



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC LAND MISC. APPLI. NO. E040 OF 2024**

**KENNETH MWANGI MBURU AND ASSOCIATES**  
**T/A K.M. MBURU &**  
**ASSOCIATES.....APPLICANT**

**AND**

**JAVISAPA ENTERPRISES LIMITED.....**  
**.....RESPONDENT**

**RULING**

1. This ruling aims to determine the chamber summons dated 8/01/2025 filed by the applicant, which has been moved under the provisions of **Rule 11 (1) - (4)** of the **Advocates (Regulations) Remuneration Order** and **Sections 1A, 1B,** and **3A** of the **Civil Procedure Act** and the reliefs sought are:-

- a) That this honourable Court be pleased to vary/ set aside the decision of the Taxing Officer***

***contained in her ruling delivered on 18/12/2024.***

***b) That this honourable court be pleased to reassess the fees due under items No. 1, 31, 32, together with the 16% VAT payable in the advocate/client bill of costs dated 9/09/2024 and make a finding on the same.***

***c) In the alternative and without prejudice to the foregoing, this honourable court be pleased to remit items No. 1, 31, 32 together with the 16% VAT payable in the advocate/client bill of costs dated 9/09/2024 for reconsideration with direction on the taxation.***

***d) That the costs of this application/ reference be provided for.***

2. The motion is premised on the grounds set out in the body thereof and supported by an affidavit sworn by advocate Mwangi Mburu on the instant date, whereby, in a nutshell, he states that: a) on 18/12/2024, the taxing officer issued a ruling on an advocate/client bill of costs dated 9/09/2024; b) upon reviewing the ruling, the applicant observed that the assessment of item 1 (instruction fees), item 31 (getting up fees), and item 32 (50% increase of item 1) was based on an application dated 15/03/2024 and filed by the advocates who

took over conduct of the matter after the applicant ceased to act for the respondent; and

3. C) In effect, the taxing officer erroneously assessed the applicant's successor's works under these heads instead of the applicant's works, as specified in the bill of costs read together with the affidavit in support and the further affidavit; d) the reasoning and determination were based on the wrong court filings, hence there was an error on the face of the record; and, e) the works that the applicant employed, insofar as instruction fees and the related items are concerned, were not assessed at all. Therefore, it is in the interest of justice that this application/reference be allowed.

4. When served, the respondent vehemently opposed the summons through the replying affidavit deposed by Jacqueline Njeru on 28/02/2025, where she briefly avers: a) in the primary suit, which was **Machakos ELC No. E060 of 2022 ("primary suit")**, the applicant only filed an application dated 05/11/2022 and a statement of defence dated 18/11/2022; b) in assessing the bill of costs, the taxing officer duly considered all the pleadings filed and the extent of legal work undertaken by the applicant; c) the applicant's primary contention pertains to an alleged clerical error in the ruling, which does not affect the substantive assessment of costs or change the court's clear intention; and

5. D) The taxing officer intended to assess the costs related to the application dated 05/11/2022 filed by the applicant in the primary suit; e) the application referred to by the taxing officer and the one filed by the succeeding advocates joining the respondent to the above-mentioned primary suit were similar in content and substance, and as such, were subjected to taxation at the same rate; f) there was a clerical error in the decision made by the taxing officer that can be remedied under the 'slip rule' and corrected without affecting the merits of the taxation ruling; and finally, g) the motion is premature, as the applicant has not adhered to the procedures prescribed under the **Advocates Remuneration Order, Rule 11**, as it has failed to notify the taxing officer in writing within 14 days of the decision of the specific items it objected to before filing this application.
6. In quick rejoinder, the applicant swore a further affidavit on 5/03/2025 and, in summary, maintains: a) the error is patent and manifest and not merely clerical as imputed and as far as compliance with the **Advocates Remuneration Order Rules 11 (1)** is concerned, by a letter dated 19/12/2024, the applicant gave notice in writing to the taxing officer of the items of taxation to which the applicant objected and which was responded to by the taxing officer on 20/12/2024.

7. Accordingly, and following court directions, the summons is argued through written submissions filed by the law firms of **Mss. N.O. Sumba & Co. Advocates** for the applicant, dated 17/03/2025, and **Kivuva Omuga & Co. Advocates**, who are on record for the respondent, dated 16/05/2025. Therefore, upon identifying and considering the issues for determination, this ruling shall, later in its analysis and decision, consider the arguments related to each specific issue and also bear in mind the law and judicial precedents. Thus, having carefully considered the summons, its grounds, affidavits, and the rival submissions, the following issues arise for determination.

***a) Whether the summons is filed prematurely.***

***b) Whether the summons is merited.***

***c) What orders should this court issue, including an order as to costs?***

And they shall shortly be handled separately.

***a) Whether the summons is filed prematurely.***

8. In addressing this matter, it is essential to emphasise the pertinent legislation. In their documents and submissions, both parties concur that, in the event a party is aggrieved by the decision of a taxing officer, as is the case with the applicant,

procedural guidance is derived from **Order 11** of the **Advocates (Remuneration) Order (“Order”)**, which states:

***“(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."***

9. In this regard, the dispute between the parties concerns whether the applicant duly issued a written notice to the taxing officer regarding the items of taxation to which it objects, as mandated by **Order 11 (1)** of the **Order**. The respondent contends that such notice was not issued, whereas the applicant asserts that it did issue such notice and has directed the court's attention to the letter dated 19/12/2024, which it authored to the taxing officer. Having considered this letter, this court is satisfied that the applicant met the legal threshold, which is why the taxing officer provided her reasons on 20/12/2024. This ground by the respondent fails, and this court finds the motion is rightfully before it.

**b) Whether this court should interfere with the taxing officer's decision**

10. Regarding this matter, the bill of costs submitted to the taxing officer pertains to an advocate-client bill of costs. Under the prevailing circumstances, the procedure for the taxation of such costs is outlined in **Schedules VIA** and **VIB** of the **Order**. According to the prescribed formula, the advocates' and

clients' costs in such a case shall be the party and party costs specified in **Schedule VIA**, augmented by an additional one-half.

11. However, when handling a reference, the persuasive decision of **First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] KEHC 1277 (KLR)** which position this court adopts, states that a court is refrained from intervening in the decisions rendered by the taxing officer concerning taxation, unless it can be demonstrated that the decision was founded on an error of principle or that the fee awarded was so clearly excessive as to suggest a mistake of principle.
12. Furthermore, it is well-established law that a superior should not overturn a taxation decision made by the taxing officer simply because it would have awarded a higher or lower amount. Some of the guidelines on assessment of costs have been summarised in the decision of **Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR)**, where the Supreme Court of Kenya elaborated thus in **paragraphs 3- 15** of its decision: -

***“a. Schedule 6A of the ARO provided for Party-Party costs, that was, the manner in which costs awarded to a successful party as against another***

**party should be assessed/computed/taxed. The essence of such costs was to ensure a successful litigant/party received a fair reimbursement/recompense for the costs/expenses he/she has had to incur on account of a suit.**

**b. The subject matter of the suit in issue should be identified first, and then the value thereof determined. Paragraph 1 of Schedule 6A of the ARO stipulated that the value of the subject matter could be determined from the pleading, judgment or settlement of the parties. That meant that the value of the subject matter could be determined from the pleadings or judgment or settlement of the parties. The basis for determining the subject matter value for purposes of instruction fees was wholly dependent on the stage at which the fees were being taxed. Where it happened before judgment, it was the pleadings that formed the basis for determining subject value. Once judgment had been entered, and for what seemed to us to be an obvious reason, recourse would not be had to the pleadings since the judgment determined conclusively the value of the subject matter as a claim, no matter how**

***pleaded, gets its true value as adjudged by the court. Where, however, a suit was settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it was indubitable that one could not start with the pleadings where there was a settlement.***

***c. Whilst the determination of the value of subject matter from a judgment and settlement of the parties was quite straight forward, the determination from pleadings was not. The determination of the value of the subject matter, could be difficult, for instance, where the pleadings/suit was struck out at a preliminary stage, such as in the instant case, and the value could only be determined/ascertained upon the conclusion of a trial.***

***d. The original plaintiffs did not provide any particulars or the value of the parcels that were allegedly compulsorily acquired by the appellant. That information was necessary as a guide to the Taxing Officer in the assessment of reasonable costs. The original plaintiffs simply pleaded or***

***claimed a sum of Kshs.13,932,000,000 as special damages and indicated that the particulars thereto would be availed during the hearing. Therefore, the value of the subject matter could only be determined upon the conclusion of the trial which never happened.***

***e. A claim in a suit which was struck out at the preliminary stage did not ipso facto render that claim or amount pleaded therein without more the value of the subject matter. The position still remained that the amount therein had not been ascertained or determined, and as such, it could not be applied as the value of a subject matter in a disputed taxation. The application of such a claim or amount as the value of the subject matter would go against the rationale that the fees/costs paid to an advocate and a successful party should be reasonable. Consequently, even where the amount claimed in a pleading which was struck out by a court, as in the instant appeal, the said amount would not act as the value of the subject matter when it came to taxation of instruction fees.***

***f. Where the value of the subject matter could be determined, the Taxing Officer was required to set out the basic fees prescribed under Schedule***

**6 Part A. Similarly, where the Taxing Officer assessed instruction fees based on the nature of a matter as stipulated in Paragraph 1, for instance like, bankruptcy proceedings or matrimonial causes she/he was required to set out the basic fees prescribed thereunder. It was after setting out the basic fees that the Taxing Officer could exercise his/her discretion to increase or (unless otherwise provided, like in matrimonial causes) reduce the said basic fees. In exercising such unfettered discretion, the Taxing Officer was required to do so judiciously and not whimsically.**

**f. In the event that value of the subject matter of a suit could not be determined from either the pleadings, judgment or settlement by the parties, and the nature of the said suit was not provided for in Paragraph 1 of Schedule 6 A, proviso thereunder empowered a Taxing Officer to exercise his/her discretion in assessing instruction fees for such a suit.**

**g. Schedule 6 Part B relates to Advocate-Client costs, it provided for the manner in which advocates costs/fees should be assessed/taxed. Once instruction fees in Party- Party costs in a particular suit were assessed/taxed under Part A,**

***and a certificate of costs to that effect was issued, the assessment of instruction fees in Advocate-Client costs in the same suit simply required the application of the formula stipulated under Part B, that was, the fees, the instruction fees, taxed or ascertained under Part A increased by one-half. Besides, the impugned majority judgment found that where Party-Party costs were taxed under Part A, the Taxing Officer was devoid of any discretionary power when it came to the assessment of instruction fees in Advocate-Client Bill of Costs.***

***h. The Taxing Officer was required to take into account Part A. That did not mean that such a Taxing Officer was simply to increase the instruction fees determined/ascertained in Part A by one-half or 50%. That was because rule 16 of the Advocates Remuneration Order provided that notwithstanding anything contained in the Order, on every taxation the Taxing Officer may allow all such costs, charges and expenses as authorized in the Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party. Rule 16 should be read together with section 2 of the Advocates Act, which interpreted the word costs***

***as including fees, charges, disbursements, expenses and remuneration.***

***h. Judicial discretion was the exercise of judgment by a judge or court based on what was fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant was not entitled to demand the act as a matter of right.***

***i. The proper interpretation of Schedule 6B was that in assessing fees thereunder, including instruction fees, a Taxing Officer was required to exercise his/her discretion guided by the prescribed scale of fees in Part A. That did not mean, as the impugned majority judgment found, that a Taxing Officer was simply to apply the mathematical formula to the instruction fees ascertained in the taxed Party-Party costs. Failure to evaluate a disputed item under taxation and determine it judiciously was contrary to the clear provisions of rule 16 of the Advocates Remuneration Order. A Taxing Officer being a judicial officer exercising a judicial mandate could not be said to be performing such mandate mechanically or merely as a formality.***

***j. An Advocate would be entitled to payment of a reasonable fee which is commensurate with the***

***work done. What was a reasonable fee in the circumstance could only be adjudicated by a taxing master by application of his discretion. If the instruction fee in a certificate of Party-Party costs was disputed when it came to the assessment of the same in Advocate-Client costs under Schedule 6B, the Taxing Officer should subject the disputed items to evaluation and judicial determination according to the circumstances of each case. The instruction fees in the Party-Party certificate of costs once disputed must be ascertained and the certificate could not be applied hook, line and sinker in the assessment of instruction fees under Part B.”***

***See also Joreth Limited v Kigano & Associates [2002] KECA 153 (KLR) and Kamunyori & Company Advocates v Development Bank Of Kenya Limited [2015] KECA 595 (KLR)***

13. Thus, having stated the principles of law, this court will now consider the grievances posited by the applicant against the taxing officer which are an alleged error in the assessment item 1 (instruction fees), item 31 (getting up fees), and item 32 (50% increase of item 1) as they were based on an application dated 15/03/2024 and filed by the advocates who took over

conduct of the matter after the applicant ceased to act for the respondent.

14. Respecting this, the respondent has admitted this error; however, she contends that such an error falls under the *slip rule* as it is a clerical mistake. She also acknowledges that the incorrect motion was relied upon by the taxing officer during the assessment of costs and corroborates the applicant's assertions by stating as follows in certain paragraphs of her supporting affidavit:

*6. That it is evident from the Ruling dated 18.12.2024 that the Taxing Officer intended to assess the costs in relation to the Application dated 05.11.2022 filed by the Applicant in the primary suit, Machakos ELC No. E060 of 2022.*

*7. That it is evident from the Ruling dated 18.12.2024 that the Taxing Officer intended to assess the costs in relation to the Application dated 05.11.2022 filed by the Applicant in the primary suit, Machakos ELC No. E060 of 2022. That the Application referred to by the Taxing Officer and the one filed by the firm Kivuva Omuga & Co. Advocates enjoining the Respondent to the above stated primary suit are similar in content and substance, and as such, were subjected to taxation at the same*

rate.....

10. *That the Taxing Officer clearly intended to assess costs for the Applicant's Application, dated 05.11.2022 seeking the enjoinder of the Respondent in the primary suit, rather than the removal of the Respondent, as was erroneously indicated by the Taxing Officer.*

15. Consequently, this court has scrutinised the impugned ruling, the instructions received by the applicant from the respondent, and the bill of costs, and suffice it to say, the respondent's argument lacks merit, as the error made by the taxing officer was not a clerical or arithmetic mistake that could be remedied under **Section 99** of the **Civil Procedure Act**. Instead, and in concurrence with the applicant, the taxing officer erred significantly in basing her assessment on instructions that were never issued to it but rather to a law firm that subsequently took over the conduct of the matter.

16. In this court's view, this error is fundamental and clearly prevents the applicant from receiving a fair reimbursement of its costs. The error is severe and involves significant irregularity, warranting an appropriate and justified order for a re-trial on the bill of costs. Consequently, this court finds that

the chamber summons is merited. The ruling and order of the deputy registrar dated 18/12/2025 are set aside, and the appropriate order is for the bill of costs to be remitted for taxation. Costs follow the event, and costs are awarded to the applicant. Ultimately, the following final orders are issued.

***a. The chamber summons dated 8/01/2025 is allowed with costs to the applicant.***

***b. The advocate-client bill of costs dated 9/09/2024 is remitted for taxation before a taxing officer other than Hon. M.A. Otindo (Ms.) Deputy Registrar.***

It is so ordered.

**Delivered and Dated at Machakos this 25<sup>th</sup> day of November, 2025.**

**HON. A. Y. KOROSS  
JUDGE  
25.11.2025**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant.

Miss Otieno holding brief for Mr. Sumba for Applicant.

No appearance for other parties.

ORIGINAL