Vishva Builders Limited v Moi University (Civil Suit 51 of 1999) [2025] KEHC 14760 (KLR) (21 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14760 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 51 OF 1999

JRA WANANDA, J

OCTOBER 21, 2025

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN PARTY AND PARTY

BETWEEN

VISHVA BUILDERS LIMITED .... PLAINTIFF

AND

MOI UNIVERSITY .... DEFENDANT

RULING

1. This Court delivered a Judgment in this matter on 2/02/2024 whereof the Plaintiff was awarded the sum of Kshs 185,305,011.30 against, and payable, by the Defendant, with interest thereon. By the further orders made subsequently on 1/03/2024 pursuant to the slip rule, the Plaintiff was also awarded costs. Thereafter, the Plaintiff filed its Bill of Costs dated 5/03/2024 computed at the aggregate sum of Kshs 31,117,092.70, which Bill was then taxed by the Deputy Registrar of this Court on 13/02/2024 and awarded at the sum of Kshs 4,779,336.56.
2. In the Bill of Costs, the Plaintiff had presented a figure of 22,240,222.30 as "Instruction" fees, which the Deputy Registrar reduced and assessed at Kshs 3,104,575.17. In respect to "getting-up" fees, the Plaintiff presented a figure of 7,413,407.40, which the Deputy Registrar reduced and assessed at Kshs 1,034,858.39.
3. Dissatisfied by the amount at which the two items in the Bill of Costs were taxed, the Plaintiff filed this Reference by way of the Chamber Summons dated 3/03/2025 under the provisions of Rule 11 of the Advocates (Remuneration) (Amendment) Order, 2014). The orders sought are as follows:

i. The decision of the Taxing Officer delivered on 13/02/2025, in respect to item 1 (instruction fees) and item 172 (fees for getting up) of the Plaintiff's Bill of costs dated 5/03/2024 be and is hereby set aside.

ii. Instruction fees and fees for getting up in the Plaintiff's Bill of Costs dated 5/03/2024 be assessed by the High Court.

iii. In the alternative to 2 above, item 1 and item 172 of the Plaintiff's Bill of Costs dated 5/03/2024, be and is hereby remitted for taxation afresh.

iv. That costs of the application be provided for.

4. The Application is supported by the Affidavit sworn by the Applicant's Counsel, Nelson Havi in which he deponed that "Instruction" fees and fees for "getting up" were sought on the basis of the principal sum of Kshs 185,305,011.30 together with interest accrued thereon as at 5/02/2024, from 15/03/1999, all totalling to Kshs 1,149,348,155.80. He deponed further that the value of the subject matter at the time of the filing of the Bill of Costs was Kshs 1,149,348,155.80 being principal and interest, that the Plaintiff filed Submissions justifying the value of the subject matter and the fees sought on the basis of the decision in National Bank of Kenya v Rachuonyo & Rachuonyo Advocates [2021] eKLR. He contended that the Taxing Officer assessed the fees on the basis of the principal of Kshs 185,305,011.30, omitting interest accrued, and that she therefore made an error in principle.

5. The Application is opposed by the Respondent who filed the Preliminary Objection dated 16/07/2025, together with the lengthy Replying Affidavit sworn on the same date by one Dorcas Mengich, who described herself as the Respondent's Legal Officer.

6. The Notice of Preliminary Objection is premised as follows:

a. That this Court lacks jurisdiction to hear this matter as it offends rule 11(2) of the Advocates Remuneration Order that requires the Applicant to file a Reference within 14 days from obtaining the reason of the Taxation of the Bill of Costs from the Taxing Officer.

b. That the Taxing Officer rendered its Ruling on the Bill of Costs together with the reasons on the 13/02/2025 whereas the Plaintiff/Applicant filed their Bill of Costs dated the 3/03/2025 on the even date.

c. That the Ruling was also with reasons hence the Reference ought to have been filed 14 days from the date thereof hence the filing on the 3/03/2025 is around 18 days later hence out of time by approximately 4 days.

d. That the provisions of Rule 11 of the Advocates Remuneration Order on limitation of time is not derogatory hence the Plaintiff/Applicant ought to have sought for an extension of time, which they did not seek thus the reference is incompetent.

e. That the Chamber Summons Application before this Honourable Court lacks merit, is bad in law and the suit should be dismissed with costs to the Defendant.

7. In the Replying Affidavit, the deponent urged that the Application should be dismissed with costs for baseless misinterpretation on the principles governing the Taxing Officer's discretion to assess the Bill of Costs, that a Reference to taxed Bill of Costs relates to a complaint about the decision of the Taxing Officer on a point of law, it is not strictly an appeal although it may be in the nature of one, that the Court is more concerned on whether the Taxing Officer has misdirected himself on a matter of principle and law, and therefore negates re-litigation of facts. She then restated the various principles to

be considered by a Taxing Officer, including that costs should not be allowed to rise to such a level as to limit access to Courts to the wealthy only, a successful litigant ought to be fairly reimbursed for the costs they have incurred; so far as practicable, there should be consistency in awards, that the Taxing Officer should utilize the amount of the subject matter involved, which shall be determined from the pleadings, settlement or judgment, the value of the subject matter should be determinate and identifiable, and that it is the discretion of the Taxing Officer to assess the Taxation of the Bill of Costs but the same should be exercised within the permits of the law.

8. She deponed further that the Court cannot interfere with the Taxing Officer's decision unless it is shown that either the decision was based on an error of principle, law, or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle. She averred that in this case, the Taxing Officer correctly and duly utilized the value of the subject as adjudged by the Court at Kshs 185,305,011.30, that the inclusion of the interest as the principal value of the subject matter, as suggested by the Plaintiff, is erroneous and inestimable since that premise incurs an ever-changing value that cannot be conclusively determined to ascertain the assessment of the costs, and that the Plaintiff asserted the same averments of inclusion of interest onto the principal value of the subject matter and the Taxing Officer considered the same, and in her discretion, decided contrary. She deponed that the Taxing Officer took note of the Plaintiff's misleading averment that interest ought to be calculated from the date of filing which they suggested to be from the 15/03/1999, whereas the suit had been dismissed for the Plaintiff's want of prosecution and reinstated vide the Plaint dated the 18/02/2011, therefore eliciting conflict as to when should the alleged interest be calculated from. She contended that inclusion of interest is an inconsistent avenue of ascertaining costs and delineates from the normal practice and precedent save for the Plaintiff's quoted High Court case law that is yet to be adopted as a practice and, in any case, it is a persuasive case law being from a Court of equal jurisdiction whereas there other cases not affirming the same, and the cited case law being a unique adventure by a superior Court.

9. She contended further that inclusion of interest that accrues on a daily basis is against the principle that the Bill of Costs should be determinable and ascertainable, and further, unjustifiably gives discrimination on the amount of costs to be awarded since the later the Bill is raised, the higher the amount. She added that in any case, interest forms the major issue in contention at the Appeal preferred by the Defendant, namely, COACA/E049/2025, and that the Defendant being a public body, it would be against public interest, policy and fairness that instruction fees be pegged on the exorbitant amount entailing disputed interest and therefore, while the Advocate should be accorded reasonable compensation for work done, the same should be weighed against the taxpayers whose interest is peremptory.

10. The parties then filed written Submissions. The Applicant's Submissions is dated 9/07/2025, while the Respondent's is dated 24/07/2025.

11. Counsel for the Plaintiff, in his Submissions, basically reiterated the matters already set out in his client's Supporting Affidavit. Regarding the contention that assessment of "instruction" and "getting-up" fees ought to be based on the decretal sum, inclusive of interest accrued, and not only on the Judgment amount, Counsel cited the Court of Appeal decisions in the cases of Joreth Limited v Kigano & Associates [2002] eKLR, and also Peter Muthoka &Another v Ochieng & 3 others [2019] eKLR. He also cited the High Court decision in the case of National Bank of Kenya Limited v Rachuonyo & Rachuonyo Advocates [2021] eKLR. He thus reiterated that exclusion of interest in the assessment of fees was an error of principle.

12. In his rival Submissions, Counsel for the Defendant, too, reiterated matters urged in his client's Replying Affidavit. In refuting the Plaintiff's contention that assessment of "instruction" and "getting-

up" fees ought to be based on the decretal sum, inclusive of interest accrued, he cited several authorities which, in his view, were decided contrary to the decision in National Bank of Kenya Limited v Rachuonyo & Rachuonyo Advocates (supra). According to him therefore, exclusion of interest in the assessment of fees was proper and justified. Regarding the reasoning in the case of National Bank of Kenya Limited v Rachuonyo & Rachuonyo Advocates (supra), he termed it as alien, unique and cannot be termed as assimilated practice in assessment of costs, and that in diverse and express pronunciations, the Courts have been sceptical on its acceptability. He cited the case of Bio Medical Laboratories Ltd v Attorney General [2014] KEHC 5872 (KLR), the case of County Government of Siaya v Oruenjo Kibet & Khalid Advocates (Miscellaneous Case E008 of 2024) [2025] KEELC 1477(KLR) (24 March 2025) (Ruling), and also the case of Kenya Airports Authority Vs Otieno Ragot & Company Advocates-Petition No. E011 of 2023 SC.

13. He urged further that the essence of a Reference is that the Plaintiff ought to only attack the Ruling on the basis of the Taxing Officer flouting the basic principles of taxation, and it is not for this Court to place itself at the position of the Taxing Officer to reassess facts and make the decision afresh, but instead, assess the principle and legal soundness of the decision, and find fault only if departing from law and principles.

14. Counsels for the parties also agreed that I could determine both the Preliminary Objection and the substantive matters in one Ruling. Of course, the latter would only arise if I were to overrule the former.

Determination

15. The issues for determination in this matter are evidently the following:

    i. Whether this Reference is fatally defective for being filed out of time.

    ii. Whether by excluding interest accrued on the Judgment sum in assessing instruction fees and getting-up fees, the Taxing Officer erred in principle thus warranting this Court's interference with her assessment thereof.

16. In respect to the issue "whether the Reference is fatally defective for being filed out of time", the Applicant did not respond or submit thereon.

17. Before I interrogate the above issue, I may comment that there is no challenge raised on whether the Preliminary Objection filed by the Defendant meets the threshold set in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696, and as reiterated by the Supreme Court in the case of Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, and in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR. Indeed, the Objection is, in my view, proper as it consists of a point of law which arises by clear implication out of the pleadings, without need to ascertain or investigate the veracity or accuracy of any facts outside the pleadings, and which, if argued as a preliminary point, may dispose of this action entirely.

18. Coming back to this matter, there is no dispute that Rule 11(2) of the Advocates Remuneration Order, stipulates that a Reference challenging or objecting to assessment or taxation of fees on a Bill of Costs is to be filed within 14 days of obtaining the reasons for the taxation of the Bill from the Taxing Officer.

19. In this case, the Taxing Officer's Ruling on the Bill was rendered on 13/02/2025, while this Reference was filed on 3/03/2025. In the Preliminary Objection, the Defendant contends that this Court lacks jurisdiction to hear the Reference as it offends, the 14 days' timeline under Rule 11(2) aforesaid. According to the Defendant, the Ruling was a reasoned one hence the Reference ought to have been

filed 14 days from the date thereof, and that when the Plaintiff filed the Reference on 3/03/2025, it was 18 days late. Rule 11 is premised as follows:

11. Objection to decision on taxation and appeal to Court of Appeal

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) far the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

20. In this case, there is no indication, either in the physical file or in the CTS, that the Plaintiff, at any time gave "notice in writing to the taxing officer of the items of taxation to which he objects" as stipulated under sub-Rule (1) above. In other words, there is no indication that the Plaintiff sought reasons for the Taxation decision. This therefore lends credence to the Defendant's submission that the Plaintiff did not need to do so since the Ruling on Taxation was itself a reasoned one and contained all the reasons required. This situation was indeed appreciated in the case of Ahmed Nassir v National Bank of Kenya Ltd [2006] 1 E.A. in which the Court held that:

> " Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling".

21. Similarly, J.M. Mutungi, J, in the case of Mirugi Kariuki & Co Advocates v Andrew Isoe Ochoki [2022] eKLR, while striking out a Reference filed 9 days from the date of Ruling, had this to say:

> " In the present matter, the ruling by the taxing officer contained the reasons and therefore there was no need for the respondent/Applicant to seek for the reasons for the taxation. As noted before, the notice of objection to taxation was filed nineteen days from the date the ruling was delivered and the respondent/Applicant did not give any reasons for the delay. In my view there is no competent reference before the Court the same having been filed out of time without the leave of the Court."

22. Sub-Rule (1) not having been invoked therefore, sub-Rule (2) took effect. This therefore means that the Plaintiff, if it wished to challenge the assessment, then it needed to file the Reference within 14 days after delivery of the Ruling. The Ruling having been rendered on 13/02/2025, the 14 days timeline expired on or about 27/01/2025. This Reference having been filed on 3/3/2025, it was filed 18 days after the Ruling, and thus 4 days out of time, clearly in breach of the 14 days timeline rule set under sub-Rule (2) above.

23. Regarding observation of timelines, the Court of Appeal, in the case of Mario Rossi v Salama Beach Hotel Limited [2018] eKLR, had this to say:

> "It is common ground that time lines fixed by Statute or subsidiary legislation made thereunder are of essence since they are designed to achieve an intended purpose and outcome, that is, not only do they ensure procedural order and certainty within the judicial system, but also advance a just, uniform and efficient dispensation of justice. It is for that reason that Courts advocate for strict compliance with such time lines."

24. It is true that under sub-Rule (4), this Court retains the power to enlarge the time for seeking reasons from the Taxing Officer and for filing a Reference, and thus permit an Applicant to file the same out of time. However, the wording of sub-Rule (4) indicates that a litigant dissatisfied with taxation decision of a Bill of Costs ought to move the Court for such enlargement of time, and persuade the Court that the delay to file the Reference out of time was borne out of excusable grounds. The Respondent to such Reference must also be given a hearing before the Court may enlarge time. In this matter, the Plaintiff has not at all moved the Court to enlarge time, and as such, the Defendant has not had the opportunity to comment on the issue. As aforesaid, the Plaintiff did not also respond or submit on the issue of the Reference being filed out of time. Further, no Application having been filed or even urged orally, the Court has not been addressed on, or made aware of the reasons for the delay. Under these circumstances, this Court cannot enlarge time suo motu as doing so will be exercising discretion at its whims, and not judicially as required in law.

25. Since there is therefore no competent Reference before Court, the same is for striking out. I will not thus delve into the second issue of determining whether the Taxing Officer erred in omitting interest accrued on the Judgment while taxing the Bill of Costs.

Final Order

26. For the foregoing reasons, the Defendant's Preliminary Objection dated 16/07/2025 hereby succeeds, with the result that the Plaintiff's Chamber Summons dated 3/3/2025 is found to be incompetent having been filed out of time without leave.

27. The Defendant is also awarded the costs of the Application.

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

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WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

N/A for the Plaintiff

Mr. Kimurgor h/b for Kigen for the Defendant

Court Assistant: Brian Kimathi