

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
FAMILY DIVISION
MISC. APPLICATION NO. E086 OF 2025

JAMES WATAKU CHUCHU

JANE MUTHONI CHUCHU

JOSEPH MACHARIA CHUCHU

MARGARET MUTHONI CHUCHU

**(SUED AS LEGAL REPRESENTATIVES OF
SOLOMON CHUCHU WATAKU)**

APPLICANTS

VERSUS

MUCHANGI NDUATI NGINGO

T/A MUCHANGI NDUATI & CO ADVS

RESPONDENT

RULING

1. The genesis of this dispute is anchored in High Court Succession Cause No. 1379 of 2006, In the Matter of the Estate of Solomon Chuchu Wataku (Deceased). The Deceased died on or about 9 March 2006. The initial Petition for Letters of Administration was filed by the firm of M/s Kang'ethe & Company Advocates on 17 May 2006, leading to issuance of the Grant of Letters of Administration to the Deceased's 3 widows.

2. The record indicates that on or about 20 February 2010, the then-Administrators appointed the Respondent firm to take over conduct of the succession proceedings. It is the professional engagement following this

appointment that has birthed the present acrimony. The Respondent acted for the Estate for a considerable period, during which time the original Administrators either passed away or became incapacitated, necessitating their substitution by the current Applicants, who are children of the Deceased.

3. The professional relationship between the Applicants and Respondent having irretrievably broken down, the Applicants appointed new legal representation, Njuguna, Kahari & Kiai Advocates. Consequently, the Respondent filed an Advocate-Client Bill of Costs dated 30 April 2024 claiming a sum of Kshs 10,440,574.20 for legal services purportedly rendered to the Estate.
4. The Applicants vehemently opposed this Bill of Costs. Through their current Advocates, they filed Grounds of Objection to the Taxation dated 6 November 2024, supported by a Replying Affidavit sworn by the 3rd Applicant. The matter proceeded before the Taxing Officer, who, in a Ruling delivered on 14 March 2025, dismissed the Applicants' Objections and ordered the taxation to proceed. It is this Ruling that the Applicants now seek to overturn.
5. The Chamber Summons dated 27 March 2025 seeks the following orders:
 - (i) That any further proceedings relating to the subject taxation matter be stayed pending the hearing and determination of this Reference;
 - (ii) That the Ruling of the Learned Taxing Officer delivered on 14 March 2025 be set aside;
 - (iii) That the subject Ground of Opposition to taxation dated 6 November 2024 be reinstated and heard and determined afresh and conclusively;
 - (iv) That the costs of the Reference be provided for.

6. The Application is premised on the grounds on the face thereof and supported by the Affidavit sworn by the 3rd Applicant. The 3rd Applicant avers that the Taxing Officer's decision was plainly wrong and a nullity in law for failing to adhere to Order 21 Rules 4 and 5 of the Civil Procedure Rules, which require a court to state its decision on each issue framed. Specifically, the Applicants contend that the Taxing Officer only addressed the issue of the Fee Agreement but completely ignored the weighty issue of the Respondent's failure to account for Kshs 45.75 million derived from unauthorized asset sales.
7. In a tactical riposte, the Respondent filed a Notice of Preliminary Objection dated 1 April 2025, challenging the competency of the Reference itself. The Respondent contends that the Application is fatally defective for non-compliance with mandatory procedural rules, specifically Rule 11 of the Advocates (Remuneration) Order. The Preliminary Objection raises 6 grounds:
 - (i) Abuse of process – the Application is ill conceived, frivolous and bad in law;
 - (ii) The Application offends the principle of *res judicata*;
 - (iii) The application is merely intended to delay the expeditious determination of costs;
 - (iv) The assessment of costs is due process and will not prejudice the Applicants;
 - (v) The claim for accounting is a vain imagination and is barred by the doctrine of limitation of actions;
 - (vi) The Application is barred by collateral estoppel.
8. In their submission, the Respondent expanded on these grounds, placing heavy reliance on the argument that the Applicants failed to follow the strict

procedure laid in Rule 11, by failing to give written notice to the Taxing Officer within 14 days of the Ruling requiring the reasons for the decision, rendering the Reference premature and fatally defective.

9. The Court issued directions that both the Preliminary Objection and the substantive Reference be canvassed simultaneously by way of written submissions. I have now had the benefit of comprehensively reviewing the pleadings, the impugned Ruling and the rival submissions filed by both parties.

Analysis & Determination

10. It is procedural trite law that a Preliminary Objection should be determined first, as its success would dispose of the matter *in limine* rendering a foray into merits unnecessary. In ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd EA 696***, the Court established the immutable parameters of a Preliminary Objection. Law, J.A stated:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

11. Sir Charles Newbold P. added that a Preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. With this litmus test in mind, I turn to the grounds raised by the Respondent.

12. The Respondent submits that the Reference is fatally defective because the Applicants did not write to the Taxing Officer requesting reasons for her decision before filing the Reference. They rely on Rule 11(1) and (2) of the Advocates (Remuneration) Order, which provides:

(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... setting out the grounds of his objection

13. The Respondent cites ***Fredrick Onyango Aoro v Mary Auma KEHC 14628 (KLR)*** and ***Pyramid Motors Limited v Langata Gardens Ltd [2015] eKLR*** to argue that this procedure is mandatory and strict. They contend that bypassing the request for reasons stage robs the Court of jurisdiction.

14. However, the Applicants, in their Supplementary Submissions, contend that the Taxing Officer has already delivered a reasoned Ruling, the requirement to formally request reasons becomes redundant and ritualistic. They rely on the Court of Appeal decision in ***Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board KECA 325 (KLR)***, where it was held:

"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"

15. I have scrutinized the rival arguments. The objective of Rule 11 is to ensure that the High Court, in exercising its supervisory jurisdiction, understands the mind of the Taxing Officer. It prevents the Judge from having to guess why a specific item was taxed off or allowed.
16. In the present case, the decision being challenged is a Ruling dated 14 March 2025. This was not a standard taxation where items are ticked off a bill; it was a reasoned decision on a Preliminary Objection to the entire taxation process. The Taxing Officer gave reasons in that Ruling, specifically addressing the Fee Agreement. The Applicants' grievance is precisely that the Ruling is defective because it failed to address the other grounds.
17. To require the Applicants to write a letter asking the Taxing Officer for reasons she had already purportedly given in her Ruling would be an exercise in futility. As held by Hon. Aburili, J in ***Francis Kimani Kiige v National Hospital Insurance Fund KEHC 5926 (KLR)***, citing ***Ahmednasir Abdikadir & Company Advocate vs National Bank of Kenya Ltd***:

"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."
18. Furthermore, a reading of Rule 11(1) reveals that the wording therein is discretionary as opposed to mandatory. The Rules states that the party who intends to object to the decision of the Taxing Officer **may** write to the Taxing Officer within 14 days.
19. Article 159(2)(d) of The Constitution mandates this Court to administer justice without undue regard to procedural technicalities. The Respondent's

insistence on a formal letter requesting reasons, when a Ruling is already attached to the Reference, is a classic technicality intended to defeat substantive justice.

20. The Respondent's reliance on the ***Fredrick Onyango Aoro case (supra)*** is misplaced. In that case, the applicant filed a reference against an assessment of specific items without any record of why the Taxing Officer ruled as they did. Here, there is a written Ruling. The defectiveness of that Ruling is the very ground of appeal. One does not ask the reasons for an omission, one appeals against an omission.
21. Therefore, I find that the Applicants have substantially complied with the law. The objection on this ground fails.
22. The Respondent's second ground of objection is *res judicata*. The Respondent argues that Reference offends the doctrine of *res judicata* because it raises the same issues that were raised before the Taxing Officer.
23. This argument is legally incoherent. Section 7 of the Civil Procedure Act, which codifies *res judicata*, bars a fresh suit regarding a matter that has been finally determined by a competent court. A Reference under the Advocates Act is not a fresh suit in that sense; it is an appellate mechanism. It is the statutory vehicle provided to challenge the decision of the Taxing Officer. If the Respondent's logic were to hold, no appeal could ever be filed in any court, because the respondent in the appeal would simply argue that the lower court had already determined the issue. The very purpose of a Reference is to determine if the Taxing Officer's decision on those issues was correct. It is a vertical challenge, not a horizontal parallel suit. This ground of objection is dismissed as meritless.

24. The Respondent also argues that the Applicants' claim regarding the need for accounting of funds from property sales is barred by the Limitation of Actions Act, alleging that the transactions occurred over 6 years ago. This ground fails the ***Mukisa Biscuit*** test for a Preliminary Objection for 2 reasons. Firstly, the date of the breach of duty, the date of knowledge of fraud or concealment, and the exact nature of the holding of funds are contested facts. Secondly, the Applicants are not filing a tort claim for damages in this Application. They are asserting an equitable right of set-off or a stay of taxation. They argue that an Advocate, as an officer of the Court, cannot utilise the Court's taxation process to demand fees while simultaneously withholding client funds.
25. Section 20 of the Limitation of Actions Act explicitly states that no period of limitation applies to an action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy. An Advocate holding client funds acts in a fiduciary capacity, akin to a trustee. Whether this exception applies requires factual inquiry, making it unsuitable for a Preliminary Objection.
26. Consequently, the Preliminary Objection dated 1 April 2025 is dismissed in its entirety with costs to the Applicants.

The Reference

27. Having cleared the procedural hurdles, I now address the merit of the Reference. The core question is whether the Taxing Officer erred in principle in her Ruling of 14 March 2025.
28. The law regarding the interference by the Court with the decision of a Taxing Officer is well settled. In ***Kipkorir, Titoo & Kiara Advocates v Deposit***

Protection Fund Board eKLR, the Court of Appeal held that a Judge will not interfere with the Taxing Officer's discretion on quantum unless there is an error of principle. However, where the dispute involves the validity of the retainer, the scope of the mandate, or jurisdictional bars, the High Court exercises a broader supervisory role to ensure the law was correctly applied.

29. The Applicants raise 2 fundamental errors in the Ruling: (i) the omission to address the accounting/Intermeddling issue; and, (ii) the erroneous finding on the Fee Agreement.

Failure to Address the Issue of Accounting

30. The Applicants' objection before the lower court was that the Bill of Costs was premature because the Respondent had sold 6 properties belonging to the estate of the Deceased for a total of Kshs 45,750,000/- and had failed to account for these proceeds. Specifically, the sales were as follows:

- | | | |
|-------|-------------------------------|--------------------------------|
| (i) | L.R. No. 7340/91 Githunguri | - Sold for Kshs. 9,450,000.00 |
| (ii) | L.R. No. 36/111/222 Eastleigh | - Sold for Kshs. 25,000,000.00 |
| (iii) | L.R. Githunguri/Githunguri/14 | - Sold for Kshs. 1,500,000.00 |
| (iv) | Plot No. 2 Kanjai Shop | - Sold for Kshs. 1,000,000.00 |
| (v) | L.R. Githunguri/Kajai/1158 | - Sold for Kshs. 2,400,000.00 |
| (vi) | L.R. Githunguri/Kimathi/861 | - Sold for Kshs. 6,400,000.00 |

31. The Applicants contend that the Respondent facilitated these sales without a Certificate of Confirmation of Grant, which is a criminal offence of intermeddling, under section 45 of the Law of Succession Act. Further, the Advocate retained the proceeds.

32. In the impugned Ruling, the Taxing Officer completely failed to address this ground. The Applicants submit that this omission violates Order 21 Rule 5 of

the Civil Procedure Rules, which mandates that a court state its decision on each separate issue framed.

33. I am persuaded by the Applicants' argument. The allegation that an Advocate is holding Kshs. 45.75 million of the client's money while demanding Kshs. 10.4 million in fees is a fundamental issue that goes to the root of the taxation. If the Advocate holds client funds, those funds must be set off against any fees due. It is inequitable to tax a Bill and issue a Certificate of Costs against a client who may actually be a net creditor to the Advocate.
34. Rule 13 of the Advocates (Accounts) Rules mandates strict accounting. By failing to make a finding on this issue, the Taxing Officer abdicated her duty. Silence on a core objection is an error of principle. A judicial officer must adjudicate on the issues presented. The failure to address this ground renders the Ruling defective.

The Validity of the Fee Agreement

35. The Applicants aver that there was a Fee Agreement of Kshs 2,500,000/=. They produced a letter dated 13th February 2012 from the Respondent, which purportedly stated: "*Agreed fees Kshs. 2,500,000.00*".
36. The Respondent argues that under Section 45 of the Advocates Act, a fee agreement must be in writing and signed by the client to be binding. Since the Applicants did not produce a document signed by themselves, the Respondent argues there was no valid agreement.
37. While Section 45(1) indeed requires the client's signature for the agreement to be enforced by the advocate against the client, the situation is different when the Advocate admits to a fee cap in writing. The doctrine of estoppel applies. If an Advocate writes to a client confirming that fees are

capped at Kshs 2.5 million, they are estopped from later turning around and billing Kshs 10 million under Schedule VI when it suits them.

38. In ***Ochieng' Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited [2007] KEHC 2677 (KLR)***, the Court emphasized that Advocates are bound by the fees they quote.
39. The letter dated 13 February 2012 was material evidence. The Applicants assert that the Respondent did not dispute the authenticity of the letter before the Taxing Officer. If the Taxing Officer found that no agreement existed solely because it was not signed by the client as required under section 45, she misdirected herself on the law and evidence and estoppel regarding the Advocate's own admissions. The record suggests that the Taxing Officer dismissed this ground without properly evaluating the evidentiary weight of the Respondent's own correspondence.
40. Based on the foregoing, the Ruling of 14 March 2025 is unsustainable and must be set aside. The matter must be remitted for a fresh hearing where these issues are interrogated substantively.
41. I, therefore, make the following orders:
- (i) The Respondent's Preliminary Objection dated 1 April 2025 is dismissed;
 - (ii) The Applicants' Chamber Summons dated 27 March 2025 is allowed;
 - (iii) The Ruling of Hon C. Nganga, Taxing Officer, delivered on 14 March 2025 is set aside in its entirety;
 - (iv) The Applicants' Grounds of Objection to Taxation dated 6 November 2024 are reinstated;
 - (v) The matter is remitted to the Taxing Officer for hearing and determination on the Grounds of Objection afresh.

(vi) The Respondent shall bear the costs of this Reference.

DATED AND DELIVERED AT NAIROBI THIS 28 DAY OF NOVEMBER 2025

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Applicants: Ms Moturi h/b Mr. Njuguna

For the Respondent: Mr. Nduati

Court Assistant: Lucy Mwangi

Ruling