



Benard Odero & Company Advocates v Simiyu (Miscellaneous Application E216 of 2024) [2025] KEELRC 2828 (KLR) (21 October 2025) (Ruling)

Neutral citation: [2025] KEELRC 2828 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E216 OF 2024**

**SC RUTTO, J
OCTOBER 21, 2025**

BETWEEN

BENARD ODERO & COMPANY ADVOCATES ADVOCATE

AND

MERIT WAMBATI SIMIYU CLIENT

RULING

1. Before this Court for determination is a Reference arising from the taxation of the Advocate/Client Bill of Costs by Hon. E. Riany, who, in a Ruling dated 24th September 2024, taxed the Bill at a total sum of Kshs. 661,351.01.
2. The Client/Applicant, being dissatisfied with the decision of the Taxing Officer, lodged the present Reference through a Chamber Summons Application dated 15th April 2025 seeking the following orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to set aside the decision of the Taxing Officer delivered on 24th September, 2024 as far as the same relates to taxation of the item numbers 1-36 of the Applicant's Bill of costs dated 22nd July, 2024 the quantum awarded thereon and the reasoning with respect to the said award.
 - c. That this Honourable court be pleased to re-tax item numbers 1-36 of the bill of costs dated 22/7/2024.
 - d. That in the alternative to prayer 2 above, this Honourable Court be pleased to remit the Applicant's bill of cost dated 22nd July, 2024 for re-taxation of items 1-36 thereof to a different taxing officer with appropriate direction thereafter.



- e. That in the alternative to prayers 2 and 4 this Honourable Court be pleased to find that the Kenya shilling's One Hundred and Thirty Thousand (Kshs. 130,000/-) paid to the Advocate/Applicant herein being the agreed fees between the parties to be sufficient and be adopted in full settlement of the bill of costs dated 22/7/2024 filed by the advocate herein.
- f. That costs of this application be provided for.
3. The Application is anchored on the grounds set out on its face and is supported by the Affidavit sworn on 15th April 2025 by Merit Wambati Simiyu, the Applicant herein. The Applicant avers that the Taxing Officer erred in law and principle by failing to demonstrate how she arrived at the sum of Kshs. 300,000/= as reasonable instruction fees in respect of the Advocate's Bill of Costs dated 22nd July 2024, and how she proceeded to tax the other items therein.
4. It is further contended that the Taxing Officer failed to take into account the nature of the proceedings which the Applicant avers was an application filed in Misc. Application No. E103 of 2022, which was subsequently withdrawn and was never determined on its merit.
5. He further contends that the Taxing Officer denied him the opportunity to be heard during the taxation of the Bill of Costs.
6. According to the Applicant, the amount awarded as instruction fees was inordinately high and excessive, and therefore based on an error of principle.
7. The Applicant further faults the Taxing Officer for failing to consider the sum of Kshs. 130,000/= which he maintains was the agreed legal fee between him and the Respondent.
8. The Applicant further avers that the Taxing Officer erred in law and in principle in awarding getting-up fees, which were not applicable in the circumstances of this matter.
9. Lastly, the Applicant asserts that the learned Taxing Officer failed to tax items 3–36 of the Bill of Costs dated 22nd July 2024.
10. In response to the Application, the Advocate/Respondent filed a Replying Affidavit sworn on 6th November 2023 by Benard Odero Okello, who describes himself as an Advocate of the High Court of Kenya and the Managing Partner of Messrs. Benard Odero & Co. Advocates.
11. Mr. Odero deposes that sometime in July 2022, the Applicant instructed him to pursue its interests against the firm of Messrs. Nguu & Co. Advocates. Pursuant to those instructions, he filed a Notice of Appointment together with Grounds of Opposition, disputing a claim of Kshs. 3,076,202.74.
12. He avers that despite rendering legal services, the Applicant failed, refused, and/or neglected to settle his legal fees. He further contends that the Applicant was evasive and unwilling to pay the amounts due, thereby leaving him with no option but to lodge a Bill of Costs.
13. Mr. Odero states that upon filing the Bill of Costs, he duly served the Applicant, who failed, neglected, and/or refused to respond or otherwise defend the matter. Consequently, the Taxing Officer, guided by Schedule 6A(j)(ii) of the *Advocates (Remuneration) Order*, awarded him Kshs. 300,000/= as instruction fees.
14. Mr. Odero further avers that since the Applicant later instructed him to withdraw the Grounds of Opposition, the value of the subject matter could only be discerned from the pleadings. In his view, the Taxing Officer therefore properly exercised her discretion in determining the subject matter value.



15. According to Mr. Odero, there is no justification for the Court to interfere with the Taxing Officer's decision, as the Applicant's contention that the instruction fees were excessive is devoid of merit.
16. Mr. Odero maintains that the Taxing Officer correctly identified the subject matter value as Kshs. 3,287,899.14 and properly applied Schedule 6A(j)(ii) of the *Advocates (Remuneration) Order* in assessing instruction fees.
17. In Mr. Odero's view, the amount awarded by the Taxing Officer was reasonable, not manifestly high, and fell well within the permissible range under the applicable remuneration guidelines.

Submissions

18. Only the Respondent filed written submissions with respect to the Reference.
19. It was the Respondent's submission that, contrary to the Applicant's assertion, the Taxing Officer is not required to consider external factors when determining the value of the subject matter, particularly where such value is readily ascertainable from the pleadings, as is the case herein.
20. The Respondent further contended that the Taxing Officer correctly applied the law and principles governing the award of getting-up fees by awarding the sum of Kshs 100,000/=, representing a third of the instruction fees as prescribed by law.
21. The Respondent additionally submitted that the amounts charged under items Nos. 3 to 36 are in accordance with the *Advocates Remuneration Order*, and to this end, it urged the Court to allow them as prayed in the Bill of Costs dated 22nd July 2024.
22. The Respondent further argued that there is no basis for the Court to interfere with the Taxing Officer's decision, as the Applicant's contention that the instruction fees were excessively calculated is without merit.

Analysis and Determination

23. Having considered the Application, the Replying Affidavit, and the Respondent's submissions, the Court discerns that the central issue for determination is whether the learned Taxing Officer misdirected herself in law and principle in taxing the Advocate–Client Bill of Costs, thereby arriving at an erroneous assessment.
24. The principles governing the Court's interference with the decision of a Taxing Officer are well settled. In the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, the Court stated as follows:

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer erred in principle in assessing the costs. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 492, the predecessor of this Court observed that where there has been an error in principle, the court will interfere; but questions solely of quantum are regarded as matters with which taxing officers are particularly fitted to deal, and the court will interfere only in exceptional cases.”
25. It is thus evident that a judge will only interfere with the Taxing Officer's discretion where it is demonstrated that the officer acted on wrong principles of law in assessing costs.



26. As to what constitutes an error of principle, the Court in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* (supra) elaborated that an example would be where the costs allowed are so manifestly excessive as to justify an inference that the Taxing Officer acted on erroneous principles, or where undue weight was placed on the difficulty, importance, or complexity of the matter. Similarly, a failure to apply the prescribed formula for assessing instruction fees under Schedule VI, or to consider all relevant circumstances of the case, would amount to an error in principle.
27. In the present case, the Applicant has taken issue with the assessment by the Taxing Officer in respect of the instruction fees, getting-up fees, and items 3 to 36 of the Bill of Costs dated 22nd July 2024.
28. With respect to instruction fees, the Applicant contends that the Taxing Officer failed to consider the nature of the proceedings and to demonstrate the basis upon which the instruction fees were assessed at Kshs. 300,000/=. The Applicant further asserts that the amount awarded under this item was inordinately high and excessive.
29. It is trite that instruction fees are ordinarily derived from the value of the subject matter. This principle was succinctly stated in *Joreth Ltd v Kigano & Associates* [2002] 1 E.A. 92, where the Court observed as follows:
- “We would at this stage point out that the value of the subject matter of a suit 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 the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.” Underlined for emphasis
30. Essentially, the value of the subject matter is ascertainable from the pleadings, judgment, or settlement, depending on the circumstances of each case.
31. In the present case, it is evident that the Respondent came on record pursuant to a dispute between the Applicant and his erstwhile advocates. At that point, the dispute centered on a settlement agreement which was in the sum of Kshs. 3,076,202.74. This sum therefore, constituted the value of the subject matter, from which the instruction fees ought to have been assessed.
32. It is noteworthy that although the Taxing Officer acknowledged that the dispute arose from a settlement agreement, she did not expressly identify the value of the subject matter. Instead, the Taxing Officer merely cited Schedule 6A (j)(ii) of the *Advocates (Remuneration) Order* and proceeded to assess instruction fees at Kshs. 300,000/= without indicating how she applied the prescribed formula for assessing instruction fees under Schedule VI or providing any discernible basis or justification for that figure.
33. As was held in the case of *First American Bank of Kenya Ltd v Gulab P Shah & Others* [2002]
- “...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.” Underlined for emphasis



34. In the Court’s view, the failure by the learned Taxing Officer to identify the value of the subject matter and to set out the considerations that informed the assessment of the instruction fees amounted to an error of principle. Indeed, the absence of a clear rationale renders it impossible to discern whether the relevant factors under Schedule 6A were properly taken into account, thereby justifying this Court’s interference with the decision of the Taxing Officer.
35. Another issue raised by the Applicant is with respect to the getting-up fees. In the Taxation Ruling, the Taxing Officer assessed this item at Kshs. 100,000/=, representing one-third of the instruction fees.
36. Schedule 6 Part 2 of the *Advocates (Remuneration) Order* is couched as follows–
- “In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:
- Provided that —
- (i)
- (ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
- (iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.”
37. It is undisputed that the matter giving rise to the taxation originated from a settlement agreement between the Applicant and his erstwhile advocates, following the resolution of the main claim by consent. Accordingly, the dispute had advanced beyond the trial stage by the time the Respondent came on record for the Applicant.
38. It is further common ground that the Miscellaneous Application filed by the Applicant’s erstwhile Advocates and the Grounds of Opposition by the Respondent were subsequently compromised by the parties. As a result, neither the Application nor the Grounds of Opposition was fully argued or adjudicated on its merits.
39. Accordingly, in terms of Schedule 6, Paragraph 2(ii) of the *Advocates (Remuneration) Order*, the Court finds that the Respondent was not entitled to getting-up fees. Consequently, the Taxing Officer erred in awarding the same.
40. The Court further finds merit in the Applicant’s contention that the learned Taxing Officer failed to tax items 3–36 of the Bill of Costs dated 22nd July 2024. Indeed, the Taxation Ruling does not indicate how these items were addressed or assessed.
41. Further to the foregoing, it is unclear from the record how the Taxing Officer arrived at the total sum of Kshs. 661,351.01, as the basis for the figures used is not discernible from the record.
42. In the same vein, it is not apparent whether the taxing Officer took into account the Kshs. 300,000/= awarded as instruction fees and the Kshs. 100,000/= awarded as getting-up fees. Consequently,



although these amounts were taxed, it remains unclear how they were incorporated in arriving at the total sum of Kshs. 661,351.01.

43. In the circumstances, the Court finds it appropriate to remit the Bill of Costs dated 22nd July 2024 for re-taxation.
44. Accordingly, the Chamber Summons dated 15th April 2025 is allowed as follows:
 - a. The Taxation Ruling with respect to the Bill of Costs dated 22nd July 2024 is set aside and remitted for taxation by a different Taxing Officer.
 - b. There will be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2025.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Shamalla instructed by Mr. Odero for the Advocate/Respondent

No appearance for the Client/Applicant

Millicent Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

