

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 89 OF 2019

MICHAEL PEROH.....PLAINTIFF

-VERSUS-

ISHMAEL MOSHI PEROH.....1ST DEFENDANT

WINFRED MOSHI PEROH.....2ND DEFENDANT

ISAAC PEROH.....3RD DEFENDANT

STEPHEN PEROH.....4TH DEFENDANT

RULING

*(In respect of the Reference application dated 14th January 2025 pursuant to Rule 11(2) of the
Advocates (Remuneration) (Amendment) Order 2014)*

Introduction

1. Before this Court is a Reference brought by way of Chamber Summons dated 14th January 2025, filed under Rule 11(2) of the Advocates (Remuneration) (Amendment) Order, 2014, Sections 1A and 3A of the Civil Procedure Act. The said application is supported by the **Affidavit of Isaac Peroh**, the 3rd Applicant, sworn on the same date.
2. The Applicants seek, inter alia, orders that this Honourable Court be pleased to set aside the decision of the Taxing Officer delivered on 9th December 2024 in respect of the Applicants' Party and Party Bill of Costs dated 12th March 2024, and that the said Bill be taxed afresh before a different Taxing Officer, or in the alternative, that this Court substitutes the amounts awarded in the disputed items. The Applicants further pray that the said bill be re-taxed and costs of this Application be provided for.

3. The Application arises from the taxation of costs following the judgment delivered on 28th November 2023 in **Kajiado ELC Case No. 89 of 2019: Michael Peroh v Ishmael Moshi Peroh & 3 Others**, wherein costs were awarded in favour of the Applicants. Pursuant thereto, the Applicants lodged a Party and Party Bill of Costs dated **12th March 2024**, seeking a total sum of **Kshs. 9,693,751.68**. Upon consideration, the Taxing Officer rendered a ruling on 9th December 2024, taxing off a total of **Kshs. 8,457,709.30** and allowing the Bill at **Kshs. 1,236,042.38**.
4. Dissatisfied with that decision, the Applicants lodged a Notice of Objection letter dated 11th December 2024 and sought the Taxing Officer's reasons pursuant to **Rule 11(1)** of the Advocates (Remuneration) Order. The record shows, however, that no response or reasons were furnished by the Taxing Officer. The applicants nevertheless proceeded, as they were entitled to, to file the present Reference.
5. The Applicants contend that the Taxing Officer erred both in principle and in law by misapplying her discretion in assessing the instruction fees under Item 1, and by failing to take into account the value of the subject matter as discernible from the pleadings and judgment, particularly the finding that the total investment in the suit property was **Kshs. 40,625,342**. It is their case that the Taxing Officer failed to appreciate the complexity, volume of documentation, and substantial work undertaken in defence of the suit, thereby undervaluing the instruction fees and other items such as getting-up fees, drawing and service of affidavits of service, copying charges, and court attendances.
6. Further, the Applicants allege that the Taxing Officer failed to consider their written submissions and supporting documents, and erred in taxing off items relating to the

making of copies of annexures, affidavits of service, and court attendances, thereby occasioning a miscarriage of justice.

7. The Application is opposed through a Replying Affidavit sworn by the Respondent, Michael Peroh. The Respondent deposes that the Reference is misconceived, lacks merit, and constitutes an abuse of the court process, as it seeks to invite the Court to interfere with the proper exercise of discretion by the Taxing Officer without demonstrating any error of law or principle.
8. The Respondent narrates that the underlying dispute emanated from **Kajiado ELC Case No. 89 of 2019: Michael Peroh v Ishmael Moshi Peroh & 3 Others**, a family-related matter involving the ownership and management of the property known as **Plot No. 65/Residential within Ongata Rongai Trading Centre**, in which he had sought, inter alia, an account of rental income, release of the original letter of allotment, injunctive orders, and removal of a caution. The 1st and 2nd Defendants (now Applicants) contended in their Defence that the suit property was held in trust by the Plaintiff (Respondent herein) under an informal family investment arrangement.
9. Following a full hearing, judgment was delivered on 28th November 2023, wherein the Court found that ownership of the property was jointly vested in both the Plaintiff and the Defendants and dismissed the Plaintiff's suit with costs to the Defendants. The Respondent asserts that the said judgment did not attribute any **specific or ascertainable pecuniary value** to the suit property or to the subject matter of the proceedings, nor was any such value pleaded or proved during trial.
10. It is therefore the Respondent's position that the Applicants' reliance on a purported value of **Kshs. 40,625,342/=** is **misplaced and self-serving**, since no valuation report

was ever filed before the Taxing Officer, nor did the Applicants invoke **Paragraph 13A of the Advocates (Remuneration) Order** to seek a valuation of the subject matter. Consequently, in the absence of an ascertainable subject value, the Taxing Officer rightly exercised her discretion under **Schedule 6A (1)(b)** of the Advocates (Remuneration) (Amendment) Order, 2014, and correctly assessed the instruction fee at **Kshs. 800,000/=** based on the complexity, nature, and duration of the proceedings, and the work done by counsel.

11. The Respondent further avers that the Taxing Officer's ruling of 9th December 2024 was comprehensive and sufficiently reasoned, addressing each contested item in accordance with the applicable law. He maintains that no misdirection, error of principle, or disregard of statutory guidelines has been demonstrated by the Applicants to warrant interference by this Court. The Respondent emphasizes that judicial interference with a Taxing Officer's discretion is limited to instances where the assessment is shown to be manifestly excessive, inordinately low, or based on wrong principles — none of which has been established in this case.

12. In response to the specific items disputed by the Applicants, the Respondent contends that: The fees allowed under **Items 16, 19, and 59** (drawing and service of Affidavits of Service) were properly assessed in accordance with the standard rates and the actual work done. The allowances under **Items 23, 31, 32, and 56** (relating to copying charges and annexures) were reasonable, taking into account the volume and necessity of the documents produced. The amounts awarded under **Items 48 and 49** (court attendances) were proportionate to the time spent and the nature of the hearings.

13. Lastly, the Respondent disputes the Applicants' allegation that the Taxing Officer failed to provide reasons for her decision under Rule 11(2) of the Advocates (Remuneration) Order, contending that the ruling itself sufficiently articulated the basis of the assessment and thus obviated the need for a separate reply to the Applicants' letter dated 11th December 2024.

14. In view of the foregoing, the Respondent urges this Court to find that the Reference is devoid of merit, and uphold the Taxing Officer's decision of 9th December 2024, and to dismiss the reference with costs for being a vexatious attempt to re-litigate the taxation process and delay the conclusion of the matter.

Directions

15. The court directed that the application be canvassed by way of written submissions. The parties accordingly filed their written submissions and the same have been duly considered in the writing of this ruling.

Analysis and Determination

16. Having carefully considered the Application, the replying affidavit, the Ruling of the Taxing Officer, and the rival submissions on record, this court finds that the issue that solely arises for determination is whether the Applicants have demonstrated sufficient grounds for this Court to interfere with the discretion of the Taxing Officer in her Ruling delivered on 9th December 2024.

17. For starters it is worth noting that in a reference, the duty of this Court is not to re-tax the bill but to examine whether the Taxing Officer applied the correct legal principles and took into account all relevant considerations. It is trite that a court can only interfere with a Taxing Officer's decision where there is an error of principle. In the case of **Francis**

Kimolo Kimatu & 59 others v Attorney General & 3 others [2022] KEELC 474 (KLR),

the court opined that:

“It is trite law that an award for taxation of costs by the taxing master should not lightly be interfered with. Circumstances under which courts can interfere with such decision would arise if the decision by the taxing master is based on an error of principle or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. This was as held in the case of Republic –Vs- Ministry Of Agriculture & 20 Others Ex-Parte Muchiri W’ Njuguna [2006]Eklr, where Hon. Justice J. B. Ojwang (as he then was) stated as follows:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle.””

18. The Applicants sought Kshs 3,729,619.04/=, whereas the Taxing Officer awarded Kshs 800,000/= as instruction fees. The Taxing Officer found that the main suit involved family litigation over properties where the value of the subject matter could not be determined from the pleadings or judgment.

19. In *Joreth Limited v Kigano & Associates [2002] 1 EA 92*, the Court held that the Taxing Officer is authorised to use his discretion to assess instruction fees where the value of the subject matter cannot be established taking into account various considerations as:

“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 importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

20. Similarly, in *Peter Muthoka & Another v Ochieng & 3 Others [2019] KECA 597*, it was stated that:

“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.”

21. The above position was upheld by the *Supreme Court of Kenya* decision in *Petition No. E011 of 2023, Kenya Airports Authority –vs- Otiemo Ragot & Company Advocates*, where the Court spelt out in great details the principles applicable in taxation of instructions fees.

22. The Supreme Court noted that schedule VI of the Advocates Remuneration Order relates to the assessment/taxation of costs in proceedings before the High Court. Part A thereof deals with party and party costs whereas part B deals with advocate-client remuneration costs. Paragraph 1 of the schedule VIA commences with assessment of instruction fees based on the value of the subject matter.
23. The procedure then should be that the subject matter of the suit in issue should be identified first and then the value thereof determined.
24. The answer to the question as to how the value of the subject matter is to be ascertained is to be found at paragraph 1 of schedule VIA which is clear on the issue. It stipulates that; ***“...where the value of the subject matter can be determined from the pleading, judgment or settlement of the parties...”***
25. The Supreme Court of Kenya concurred with the reasoning of the Court of Appeal in ***Joreth Limited –vs- Kigano Associates (2002) IEA 92***, where the court stated that the value of the subject matter for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case).
26. The Taxing Officer in this case therefore duly exercised her discretion, taking into account the complexity of the matter, the number of papers perused, and the duration of litigation (2019–2024). The Court finds no error of principle. The award of Kshs 800,000/= as instruction fees stands.
27. The Taxing Officer awarded Kshs 266,667/= (one-third of instruction fees) as the getting up fees. This is fully consistent with the statutory minimum. The Applicants’ request for a higher figure does not demonstrate an error in principle.
28. Schedule 6, paragraph 4(g) provides:

“Affidavit or return of service Kshs. 240”

29. The Taxing Officer awarded Kshs 240 per affidavit, exactly as prescribed by the Order.

The Applicants’ objection based on quantum lacks merit; no misdirection occurred.

30. Schedule 6, paragraph 5(a) provides:

“Of plaint, written statement of defence, affidavit, petition of appeal, ... exhibit, bill of costs and every other document (whether for court or opposing party) Kshs 25 per folio”

31. The Taxing Officer awarded Kshs 8,625/=, reflecting the statutory rate. This is within her discretion.

32. Schedule 6, paragraph 5(a) applies in regard to the List of Documents. The Taxing Officer awarded Kshs 1,100/= for one page of documents, having determined the list was one page. The Court notes that mere disagreement over factual assessment does not amount to an error of principle.

33. The Taxing Officer awarded Kshs 41,200/= for three copies of list and bundle of documents, (1,644 pages × Kshs 25 per folio), fully in accordance with Schedule 6. This was within lawful discretion.

34. On court attendances, Schedule 6, paragraph 7(d) provides:

“At court or in chambers before judge not otherwise provided for — Ordinary Scale ... Whole day Kshs 10,000; Higher Scale Kshs 15,000”

35. The Taxing Officer awarded 7,000 in exercise of their jurisdiction. I find no error of principle.

36. For copies of documents, Schedule 6, paragraph 5(a) applies. The Taxing Officer awarded Kshs 1,400/=, consistent with the statutory rate and within her discretion.

37. For drawing and service of affidavit of service, Schedule 6, paragraph 4(g) provides Kshs 240 per affidavit. The award matches the scale. No error of principle is evident.

38. Accordingly, the Court finds no error of principle in the decision of the Taxing Officer. The decision of the Taxing Officer is hereby **upheld** as properly arrived at within discretion and consistent with law and principle. The Chamber Summons Application dated 14th January 2025 is **dismissed** with costs to the Respondents.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 13th Day of November 2025.

M.D. MWANGI
JUDGE

In the virtual presence of:

Mr. Wamae h/b for Ms. Githongori for the Plaintiff/Respondent

Ms. Mukobi h/b for the Defendants/Applicants

Court Assistant: Mpoye

M.D. MWANGI
JUDGE