REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 34 OF 2019

HON. ROBERT MBATIA ..... 1ST APPELLANT

NAIROBI CITY COUNTY ..... 2ND APPELLANT

VERSUS

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA) ..... 1ST RESPONDENT

BETTY MBUGUA, DAVID NDIRANGU & 100 OTHERS ..... 2ND RESPONDENT

RULING

1. Through a Chamber Summons application dated 14th March, 2025 brought under **Sections 1A** and **3A** of the **Civil Procedure Act** and **Regulation 11** of the **Advocates Remuneration Order**, the 2nd Respondent seeks the following orders:

a) That the ruling of the court delivered on 11th February 2025 by the Hon. Deputy Registrar Judith Omollo pertaining the assessment of the 2nd Respondent/ Applicant's party & party bill of cost dated 19th January 2024 be set aside and/or vacated.

b) That the Honourable Court be pleased to refer the said party & party bill of costs dated 19th January 2024 back for re-assessment by a different Deputy Registrar other than Hon. Judith Omollo.

c) That in the alternative to prayer (b) the Honourable Court be pleased to re-tax the said party & party bill of costs dated 19th January 2024.

2. The application is premised on the grounds appearing on its face and is supported by the Affidavit of Betty Mbugua, who deponed that on 19th January 2024, the 2nd Respondent filed a Party and Party Bill of Costs arising from a successful judgment wherein the Appellants had withdrawn their appeal with costs to the 2nd Respondent.

3. It was deposed by Ms Mbugua that the Bill of Costs was taxed on 11th February 2025 at Kshs. 113,635, a figure the 2nd Respondent contends was manifestly low; that being dissatisfied, the 2nd Respondent applied for reasons for the taxation on 12th February 2025, but none were provided and that instead, on 13th March 2025, the 2nd Respondent was furnished with a certified copy of the ruling dated 5th March 2025.

4. Ms. Mbugua averred that the amount taxed was far below their legitimate expectation, particularly in respect of Item 1, which, in her view, was not properly considered given the

scope of work, research undertaken, and the complexity and time spent on the matter.

5. It was deponed that the taxing officer erred in law and in principle by applying wrong parameters in assessing instruction fees, resulting in an inordinately low sum despite the matter's complexity and its pendency for about nine years.

6. Further, it was contended that the taxing officer failed to appropriately consider items 10, 14, 21 and 26, which related to distinct instructions issued during the proceedings, including prosecuting injunction and stay applications and that similarly, items 70, 72 and 75, concerning costs incurred in commissioning affidavits, were not considered.

7. It was further deponed that the sum awarded was grossly low considering the nature and weight of the matter, and that it would be just and equitable that the orders sought be granted.

8. The Applicant further stated that the proceedings subject to the Bill of Costs arose from an appeal filed by the 1st and 2nd Appellants challenging the judgment of the National Environment Tribunal delivered on 5th March 2019, which had cancelled Environmental Impact Assessment Licence No. NEMA RB/P2/5/1/9141 issued on 29th April 2016.

9. According to the 2nd Respondent, the appeal concerned a parcel of public land valued at over Kshs. 2 billion, which had allegedly been converted into private ownership. It was contended that the taxing master misdirected herself by holding that value was not pleaded and by awarding Kshs. 25,200/- as instruction fees without considering the complexity, the time the matter had taken, and the ascertainable value of the land.

10. It was further averred that the taxing master erred in treating items 45 to 68 (being 23 attendances) as half-hour attendances and awarding Kshs. 1,100/- for each, without appreciating that some of the attendances exceeded one hour.

11. The Appellants opposed the application through Grounds of Opposition dated 24th September 2025, terming it an affront to **Rule 16** of the **Advocates (Remuneration) Order**, which grants the taxing officer discretion in taxation.

12. It was their position that the Bill of Costs dated 19th January 2024 was properly taxed on 11th February 2025 in accordance with the **Advocates (Remuneration) Order**, and that the taxing master duly considered all relevant principles under **Rule 5** thereof. Consequently, it was averred, the amount of Kshs. 113,635 was justifiable.

Submissions

13. The 2nd Respondent submitted that the matter originated in 2016 before the National Environment Tribunal in Appeal No. 177 of 2016, culminating in a judgment on 5th March 2019 adverse to the Appellants. Dissatisfied, the Appellants lodged the present appeal in 2019, which proceeded through several interlocutory applications until its withdrawal with costs to the 2nd Respondent on 31st October 2023.

14. It was submitted that following the withdrawal, the 2nd Respondent was entitled to costs and accordingly filed a Party and Party Bill of Costs, which was taxed at Kshs. 113,635/- by the Deputy Registrar.

15. It was contended that the taxing master failed to furnish sufficient reasons for her decision and the 2nd respondent was only supplied with a copy of the certified ruling. The 2nd Respondent, therefore, sought a reference for reassessment, particularly in relation to Item 1 and the other items highlighted in the Supporting Affidavit.

16. The 2nd Respondent maintained that the taxing officer failed to appreciate the weight and complexity of the matter, which concerned an Environmental Impact Assessment licence over a parcel of land whose value was readily ascertainable. She urged the Court to either reassess the Bill itself or direct that it be re-taxed by another Deputy Registrar.

17. Counsel for the Appellants, on the other hand, submitted that the taxing master meticulously evaluated each item, allowing

or disallowing them as appropriate and taxing off excessive claims in line with the Advocates (Remuneration) Order.

18. Counsel further submitted that interference with a taxing officer's decision can only arise where there is a demonstrable error of principle, which has not been shown in this case. Reliance was placed on the case of ***Rosslyn Njoki Kamau vs Emomentum Interactive Systems Limited [2018] KEELRC 101 (KLR)***; ***Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund [2005] eKLR***; and ***Nyangito & Co. Advocates vs Ndoinyo Lessos Creameries Ltd [2014] eKLR***.

19. Counsel contended that the ruling of 11th February 2025 contained sufficient reasons explaining the treatment of each item and that it was therefore frivolous for the 2nd Respondent to allege that reasons were not provided.

20. On the specific complaint regarding Items 1 and 45–68, counsel submitted that the same were taxed strictly in accordance with the prescribed scale and ought not to be disturbed. He adopted the Appellants' submissions dated 22nd November 2024 in support thereof.

21. It was further submitted that the 2nd Respondent had not demonstrated that the attendances in question lasted longer than thirty minutes as alleged. Counsel contended that the application was motivated by dissatisfaction with the

quantum rather than any discernible error of principle, and amounted to an attempt at unjust enrichment.

22. Counsel emphasized that costs are intended to indemnify a successful party for reasonable expenses incurred in litigation and not to enrich them. He submitted that the discretion to determine what costs were reasonably or properly incurred rests with the taxing master, who exercised it judiciously.

Analysis and Determination

23. The sole issue for this court's determination is whether sufficient grounds have been established to warrant this Court's interference with the decision of the taxing master delivered on 11th February 2025 in respect of the 2nd Respondent's Party and Party Bill of Costs dated 19th January 2024.

24. The procedure for challenging the decision of a taxing officer is set out under **Paragraph 11** of the **Advocates (Remuneration) Order**. **Rules (1) to (4)** thereof provides as follows:

> ***"(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 this 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."

25. The 2nd Respondent contended that the Taxing Officer failed to provide reasons for their ruling delivered on 11th February 2025, notwithstanding a written request for the same. The

Court of Appeal in ***Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR*** addressed this issue and held that although strict compliance with **Paragraph 11(2)** is required, substantial compliance may suffice where reasons are contained in the taxation ruling itself. The Court stated:

> ***"It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a Reference and the absence of such reasons would not in itself preclude the objector from filing a competent Reference."***

26. The position was elaborated by Odunga J (as he then was) in ***Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Limited [2012] eKLR***, where he observed that where reasons are apparent on the face of the taxation ruling, it is unnecessary to demand additional reasons. The learned Judge stated that:

> ***"It is therefore clear that the interpretation by the Court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.***
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> ***However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference."***

27. From the ruling of 11th February 2025, it is evident that the Taxing Master incorporated her reasons into the decision. She observed that the value of the subject matter could not be discerned from the pleadings and, applying the Advocates

(Remuneration) Order, 2014, taxed the instruction fee at Kshs. 25,200/=, being the minimum sum prescribed for such appeals. She further noted that the appeal did not proceed to full hearing and accordingly taxed off the balance of the Kshs. 3,000,000 claimed.

28. The ruling also reflected consideration of individual items, including: Items 4 and 5 which were taxed off for lack of proof of correspondence; Item 11, of which six folios were taxed at Kshs. 1,400; with respect to Items 19, 25 and 30 service in three places, was taxed at Kshs. 4,200; and disallowance of Items 21, 26, 33 and 41 for reasons specified. Attendances (Items 45 to 68) were taxed at Kshs. 1,100 having lasted for thirty minutes or less, and disbursements (Items 70, 72 and 75) were disallowed for want of proof.

29. Having found that reasons were duly provided, by the taxing master in her ruling, the next question is whether those reasons disclose an error of principle warranting interference by this Court.

30. The principles guiding interference with the decision of a taxing master were restated in ***Del Monte Kenya Limited vs Kenya National Chamber of Commerce and Industry (KNCCI) Murang'a Chapter & 2 Others [2021] eKLR***, drawing from ***Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162***, ***First American Bank of Kenya vs Shah***

and Others (2002) EA 64 and ***Joreth Ltd vs Kigano and Associates (2002) 1 EA 92***. These include:

a. ***That there was an error of principle***
b. ***The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy***
c. ***That the successful litigant ought to be fairly reimbursed for the costs he has incurred***
d. ***That so far as practicable there should be consistency in the award.***

31. It is well settled that a Judge will not interfere with the taxing officer's discretion unless it is shown that the officer acted on a wrong principle or the award resulted in manifest injustice. This was reiterated in ***Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board [2005] KECA 325 (KLR)*** where the Court of Appeal held:

> ***"On 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."***

32. The Court of Appeal in ***Kamunyori & Company Advocates vs Development Bank of Kenya Limited (2015) Civil Appeal 206 of 2006,*** as cited in ***Otieno, Ragot &***

Company Advocates vs Kenya Airports Authority [2021] eKLR articulated instances of error in principle as follows:

> ***".. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside."***

33. Similarly, the Ugandan Supreme Court in ***Bank of Uganda vs Banco Arabe Espanol SC Civil Application No. 23 of 1999*** (Mulenga JSC) underscored the limited scope of interference, observing:

> ***"Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not***

alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

34. Guided by the foregoing principles, this Court notes that the 2nd Respondent's grievance relates to the taxation of instruction fees, alleged disregard of specific items, and undervaluation of attendances.

35. It is trite that instruction fees are to be determined from the value of the subject matter, which may be ascertained from the pleadings, judgment, or settlement. Where such value cannot be determined from these, the taxing officer exercises

discretion to assess what is fair and reasonable in the circumstances.

36. The Court of Appeal in ***Peter Muthoka & Another vs Ochieng & 3 others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR*** while expanding the principles in ***Joreth Ltd vs Kigano & Associates (supra)*** clarified:

> ***"...that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court...***
>
> ***It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have***

discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive."

37. The 2nd Respondent contended that the value of the subject matter was readily ascertainable from the pleadings, asserting that the land in question was valued at Kshs. 2 billion. This Court, however, takes a different view.

38. The proceedings before the Tribunal and this Court did not concern the proprietary interest in the land per se, but rather, the legality of the administrative process culminating in the issuance of an Environmental Impact Assessment (EIA) Licence for the proposed construction of a social hall upon that parcel. The gravamen of the dispute, therefore, was not the value of the land, but whether due process was followed in the grant and approval of the EIA licence.

39. Accordingly, the subject of the proceedings was not a proprietary claim amenable to valuation in monetary terms,

but an environmental compliance dispute governed by statutory standards and administrative procedures. The pleadings and record did not disclose any quantifiable or ascertainable value that could form a proper basis for assessing instruction fees under the **Advocates (Remuneration) Order**.

40. In view of the foregoing, the Taxing Master was correct in finding that the value of the subject matter could not be ascertained from the pleadings, judgment, or record. Consequently, the applicable provision for purposes of taxation was **Schedule Six**, paragraph on Appeals of the **Advocates (Remuneration) Order, 2014**, which prescribes that:

> ***'to present or oppose an appeal in any case not provided for above; such sum as may be reasonable but not less than Kshs. 25,200/='.***

41. This provision recognizes that certain proceedings, do not have a pecuniary value attached to the subject matter. In such cases, the Taxing Officer is required to exercise judicial discretion in assessing a reasonable instruction fee, taking into account the complexity of the matter, the time and labour expended, the novelty of the issues, and the responsibility placed upon counsel.

42. That said, while the Taxing Master was entitled to apply the minimum fee, the Court is persuaded that in the present

case, the award of the bare minimum was not commensurate with the complexity of the matter or the duration of its pendency.

43. The appeal spanned four years and involved multiple interlocutory applications, requiring active participation and research by the parties. The dispute also entailed regulatory and environmental considerations involving multiple respondents. In those circumstances, the taxing officer's decision to award the bare minimum constituted a failure to fairly reimburse the 2nd Respondent for costs reasonably incurred and thus amounted to an error in principle.

44. The 2nd Respondent also faulted the Taxing Master for failing to consider items 10, 14, 21 and 26, which it claimed arose from distinct instructions relating to interlocutory applications and filing of submissions. This argument is however misplaced.

45. It is a settled principle that instruction fees are charged once, upon receipt of instructions to act in a matter, and encompass all work necessary for its conduct, including interlocutory motions, unless it is shown that the subsequent applications constituted separate and independent proceedings requiring fresh instructions.

46. As no demonstration was made that the instructions were with respect to separate motions, this court finds that the

Taxing Master properly treated those items as falling within the general conduct of the appeal.

47. The 2nd Respondent further took issue with the disallowance of Items 70, 72 and 75 relating to commissioning of affidavits. The Taxing Master disallowed these items on the ground of lack of proof. Upon perusal of the record, this Court notes that the relevant affidavits are on file and bear clear endorsement of commissioning. It would therefore have been prudent for the Taxing Master to allow those modest disbursements.

48. The 2nd Respondent also challenged the taxation of attendances (Items 45 to 68), which were assessed at Kshs. 1,100/= each on the basis that the attendances lasted less than thirty minutes. Although the 2nd Respondent claimed that some attendances exceeded one hour, no contemporaneous record or supporting note was provided. In the absence of such proof, this Court finds no reason to interfere with the Taxing Master's finding on attendances.

49. Having carefully considered the record, the ruling of the Taxing Master, the submissions by learned counsel, and the applicable principles of law, this Court finds that the Taxing Master erred in principle in assessing the instruction fee at the bare statutory minimum of Kshs. 25,200/=.

50. While the Taxing Master correctly observed that the value of the subject matter could not be ascertained from the pleadings, she failed to take into account the duration the

matter had been pending, the complexity of the issues involved, and the effort expended by counsel over several interlocutory applications.

51. The appeal herein remained active for a considerable period, during which the advocates and parties were required to research, prepare, and respond to multiple applications touching on both substantive and procedural aspects of environmental licensing and regulatory approvals. In such circumstances, an award of the minimum instruction fee does not achieve fair reimbursement for professional work done and thus constitutes an error of principle warranting this Court's interference.

52. Taking into consideration judicial time, the effort and diligence demonstrated by counsel, the time invested in the matter, and the complexity of the dispute, this Court exercises its discretion to re-assess the instruction fees itself, rather than remit the Bill for re-taxation. Accordingly, the instruction fee is hereby taxed at Kshs. 1,000,000, which in the Court's view constitutes fair and reasonable compensation in the circumstances of this case.

53. As regards Items 70, 72 and 75 relating to disbursements for commissioning of affidavits, this Court has observed that the said affidavits are on record and bear the endorsement of a Commissioner for Oaths. The disallowance of those items was therefore unwarranted. The same are hereby allowed as reasonable disbursements.

54. With respect to the remaining items, including the taxed attendances and other disbursements, no sufficient basis has been laid to warrant interference. Those items shall therefore stand as taxed.

55. In light of the foregoing, the Court makes the following final orders:

a. **The taxation of Item 1 (Instruction Fees) in the ruling of the Taxing Master dated 11th February 2025 is hereby set aside and substituted with an award of Kshs. 1000,000.**

b. **The disallowance of Items 70, 72 and 75, relating to commissioning of affidavits, is hereby set aside, and the said items are allowed as reasonable disbursements.**

c. **Save for the foregoing amendments, all other items taxed by the Taxing Master shall stand as taxed.**

d. **Each party shall bear its own costs of this Reference.**

Dated, signed and delivered virtually in Nairobi this 6th day of November, 2025.

O. A. Angote

Judge

In the presence of;

Mr. Betty Mbugua for 2nd Respondent/Applicant

Mr. Kariuki for Appellants

Court Assistant: Tracy