**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCOMM MISC. APP. NO. E075 OF 2024**

**IN THE MATTER OF THE ADVOCATES ACT**

**-AND-**

**IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOVATE AND CLIENT**

**-BETWEEN-**

**TITUS MAKHANU & ASSOCIATES**

**ADVOCATES…….APPLICANT/ADVOCATE**

**-VERSUS-**

**HALL EQUITORIAL LIMITED…….....…….....RESPONDENT/CLIENT**

*(Being a Reference from the Ruling of the Hon. C.L. Adisa, siting as a Taxing Master, delivered on 7th October 2024).*

**RULING**

1. Before me is a Chamber Summons application dated 11th October 2024 filed by the respondent pursuant to the provisions of Paragraph 11 of the Advocates Remuneration Order, 2014 and all other enabling provisions of the law. The respondent seeks to set aside the Taxing Master's decision and Orders of 7th October 2024 regarding instruction fees and VAT and for re-assessment of instruction fees, while taking into account payments already made by the respondent.

2. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Mr. Abdulali Kurji, a Director of the respondent company. Mr. Kurji averred that the applicant filed

a bill of costs dated 23rd January 2024, which the respondent opposed vide a replying affidavit sworn on 16th April 2024. He stated that vide a Ruling delivered on 7th October 2024, the Taxing Master, Hon. C.L. Adisa, taxed the said bill of costs at Kshs.164,383.00. He stated that being dissatisfied with the said Ruling, the respondent objected to the taxation vide a letter dated 8th October 2024.

3. Mr. Kurji contended that the Taxing Master erred by awarding the applicant full instruction fees despite the participation of other Advocates, granting full fees even though the applicant abandoned the suit, ignoring prior Agreements on legal fees and payments already made totaling Kshs.193,070.00, and subjecting all amounts to Value Added Tax (VAT). He deposed that these are errors in principle to warrant the setting aside of the Taxing Master's Ruling delivered on 7th October 2024 and issuance an order dismissing the applicant's bill of costs dated 23rd January 2024.

4. In opposition to the application, the applicant filed a replying affidavit sworn on 24th March 2025 by Mr. Titus Makhanu, an Advocate of the High Court of Kenya, practising in the applicant law firm. Mr. Makhanu averred that the applicant law firm is entitled to full instruction fees as it duly executed the respondent's instructions, including drafting and filing a plaint on 21st September 2020. He contended that the respondent failed to provide evidence of another Advocate having filed pleadings and that the mere involvement of other Advocates after the applicant law firm ceased from acting, does not negate entitlement to full fees.

5. He deposed that no written Agreement evidencing the alleged fee arrangements has been produced and that the respondent did not provide verifiable proof of payment of Kshs.193,070.00 as alleged. Counsel maintained

that the total fees claimed by the respondent are inconsistent with calculations under Schedule 7 of the Advocates Remuneration Order, 2014 and averred that the Taxing Master correctly applied Value Added Tax in accordance with the law. Mr. Makhanu asserted that no error in principle occurred, and that the taxation of Kshs.164,383.00 was fair, just and reasonable, and that the respondent's Reference is without merits, and ought to be dismissed with costs.

6. This Reference was canvassed by way of written submissions. The respondent's submissions were filed on 20th June 2025 by the law firm of Kinyua, Mwaniki & Wainaina Advocates, whereas the applicant's submissions were filed by the law firm of Titus Makhanu & Associates Advocates.

7. Mr. Wainaina, learned Counsel for the respondent submitted that the Taxing Master erred in principle by awarding the applicant full instruction fees including VAT, without taking into account that the applicant abandoned the matter midway, necessitating instruction of other Advocates. He argued that the parties herein had agreed on legal fees totaling Kshs.245,100/=, of which Kshs.193,070.00 had already been paid, leaving a balance of Kshs.122,55.00 Mr. Wainaina contended that failure to consider these payments resulted in an excessive and unjust award. Counsel relied on cases of **First American Bank of Kenya Ltd v Gulab P. Shah & 2 others** [2002] KEHC 1277 (KLR), **Mayers & Another v Hamilton & Others** (1975) EA 13 [2018] eKLR and **Mereka & Co. Advocates v New Kenya Co-operative Creameries Limited** [2018] KEHC 551 (KLR), and submitted that instruction fees must be reasonable, commensurate with work performed, and that the Taxing Master must exercise discretion judiciously.

8. Mr. Letaya, learned Counsel for the applicant relied on the case of **Kakuta Maimai Hamise v Peris Pesi Tobiko, Independent Electoral and Boundary**

**Commission & Returning Officer Kajiado East Constituency** [2017] KEHC 3070 (KLR), and submitted that no written and signed fee agreement existed as provided for under Section 45(1) of the Advocates Act. He cited the case of **Hillary Cheboi Chelimo t/a CK Advocate v China State Construction Engineering Corporation Ltd** [2022] KEHC 16160 (KLR) and further submitted that the fee note produced by the respondent could not be equated to a binding Agreement. Counsel referred to the case of **M/s Lubuleliah & Associates Advocates v N K Brothers Limited** [2014] KEHC 7393 (KLR) and contended that this Court has no jurisdiction to determine the question of Agreement for fees at this juncture.

9. Counsel submitted that the respondent failed to adduce cogent evidence, such as a bank statement or cheque to prove payment of the alleged Kshs.193,070.00, and as such, the Taxing Master correctly disregarded this unproved claim. He cited the case of **Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd** [2014] KEHC 5481 (KLR), and argued that the mere involvement of other Advocates in a case does not diminish entitlement to full instruction fees. Mr. Letaya relied on the case of **Mereka & Co. Advocates v New Kenya Co-operative Creameries Limited** [2018] KEHC 551 (KLR), and submitted that VAT is a statutory requirement chargeable on all amounts in the bill of costs, thus the Taxing Master acted correctly in subjecting the award to VAT.

**ANALYSIS AND DETERMINATION.**

10. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the applicant and the written submissions by Counsel for the parties. The issues that arise for determination are –

i) **Whether the applicant is entitled to full instruction fees; and**

ii) **Whether the Taxing Master was correct in subjecting the taxed sum to VAT.**

11. It is now settled law that the High Court can only interfere with the Taxing Master's decision where there has been an error in principle and not solely on questions of quantum, as that is an area where the Taxing Master is more experienced and therefore more apt to the job. The Court of Appeal in the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board** [2005] KECA 325 (KLR), held as hereunder in this respect –

> ***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.***

**Whether the applicant is entitled to full instruction fees.**

12. The applicant law firm was duly instructed by the respondent company and proceeded to prepare and file the necessary pleadings, including a plaint dated 21st September 2020. The respondent nonetheless argued that the applicant law firm abandoned the matter midway, prompting the engagement of new Counsel, hence it is not entitled to full instruction fees. This Court however does not agree with this position. An advocate becomes entitled to instruction fees upon being retained and taking steps to execute the instructions, and such entitlement is not diminished merely because the Advocate later ceases to act. This position was affirmed by the Court of Appeal in the case of **Joreth Ltd v Kigano & Associates** [2002] 1 E.A. 92, as follows-

> ***In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.***

13. In light of the foregoing decision, I am not persuaded that the applicant law firm's decision to cease from acting for the respondent disentitles it from claiming full instruction fees.

14. The respondent further argued that the Taxing Master failed to take into account prior fee arrangements and payments allegedly made, totaling Kshs.193,070.00. It asserted that the parties herein had agreed on legal fees amounting to Kshs.245,100/=, leaving an outstanding balance of Kshs.122,550.00. According to the respondent, the Taxing Master's failure to consider these payments resulted in an excessive and unjust assessment. The applicant law firm however maintained that no written and duly executed Fee Agreement was ever produced by the respondent and that the respondent did not provide verifiable proof of having paid the alleged Kshs.193,070.00. The applicant further asserted that the fee note relied upon by the respondent did not amount to a binding fee Agreement.

15. Fees Agreements are provided for under Section 45 of the Advocates Act. Section 45 (1) provides that –

> ***Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may -***
>
> ***a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;***
>
> ***b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the***

***advocate's instruction fee in respect thereof or his fees for appearing in court or both;***

***c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.***

16. In **Kakuta Maimai Hamise v Peris Pesi Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency** [2017] KEHC 3070 (KLR), the Court in addressing the import of the above provisions held that -

> ***To constitute a valid and binding agreement for the purpose of section 45 of the Advocates Act, it expressly provides that the same must be in writing and signed by the client or his agent duly authorized in that behalf. In this case, both the two letters are not signed by the client. Whereas an agreement may be formed by a series of correspondences, the client has not exhibited any document by which he signaled his acceptance of the proposed fees by the advocate. In my view, for a document to be said to constitute a valid and binding agreement for purposes of section 45 of the Advocates Act, the same must not only be unequivocal that it signifies what the precise final amount is but must be signed by the person to be charged who in this case is the client…***

17. In this case, save for a fee note advice, the respondent produced no Fee Agreement between itself and the applicant law firm to substantiate its claim that such an Agreement existed. Accordingly, this Court concurs with the

holding in the case of **Hillary Cheboi Chelimo t/a CK Advocate v China State Construction Engineering Corporation Ltd** (supra), cited by the applicant, that a fee note does not amount to a valid and binding Agreement since it does not satisfy the essential elements of a contract, namely; offer, acceptance and consideration. Moreover, from the face of the fee notes relied upon by the respondent, it is not possible to ascertain whether there was any meeting of the minds regarding the fees indicated thereon.

18. In the circumstances, I am not persuaded that any Fee Agreement existed between the parties herein for the Taxing Master's consideration.

19. This Court takes cognizance of the cheque for Kshs.187,695.00 issued by the respondent in favour of the applicant, together with the corresponding payment voucher referencing an invoice in the Murban Movers Limited matter. It is however significant that neither the cheque nor the voucher was accompanied by an acknowledgment receipt from the applicant law firm confirming actual receipt of those funds. Therefore, in the absence of such acknowledgment, this Court is unable to determine whether the applicant law firm indeed received the sum of Kshs.187,695.00, and if so, whether the payment related to legal fees, Court fees, or some other purpose.

20. It is further noted that in an email dated 13th July 2023, the applicant expressly requested the respondent company to settle its outstanding legal fees. In light of this communication and the evidence presented, I am not satisfied that the respondent has discharged its burden of proving that any partial payments were made towards the applicant law firm's legal fees.

21. It is therefore my finding that the applicant is entitled to the full instruction fees as taxed by the Taxing Master.

**Whether the Taxing Master was correct in subjecting the taxed sum to VAT.**

22. The respondent further challenged the Taxing Master's decision to subject the taxed amount to Value Added Tax (VAT). On the question of applicability VAT on taxed sums, this Court aligns itself with the position taken in the case of **Mumias Sugar Company Limited v Tom Ojienda & Associates** [2019] KEHC 9737 (KLR), where the Court held as follows-

> ***I also find that the learned taxing officer erred when she levied VAT on all the taxed sums, which include Court Fees and other disbursements.***
>
> ***Where a party had paid Court Fees or other disbursements, the said payments would not attract VAT when a Bill of Costs was being taxed.***
>
> ***When Court Fees or other disbursements have been paid, if any such payment attracts a levy such as VAT, the said levy would have already been paid.***
>
> ***If the payment was made by the advocate, he would be seeking reimbursement from the client. In the event, such reimbursement of money which had already been paid, would not ordinarily attract VAT.***
>
> ***Where any particular disbursement is being claimed by an advocate, the taxing officer who allows such a payment to be recovered, should ensure that he or she verifies that such money had been disbursed.***
>
> ***And if the taxing officer were to order that VAT be paid on any particular disbursement, the said taxing officer would need to give reasons why VAT was payable on the said disbursements.***

23. Further, Section 13(5) of the Value Added Tax Act provides that -

***In calculating the value of any services for the purposes of subsection (1), there shall be included any incidental costs incurred by the supplier of the services in the course of making the supply to the client:***

***Provided that, if the Commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value.***

24. Upon reviewing the Taxing Master's Ruling delivered on 7th October 2024, it is evident that VAT was applied to the taxed amount comprising instruction fees and drawing and service fees, excluding disbursements. Consequently, this Court is satisfied that the Taxing Master did not commit an error in principle in subjecting the taxed sum to Value Added Tax to warrant this Court's interference.

25. Ultimately, this Court finds that the Chamber Summons dated 11th October 2024 is not merited. It is hereby dismissed with costs to the applicant law firm.

It is so ordered.

**DELIVERED, DATED** and **SIGNED** at **NAIROBI** on this **14th** day of **November, 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Letaya for the Applicant/Advocate

No appearance for the respondent

Ms B. Wokabi – Court Assistant.