited to dismiss the application with costs to the respondents.

21. Having reviewed the Chamber Summons application; the supporting affidavit; the replying affidavit in opposition thereto; and upon consideration of the oral submissions canvassed on behalf of the parties, I come to the conclusion that the determination of the subject application turns on two[2] key issues, namely; whether the application before the court is competent and legally tenable; and whether the learned taxing officer applied the correct principle in determining/awarding instruction fees or otherwise.

22. Regarding the first issue, namely; whether the subject application is competent, it is important to highlight that the certificate of taxation which is sought to be impeached/impugned by the applicant, was issued in ELC appeal No. E023 of 2024. For good measure, the party and party costs which birthed the impugned certificate of taxation were also filed in the said appeal file.

23. However, the reference beforehand and which challenges the certificate of taxation, has been filed vide a miscellaneous application. Moreover, the miscellaneous application is purported to be ELC A Miscellaneous application No. E023 of 2024; whereas the application is dated the 15th September 2024.

24. To start with, it is inconceivable that the miscellaneous application file herein could have been opened in the year 2024, yet the application that originates the miscellaneous file is dated 15th September 2025. For good measure, one would have expected the miscellaneous file to be opened and operationalized following the filing of the subject application and not otherwise. Be that as it may, what is apparent is that the miscellaneous file predated and preceded the application. Quite interesting.

25. Secondly, it is imperative to state that the provisions of rule 11 of the Advocates' Remuneration Order which guide the filing/lodgment of a reference, denote that such an application [reference] ought to be filed in the matter giving rise to the certificate of taxation. In this regard, it was incumbent upon the applicant to file/lodge the reference in the main/parent appeal file wherein the certificate of taxation was issued.

26. The applicant, however, has chosen to file the reference vide a miscellaneous application. To my mind, the deployment and usage of a miscellaneous application to challenge the certificate of taxation issued vide ELC appeal E023 of 2024, was erroneous and illegal. For good measure, a miscellaneous application cannot be filed to address issues which are underpinned in an existing substantive file.

27. Additionally, I hold the view that the question of reference which challenges the quantum of taxation, is a matter which technically touches on and concerns execution/recovery of costs. To this end, such a matter does not envisage the filing of a fresh cause; save where the recovery of course touches on

advocate's client bill and not otherwise. [See the provisions of section 34 of the *Civil Procedure Act* which prohibit the filing of a fresh suit for purposes of addressing execution proceedings].

28. Finally, and on this issue, I beg to underscore that the vehicle/mechanism/mode deployed in approaching the jurisdiction of the court goes to the root of the jurisdiction. Such a matter is not a procedural technicality and hence same is not curable by invocation and reliance on the provisions of Article 159 (2d) of *the Constitution*. I am afraid that the reliance on the said provisions by learned counsel for the applicant does not help the situation.

29. In the case of Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] KECA 545 (KLR), the Court of Appeal considered a situation where a miscellaneous application was deployed in lieu of a substantive suit and stated as hereunder;

> It must be borne in mind that the substantive provision that the 1st respondent invoked was Section 7 of the Act. The 1st respondent was seeing an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by Rule 2 of the Arbitration Rules, 1997. Suffice it to say that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or Statute, that procedure should be strictly followed (See Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of *the Constitution* for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of *the Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure (See Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Ors [2010] eKLR).

30. Before concluding on this issue, it is imperative to draw the attention of learned counsel for the applicant to the dictum of the Court of Appeal in the case of Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR.

31. For coherence the court stated thus;

> A five-judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of MUMO MATEMU Vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS Civil Appeal No. 290 of 2012 as follows;
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> "In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

32. Premised on the ratio decidendi in the decision supra, I am afraid that the defect attendant to the miscellaneous application beforehand is not curable by the invocation and reliance on the provisions of article 159 (2d) of *the constitution*. For good measure, the said provisions do not rescue a defect that touches on and concerns substantive irregularities which go to the root of the jurisdiction of the court. [See also the Supreme Court decision in the case of Fredrick Otieno Outa vs Jared Odoyo Okello (2017) eKLR- at paragraph 67 thereof].

33. Turning to the second issue, learned counsel for the applicant has contended that the learned taxing officer improperly taxed the item relating to instruction fees by disregarding/ignoring the monetary values that were contained in the face of the plaint. Moreover, it has been contended that the learned taxing officer misapprehended the principle applicable to taxation of instruction fees where the value of the subject matter is discernible from the face of the pleadings [read plaint].

34. I beg to underscore that the learned taxing officer was taxing the cause arising from the appeal and not the primary suit. Furthermore, it is common ground that the dispute at the foot of the appeal touched on and concerned the question of constructive trust. In addition, there is no gainsaying that at the foot of the appeal and the resultant judgment arising therefrom, there was no monetary award or at all. Quite clearly, the value of the subject matter at the appeal level was not discernible from the face of the judgment.

35. Other than the foregoing, it is also important to highlight that where a taxing officer is taxing a bill of costs in a matter where judgment has since been rendered, it behooves the taxing officer to deploy and use the value [if any] discernible from the judgment, settlement and not the pleadings. Suffice it to state that the taxation in respect of the impugned party and party bill was being undertaken long after the delivery of judgment. In this regard, the correct legal principle in ascertaining the value of the subject matter would be the judgment and not the pleading [if at all]. [See Peter Muthoka & another v Ochieng & 3 others [2019] KECA; See also the decision of the Supreme Court in Kenya Airports Authority vs Otieno Ragot & Co. Advocates (2024) KESC].

36. It was admitted and conceded by learned counsel for the applicant that the appeal concerned the question of constructive trust. In addition, it was also conceded that there was no value adverted to at the foot of the judgment. This being the position, I am in agreement with the learned taxing officer in deploying and exercising discretion in ascertaining the instruction fees. Moreover, I beg to highlight that the learned taxing officer was not obligated to reference and rely upon the values contained at the foot of the plaint. For good measure, the taxation of the instruction fees due and payable to the applicant was determinable from the judgment of the court and not otherwise.

37. In the premises, I am afraid that the submissions by learned counsel for the applicant are anchored on a misapprehension of the principles governing the taxation of instruction fees in appeals. To this end, I am afraid that the applicant has not demonstrated/established any error of principle to warrant the variation of the certificate of taxation.

38. It would not be apposite to terminate this ruling without highlighting the legal principles that govern the interference of the discretion of the taxing officer in matters pertaining to taxation. In this regard, it suffices to reference the decision in the case of First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] KEHC 1277 (KLR) where the court [Ringera J – as he then was] stated thus;

> First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. (See STEEL & PETROLEUM (E.A) LTD VS. UGANDA SUGAR FACTORY (Supra). Of course. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist

in the actual case before him. If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment. (see Nanyuki Esso Service V Touring Cars Ltd; Steel & Petroleum (e.a.) Ltd V Uganda Sugar Factory; Thomas James Arthur V Nyeri Electricity Undertakers And Joreth V Kigano & Associates). However, the Judge does have jurisdiction and it is within his discretion to reassess the bill himself; (See Steel & Petroleum (e.a.) Ltd And Thomas James Arthur). The court is not entitled to upset a taxation because in its opinion, the amount awarded was high (See Steel Construction & Petroleum Engineering (e.a.) Ltd. The other general principle is that it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and that the amount of the increase or reduction is discretionary. (See THomas James Arthur V Nyeri Electricity Undertakers). In that respect, I must reject the submission made on behalf of the third defendant that the taxing officer has no discretion to reduce the basic instruction fees. On the contrary, I accept the submission made on behalf of the plaintiff that such discretion exists and that the only fees which cannot be reduced are those in respect of which it is provided that the amount thereof shall not be less than what is prescribed. An example is schedule VI (1) (g) (i): the instruction fees in matrimonial causes.

39. Even on the merits of the arguments that were raised by learned counsel for the applicant, I find and hold that same neither established nor demonstrated any error of principle in the certificate of taxation. Absent error of principle, this court cannot be called upon to interfere with the discretion of the taxing officer.

40. Flowing from the foregoing, it must be apparent that the chamber summons application [reference] is premature and misconceived. Moreover, the application is a nullity.

Final Disposition.

41. For the reasons that have been adverted to in the body of the ruling, it must have become evident that the application beforehand is legally untenable. Same courts dismissal.

42. In the upshot, and for the reason[s] already alluded to; the final orders that commend themselves to the court are as hereunder;

    i. The Chamber Summons Application dated 15th September 2025 is dismissed.

    ii. Costs of the Application be and are hereby awarded to the respondent.

    iii. The costs in terms of clause [ii] are hereby assessed and certified in the sum of Kshs.15,000/= only.

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF OCTOBER 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant

Ms. Kerubo holding brief for Mr. Kiautha Arithi for the Applicant

Mr. Kariuki for the Respondents