



Everton Coal Enterprises Limited v Theuri & Company Advocates (Miscellaneous Application E041 of 2022) [2025] KEELC 7197 (KLR) (23 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION E041 OF 2022
JM ONYANGO, J
OCTOBER 23, 2025**

BETWEEN

EVERTON COAL ENTERPRISES LIMITED APPLICANT

AND

WANJIRU THEURI & COMPANY ADVOCATES RESPONDENT

RULING

1. This Ruling is in respect to a Reference filed by Everton Coal Enterprises Limited (the Client/Applicant) through the Chamber Summons dated 2nd August 2023. Through the application, the Client/Applicant seeks an order that this court reviews, varies or sets aside the decision of the Learned Taxing Officer contained in the Ruling in Miscellaneous Application No. E041 of 2021: In the Matter of Advocate Client Bill of Costs between Wanjiru Theuri & Company Advocates and Everton Coal Enterprises Limited dated 29th August 2022. In the alternative, the Client/Applicant seeks an order to refer Miscellaneous Application No. E041 of 2021: In the Matter of Advocate Client Bill of Costs between Wanjiru Theuri & Company Advocates and Everton Coal Enterprises Limited for Taxation before the Taxing Officer in view of the Judgment in Thika ELC Case No. 174 of 2018: Josvir Traders & Agencies Ltd v Geoffrey Chege Kirundi & 2 Others dated 18th February 2022.
2. M/s Wanjiru Theuri & Company Advocates (the Advocate/Applicant) filed an Advocate-Client Bill of Costs dated 12th August 2021. The Advocate/Applicant canvassed the same through written submissions dated 25th February 2022. The Client/Respondent opposed the Bill of Costs through written submissions dated 15th February 2022. Upon consideration of the Bill of Costs and the parties' respective submissions, the Taxing Officer rendered a ruling dated 29th August 2022 awarding the Advocate/Respondent the sum of Kshs 2,238,190.
3. Dissatisfied with the decision of the Taxing Officer, the Client/Applicant filed this Application which is supported by the Affidavit of Prof. Patrick Karanja Ngugi (a director of the Client/Applicant). He contends that the reference before the court is merited and raises serious issues of law which call for



- determination by the court, including whether a Taxing Officer ought to consider the pleadings or the award contained in a judgment when determining the value of the subject matter for purposes of calculating instruction fees.
4. He states that the Applicant Company is merely exercising its legal right to avoid suffering occasioned by errors or mistakes apparent on the face of the court record. He explains that the Applicant Company has already paid the Respondent Advocates their legal fees in respect of the subject suit.
 5. He further indicates that the impugned decision contains material errors that are prejudicial to the Applicant Company in relation to the taxation of the Respondent's Bill of Costs. He points out that upon reading the Ruling of the Taxing Officer delivered on 29th August 2022, several mistakes are apparent on the record. He notes that the Taxing Officer erroneously held that the matter was concluded in 2014, whereas the judgment clearly shows it was delivered on 18th February 2022. He also observes that the Taxing Officer found that no award had been made as at the time of the ruling, despite there being a judgment on record awarding the Plaintiff Kshs. 22,550,000 on 18th February 2022. He adds that the Taxing Officer further held that the substantive suit was still pending determination as at the time of writing the ruling, notwithstanding that a judgment had already been delivered.
 6. He asserts that the Taxing Officer relied on a fraudulent, illegal, null and void agreement dated 5th May 2009 to ascertain the value of the subject matter at Kshs. 100,000,000 for purposes of calculating instruction fees, instead of relying on the judgment which awarded the Plaintiff Kshs. 22,550,000. He notes that the said agreement was between the Defendants, whereas the claim was by the Plaintiff, and therefore could not be a proper basis for determining the value of the subject matter.
 7. He also states that the Taxing Officer failed to take into account that in the judgment delivered on 18th February 2022, no orders were made against the 3rd Defendant, who is the Applicant herein. He therefore asserts that the Applicant objects to Items 1, 51, and 85 of the Bill of Costs namely, the instruction fees and getting up fees and seeks the intervention of the court. He maintains that unless the court intervenes, the decision of the Taxing Officer will occasion irreparable loss and injustice to the Applicant Company, while no party would be prejudiced if the orders sought are granted.
 8. The Respondent opposes this Application through a Replying Affidavit sworn by Wanjiru Theuri Ngugi Advocate on 10th August 2023. She states that the Client/Applicant has not disclosed how much money was paid, save for the amounts already indicated in the Respondent's Bill of Costs as having been settled.
 9. She observes that the Client/Applicant contends that the Reference raises an issue as to whether a Taxing Officer should consider the pleadings or the award contained in the judgment in determining the value of the subject matter for purposes of assessing instruction fees. She asserts that, in her view, the Taxing Officer considered the evidence presented by the Client/Applicant regarding the value of the subject property. She adds that the Taxing Officer was entitled to use any of the methods provided under Schedule 6(b) of the Advocates (Remuneration) Order in arriving at the applicable value.
 10. It is her position that it is peculiar for the Client/Applicant to now claim that the agreement it presented in court was fraudulent and illegal, yet it was the same document that the Client/Applicant had voluntarily produced as evidence in the main proceedings. She notes that the Client/Applicant had submitted that the substantive suit was still pending, as shown in paragraph 2 of its own submissions in opposition to the Bill of Costs. She therefore contends that the Client/Applicant cannot now fault the Taxing Officer for adopting that position.
 11. She depones that the Plaintiff's claim before the trial court included prayers that the Defendants pay Kshs. 109,500,000 as damages for deceit and fraud, punitive and aggravated damages, interest, costs,



and any other relief the court deemed just. She further points out that it is undisputed that on the hearing date, the Plaintiff amended its claim to seek a sum of Kshs. 1,377,147,144. She contends that the Client/Applicant is merely attempting to evade payment of legal fees that were properly earned. She maintains that it would be fair and just for the court to dismiss the Reference with costs.

Client/Applicant's Submissions

12. The Client/Applicant canvassed the Application through written submissions dated 30th October 2023. Counsel for the Client/Applicant submitted that the sole issue for determination was whether the Taxing Officer erred in awarding the instruction fees in the manner she did. He contended that in her ruling delivered on 29th August 2022, the Taxing Officer had taken the position that there was no award in the substantive suit, ELC Case No. 174 of 2018, and consequently relied on an agreement that had been declared a nullity to compute the instruction fees, adopting a value of Kshs. 100,000,000 as quoted in that agreement. He pointed out that, contrary to the Taxing Officer's finding, the court had already delivered judgment on 18th February 2022, nearly six months earlier, awarding the Plaintiff Kshs. 22,550,000 against the 1st and 2nd Defendants. He emphasized that the Client/Applicant Company, which was the 3rd Defendant in the suit, was not the subject of any order in that judgment.
13. Counsel relied on the holding in *Lubullelah & Associates Advocates v N.K. Brothers*, Nairobi Misc. Application No. 52 of 2012, as cited with approval in *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 Others* [2014] eKLR, to submit that the Taxing Officer ought to have based the instruction fees, if any, on the amount that had actually been awarded by the court and not on the pleadings or on any agreement. He argued that the departure from the established principle amounted to an error in principle, thereby warranting the court's interference.
14. He explained that although the Applicant's submissions before the Taxing Officer had indicated that the matter was yet to be concluded, that position had been accurate as at the time of filing the submissions, which were dated 15th February 2022. He added that the position changed three days later when judgment was delivered on 18th February 2022. He also observed that the Respondent Advocates had filed their submissions on 25th February 2022, seven days after the delivery of judgment.
15. He submitted that a purposive reading of the Taxing Officer's ruling of 29th August 2022 showed that the substantive file, ELC No. 174 of 2018, was before her and that she had perused it. It therefore followed, he argued, that the judgment of 18th February 2022 was on record and available to her, yet she nonetheless took the position that there was no award forming the basis for the computation of instruction fees.
16. Counsel further relied on the case of *First American Bank of Kenya v Shah & Another* [2002] 1 EA 64, also cited with approval in *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 Others* (supra), which held that an advocate becomes entitled to full instruction fees upon filing a defence, and that the subsequent progress of the case is immaterial. He pointed out, however, that in instances of a lawful change of advocates, the incoming advocate is only entitled to fees for the actual work done thereafter.
17. He submitted that the Advocate/Respondent fell squarely within this latter category, since the record showed that they only came on record after filing a Notice of Change of Advocates replacing the Client/Applicant's previous advocates. He therefore contended that the Advocate/Respondent was not entitled to the level of instruction fees awarded, and urged the court to review the Taxing Officer's decision downward. He added that a downward revision of Item 1 (instruction fees) would automatically result in the reconsideration and corresponding reduction of Items 51 and 85 (getting up fees).



18. Counsel concluded by submitting that the Applicant had demonstrated, without equivocation, that the ruling of the Taxing Officer contained an error in principle necessitating the court's interference. He accordingly urged the court to allow the Chamber Summons dated 2nd August 2023 as prayed.

Advocate/Respondent's Submissions

19. Counsel for the Respondent opposed the Reference dated 2nd August 2023 through written Submissions dated 27th November 2023. Counsel stated that it was not in dispute that the Advocate/Respondent had been instructed to act for the Client/Applicant in ELC No. 174 of 2018, and that the issue raised by the Client/Applicant was whether the Taxing Officer had erred in the manner in which she awarded the instruction fees.
20. Counsel pointed out that, in the Client/Applicant's own submissions dated 15th February 2022, at paragraph 2 thereof, the Client/Applicant had expressly indicated that the matter in ELC No. 174 of 2018 was still pending determination and that the subject matter remained unknown as no award had been made. She argued that it was therefore inconsistent for the Client/Applicant to now allege that the Taxing Officer erred by holding the same view that the Applicant had itself previously taken.
21. Relying on the Court of Appeal decision in *Joreth Limited v Kigano & Associates* [2002] 1 EA 92, Counsel submitted that the value of the subject matter, for purposes of taxation, ought to be determined from the pleadings, judgment, or settlement, and where such value was not ascertainable, the Taxing Officer was entitled to exercise discretion in assessing a just instruction fee, taking into account the importance of the matter, the conduct of proceedings, and other relevant circumstances.
22. She further noted that the Client/Applicant had not proposed what amount it considered appropriate as instruction fees, and therefore its challenge to the award was baseless. Citing *Preuchard Raichard v Quarry Services* (1992) E 162, Counsel emphasized that a court would not interfere with the Taxing Officer's decision merely because it considered the amount awarded to be too high or too low. She also referred to *Masore Nyangau & Co. Advocates v Kensalt Ltd*, ELC Misc. Appl. No. 196 of 2015, to support the position that the value of the subject matter could be ascertained from documents other than pleadings.
23. Counsel explained that the suit in ELC No. 174 of 2018 sought, among other reliefs, specific performance of an agreement between the Plaintiff and the 1st and 2nd Defendants, and an order for cancellation of the Client/Applicant's (as 3rd Defendant) title. In its defence, the Client/Applicant had pleaded that it had purchased the property for Kshs. 100,000,000 from the 1st and 2nd Defendants and was an innocent purchaser for value. Counsel added that this position was confirmed through the evidence of the Client/Applicant's director, Dr. Patrick Karanja, during the hearing. Counsel contended that the Taxing Officer had properly taken this information into account in determining the value of the subject matter.
24. She maintained that the defence in the suit was of great importance, as ownership of the property was directly at stake. Counsel concluded that there was nothing placed before the court to justify interference with the Taxing Officer's decision and urged the court to dismiss the Reference with costs to the Advocate/Respondent.

Analysis and Determination

25. Having considered the Chamber Summons Application, the Affidavits by the parties, the Submissions by the parties as well as the applicable law and authorities, I find that the issue for determination



is whether the Taxing Officer erred in principle in assessing the instruction fees payable to the Respondent Advocate in the ruling delivered on 29th August 2022.

26. The parameters for assessing instruction fees are set out under Schedule 6(b) of the Advocates (Remuneration) Order, which provides that the value of the subject matter should be determined from the pleadings, judgment, or settlement, if ascertainable. Where such value cannot be determined, the Taxing Officer may exercise discretion and assess a reasonable fee, taking into account the importance of the cause, the interest of the parties, and the general conduct of the proceedings.
27. The Court of Appeal in *Joreth Limited v Kigano & Associates* (supra) emphasized that:

“The value of the subject matter for purposes of taxation should be determined from the pleadings, judgment or settlement, but if not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just.”
28. Similarly, in *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Another* (supra), the court held that it will only interfere with a Taxing Officer’s decision if it is shown that the officer acted on a wrong principle, took into account irrelevant factors, or failed to consider relevant ones.
29. It is not disputed that the Advocate/Respondent was instructed to act for the Applicant in ELC No. 174 of 2018. The Taxing Officer, in assessing the instruction fees, relied on the value of Kshs. 100,000,000 appearing in the defence filed by the Client/Applicant before the trial court. However, by the time the ruling on taxation was rendered on 29th August 2022, the ELC had already delivered its judgment on 18th February 2022, in which the award was quantified at Kshs. 22,550,000.
30. Although the Applicant’s Written Submissions on the Bill of Costs were dated 15th February 2022, three days before delivery of the judgment, the proper course for the Client/Applicant would have been to file Supplementary Submissions to bring to the attention of the Taxing Officer that a judgment had been delivered. Nonetheless, the Taxing Officer had access to the substantive court file (ELC No. 174 of 2018) which she ought to have perused prior to making her determination. It follows that the judgment of 18th February 2022 was on record and should have guided the assessment of instruction fees.
31. A perusal of the judgment delivered on 18th February 2022 in ELC Case No. 174 of 2018 shows that the transfer of the suit property was declared a nullity by the Court of Appeal. The trial court stated as follows in its judgment:

“Considering that this court has found the sale agreement that was entered into between the 1st and 2nd Defendants and the 3rd Defendant a nullity, I would not have hesitated to cancel the said transaction and the title that was issued to the 3rd Defendant. Indeed, this court has always been of the firm view that where the sale of land to a third party is a nullity, the ensuing title should be cancelled, and the title to revert to the party who is entitled to the land, whether the said third party was an innocent purchaser for value or not.

However, the evidence that was adduced in this court shows that the title to the 1st and 2nd Defendants was nullified by the Court of Appeal in Nairobi Civil Appeal number 172 of 2010 on 29th July, 2016. Going by the decision of the Court of Appeal, the transfer of the suit property to the 1st and 2nd Defendants on 24th April, 2004 pursuant to an order of the High Court in succession case number 3608 of 2003 was a nullity. The title to the suit property has since reverted to the Estate of the late Walter Karanja.



That being the case, the nullification of the transfer of the suit property to the 3rd Defendant by this court has since been overtaken by the order of the Court Appeal. The property having reverted to the Estate of Walter Karanja, the 1st and 2nd Defendants do not have a title to pass to the Plaintiff. The Plaintiff is only entitled to damages as against the 1st and 2nd Defendants for breach of the sale agreement.”

32. By relying instead on a sale agreement that had been declared a nullity and ignoring the existing judgment, the Taxing Officer misdirected herself and fell into error in principle. The Joreth and Premchand Raichand authorities make it clear that once a judgment has been delivered, it forms the most reliable and objective basis for determining the value of the subject matter.
33. In view of the foregoing, it is evident that the Taxing Officer’s failure to base the instruction fee on the judgment amount of Kshs. 22,550,000 constituted an error in principle. The reliance on the void agreement of Kshs. 100,000,000 led to an inflated and unjustified award of instruction fees.
34. The proper basis for computation ought to have been the judgment sum, as it reflected the court’s final pronouncement on the value of the claim after full consideration of the pleadings and evidence. The failure to adopt that approach rendered the taxation irregular and amenable to review.
35. In light of the above analysis, I find that the Taxing Officer erred in principle by ignoring the judgment of 18th February 2022. Although the Applicant failed to update the record through supplementary submissions, the error was not fatal, as the judgment formed part of the court file and was available to the Taxing Officer.
36. Accordingly, the reference dated 2nd August 2023 is allowed, and the ruling of the Taxing Officer delivered on 29th August 2022 is hereby set aside to the extent of the instruction fees and getting up fees. The Bill of Costs shall be remitted for fresh taxation before a different taxing officer, who shall assess the instruction fee based on the judgment sum of Kshs. 22,550,000 in Thika ELC Case No. 174 of 2018 Josvir Traders & Agencies Ltd v Geoffrey Chege Kirundi & 2 others.
37. Each party shall bear its own costs of the reference.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF OCTOBER 2025.

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J. M ONYANGO

JUDGE

In the presence of :

Mrs Ngugi for Wanjiru Theuri & Co Advocates - Respondents

Mr Mahugu for the Applicant

Court Assistant: Hinga

