Limo & Njoroge Advocates v Nairobi City Water & Sewerage Company Ltd (Environment and Land Miscellaneous Application E050 of 2024) [2025] KEELC 8499 (KLR) (2 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8499 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E050 OF 2024

MN KULLOW, J

DECEMBER 2, 2025

BETWEEN

LIMO & NJOROGE ADVOCATES ..... ADVOCATE

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LTD ..... CLIENT

(Being a Reference from the Duling of the Honourable Learned Taxing Master, Honourable T.E. Marienga (DR) dated 4th July 2024)

RULING

Introduction and Background

1. The Applicant/Advocate, has approached this Honourable Court vide a Chamber Summons dated 12th July 2024, brought under Rule 11(1) & (2) of the Advocates Remuneration Order, seeking the following reliefs;

   I. The decision of the Taxing officer contained in the Ruling dated 4th July 2024 in respect of items 1 and 22 in the Advocate- Client Bill of costs dated 8th March be set aside;

   II. The Advocate -Client Bill of Costs dated 8th March 2024 be remitted back to the Taxing Officer for taxation of items 1 and 22 thereof;

   III. In the alternative to prayer 2 above, the Honourable Court be pleased to tax items 1 and 22 of the Advocate-Client Bill of costs dated 8th March 2024 or make appropriate directions from the fresh taxation thereof; and

   IV. Costs of the Application be provided for.

2. The Reference is premised on the grounds contained in the Supporting Affidavit sworn by Fidelis M. Limo on 12th July 2024, wherein it is averred that the Taxing Master erred in principle in particular:

    a. She applied Paragraph 1(j) of Part A of the Schedule 6 of the Advocates (Remuneration) (amendment) Order,2014 and

    b. Failed to assess instruction fees under paragh1(C) of Part Schedule 6 of the Advocates (remuneration)(amendment) Order 2014 as read with Paragraph 1(b) thereof

3. Upon being served with the Reference, the Respondent/Client, through the firm of Robson Harris Advocates, filed a Replying Affidavit dated 12th September 2024, opposing the Reference. The Respondent contends that the Taxing Master properly exercised her discretion to adjust the instruction fee in line with the applicable law taking into consideration the nature of the case, its complexity and outcome.

4. The Advocates for the Parties agreed to canvass and dispose of the Reference by way of written submission. Consequently, and in this regard, the Honourable Court proceeded to and issued directions pertaining to the timelines for the filing and exchange of the Written Submissions.

5. For good measure and in compliance with the directions of the Court, the advocate/Applicant filed written submissions dated the 2nd April 2025, whilst the client/Respondent filed written submission dated the 4th June 2025.

Submissions by the Parties:

a. Applicant's Submissions:

6. The Advocate/Applicant, Limo & Njoroge Advocates, contends that the Taxing Officer's ruling dated 4th July 2024, which awarded KES 950,000 as instruction fees, represents a grave error of principle and a manifestly unjust undervaluation of the services rendered. The Applicant asserts that their fees ought to have been computed on the ascertainable value of the subject matter, namely KES 914,595,037.00, as indicated under Prayer 6 of the Petition in ELC Petition No. E023 of 2020.

7. They maintain that the matter was not purely constitutional but one involving substantial monetary claims, thus falling under Paragraph 1(c) read with Paragraph 1(b) of Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014, and not Paragraph 1(j) as erroneously applied.

8. The Advocate/Applicant submits that the Taxing Officer's discretion was improperly invoked, contrary to the guiding principle in Joreth Ltd. v Kigano & Associates [2002] eKLR, which held that "the value of the subject matter ought to be determined from the pleadings, judgment or settlement". The Applicant argues that since the monetary value was expressly pleaded and acknowledged in the judgment, the Taxing Officer was bound to use that figure as the basis for assessment, rather than exercising discretion applicable only where no value is ascertainable.

9. Relying on Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR, the Applicant emphasizes that discretion arises only after engaging with the statutory starting point being the pleadings, judgment, or settlement and cannot replace it. Further reliance is placed on Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR, which confirmed that failure to apply the correct schedule or to consider relevant factors constitutes an error in principle justifying the court's interference. Accordingly, the Applicant urges the Court to find that the Taxing Officer's misapplication of Paragraph 1(j) vitiated the entire taxation process.

10. The Applicant further argues that the instruction fees awarded were disproportionately low given the magnitude, complexity, and success of the representation. Citing George Arunga Sino T/A Jone Brooks Consultants Ltd. v Patrick J.O. & Geoffrey D.O. Yogo T/A Atieno, Yogo & Co. Advocates [2012] eKLR, counsel submits that "an advocate's fee is pegged on the amount he is instructed to pursue or defend, not on the outcome." They assert that having successfully defended a claim worth KES 914,595,037.00, their instruction fee, when computed under the proper paragraph, should amount to KES 13,918,925.56, rather than the "paltry" figure taxed.

11. Finally, invoking First American Bank of Kenya Ltd. v Shah & Others [2002] 1 EA 64 and Kenya Airports Authority v Otieno, Ragot & Co. Advocates (Petition No. E011 of 2023), the Advocate/Applicant urges the Court to find that the Taxing Officer's omission to consider the value of the subject matter was a fundamental misdirection. They therefore pray that the Court sets aside the ruling dated 4th July 2024, and either re-tax the Bill of Costs or remit it for fresh taxation before a different Taxing Officer, in line with the proper statutory framework and judicial precedent.

b. Respondent's Submissions

12. The Client/Respondent opposes the Reference and relies on its Replying Affidavit (Viola Odhiambo, 12th July 2024) and written submissions. The Respondent accepts that the Advocate was entitled to be paid for services rendered, but contends that the Taxing Master correctly applied Schedule 6(1)(j) of the Advocates (Remuneration) Order, 2014 in assessing the instruction fee. The Respondent stresses that the primary suit before the Environment & Land Court was essentially a constitutional/petition matter where the claimed monetary figures were either not determinative or incapable of precise valuation for purposes of taxation.

13. The Respondent submits that the pleaded aggregate of KES 914,595,037.00 relied upon by the Applicant is not a reliable or ascertainable subject value and, in any event, was effectively undermined by the trial judgment. Several heads of the claim were dismissed as non-starters (for example claims on movable assets and loss of livelihood) or rejected for lack of evidence (notably the claimed values for buildings and structures). In those circumstances the Taxing Master was entitled to decline to adopt the pleaded figure as the baseline and to exercise judicial discretion in fixing a fair instruction fee.

14. It is further submitted that the Taxing Master did not err in principle: she considered the pleadings, the judgment and all relevant circumstances (complexity, importance of the matter, conduct of the parties and directions by the trial judge) and properly exercised the discretion conferred by Schedule 6(1)(j). Reliance is placed on authorities which caution that the High Court will only interfere where a taxing officer has applied wrong principles or reached a result manifestly excessive or manifestly low see Peter Muthoka & another v Ochieng & 3 others [2019] eKLR and Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR.

15. The Respondent emphasizes that a mere figure in pleadings does not automatically translate into a subject value for taxation; a figure that is "plucked from the air" must not be allowed to dictate fees. The Respondent therefore cites Moronge & Company Advocates v Kenya Airports Authority [2014] eKLR and Otieno, Ragot & Co. v Kenya Airports Authority [2021] eKLR to show that where the pleaded value lacks documentary or evidential foundation the taxing officer must resort to her discretionary assessment. On the facts of this case, the Taxing Master's decision to fix the instruction fee at KES 950,000 (and to tax the Bill at KES 1,552,518.01) was a reasoned exercise of that discretion.

16. In conclusion, the Respondent prays that this Honourable Court dismiss the Advocate/Applicant's Reference as devoid of merit, find that no error of principle was committed, and uphold the Ruling

of 4th July 2024. The Respondent further asks for costs of the Reference to be awarded to the Client/ Respondent, and for any such costs to be taxed if not agreed

Issues for Determination

17. Having reviewed the Chamber Summons, as well as the Response thereto and upon considering the written submissions on the behalf of the Parties, I opine that the following issues are pertinent and thus worthy of determination by the Honourable Court;

    a. Whether this Court should interfere with the decision of the Taxing Master dated 4th July 2024, and the principles governing such interference.

    b. Whether the Taxing Master erred in principle by applying Paragraph 1(j) of Part A of Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014, instead of Paragraph 1(c) as read with 1(b) when assessing instruction fees.

    c. Whether the value of the subject matter (KES 914,595,037.00) was ascertainable from the pleadings, judgment, or settlement, or whether the Taxing Master properly exercised discretion under Schedule 6(1)(j) in its absence.

    d. Whether the Instruction Fee and Getting-Up Fee Were Manifestly Low or Excessive.

    e. What orders should issue, including whether to uphold, vary, or remit the taxation, and who should bear the costs of the Reference.

Analysis and Determination

Issue Number 1: Whether this Court should interfere with the decision of the Taxing Master dated 4th July 2024, and the principles governing such interference.

18. It is now settled law that a court will only interfere with the decision of a Taxing Master in very limited circumstances. The Taxing Officer exercises a judicial discretion, and such discretion must not be lightly disturbed unless it is shown that the decision was based on an error of principle, or that the fee awarded was manifestly excessive or manifestly low so as to amount to an injustice.

19. In Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR, the Court of Appeal underscored this principle, holding that: On a 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. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:

> " where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".(emphasis by Court)

20. Similarly, in Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR, the Court emphasized that matters of taxation fall squarely within the province of the Taxing Master, and that the High Court

must be slow to interfere unless the discretion was improperly exercised, resulting in misdirection or manifest injustice. The Court stated that:

> "It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them."

21. Further Odunga J. (as he then was) in Republic v Competition Authority of Kenya Ex parte Ukwala Supermarket Ltd & Another [2017] eKLR, where he outlined the controlling principles as follows:

> "The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are,
>
> 1. That 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;
> 2. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
> 3. If the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
> 4. It is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
> 5. The Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;
> 6. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
> 7. The mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of First American Bank of Kenya v Shah and Others [2002] 1 EA 64.

22. Guided by these authorities, this Court reaffirms that it does not sit on appeal over the Taxing Master's discretion. Its role is supervisory to correct an error of principle or a plainly unjust result, not to re-evaluate the entire taxation exercise.

23. The Applicant must therefore demonstrate, with specificity, that the Taxing Master misapplied the law for instance, by using the wrong paragraph of Schedule 6 or failed to consider material factors such as the nature and importance of the matter, complexity, and value involved.

24. Applying the above principles, this Court must first determine whether the Applicant has shown that the Taxing Master erred in principle, before it can proceed to evaluate the propriety of the paragraph applied (Issue No. 2) and the reasonableness of the fees awarded (Issue No. 4).

Issue Number 2: Whether the Taxing Master erred in principle by applying Paragraph 1(j) of Part A of Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014, instead of Paragraph 1(c) as read with 1(b) when assessing instruction fees.

25. The Applicant's principal contention is that the Taxing Master erred in principle by applying Paragraph 1(j) of Part A of Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014, which governs matters not specifically provided for, rather than Paragraph 1(c) read together with Paragraph 1(b), which applies where the value of the subject matter is ascertainable from the pleadings, judgment, or settlement.

26. The Taxing Master's ruling of 4th July 2024 reveals that she treated the underlying cause ELC Petition No. E023 of 2020 as a constitutional petition without an ascertainable value, and thus resorted to Paragraph 1(j) to assess a "fair and reasonable" instruction fee.

27. However, the Applicant maintains that the Petition expressly quantified the value of the subject matter at KES 914,595,037.00 under Prayer 6 of the Petition and that the Taxing Master was therefore bound to compute the instruction fee based on Paragraph 1(c) (as read with 1(b)) which provides for fees dependent on the value of the claim.

28. In the landmark case of Joreth Ltd. v Kigano & Associates [2002] eKLR, the Court of Appeal set out the guiding principle for determining the value of the subject matter in taxation, stating: "The value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if any), but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances."

29. The above principle was reinforced in Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR, where the Court emphasized that the starting point is always the pleadings, judgment or settlement. Only where no specific value is ascertainable may the Taxing Master invoke discretion under Paragraph 1(j). The Court warned that discretion must not replace statutory parameters, but operate in aid of them.

30. The same approach was adopted in First American Bank of Kenya Ltd v Shah & Others [2002] 1 EA 64, where Ringera J. (as he then was) stated that an error of principle occurs when a Taxing Officer fails to apply the correct schedule, or ignores an ascertainable subject value that should have guided the computation. The Applicant's argument therefore hinges on whether the KES 914,595,037.00 figure pleaded in the Petition was a genuine, ascertainable value tied to the property or rights in issue, or whether it was speculative and unsupported, thus falling outside the application of Paragraph 1(c).

31. The Respondent on the other hand contends that the pleaded sum was not an ascertainable value, as several heads of claim were rejected or unproven in the judgment, and thus the Taxing Master was justified in resorting to Paragraph 1(j). This contention aligns with Moronge & Company Advocates

v Kenya Airports Authority [2014] eKLR, where the Court held that a figure "plucked from the air" cannot form the basis of assessing instruction fees.

32. In light of the above authorities, it is clear that the correctness of the paragraph applied depends on whether the subject value was truly ascertainable from the record. If the value was indeed ascertainable, the Taxing Master's reliance on Paragraph 1(j) constituted an error of principle warranting interference. Conversely, if the value was speculative or unproven, her decision to apply Paragraph 1(j) was proper. Accordingly, the determination of this issue must be read together with Issue No. 3 on whether the value of KES 914,595,037.00 was ascertainable from the pleadings, judgment or settlement as it directly influences whether an error of principle occurred.

Issue Number 3: Whether the value of the subject matter (KES 914,595,037.00) was ascertainable from the pleadings, judgment, or settlement, or whether the Taxing Master properly exercised discretion under Schedule 6(1)(j) in its absence.

33. The Applicant's central argument is that the value of the subject matter KES 914,595,037.00 was expressly pleaded in ELC Petition No. E023 of 2020 under Prayer 6, and therefore, the Taxing Master was bound to assess the instruction fee under Paragraph 1(c) as read with 1(b) of Part A, Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014, which ties fees to the ascertainable monetary value of the claim.

34. Conversely, the Taxing Master, in her Ruling dated 4th July 2024, found that the underlying petition was "of a declaratory nature which falls under Schedule 6(j)" (para. 10). She further stated that: "From the Petition, no monetary value was claimed as the prayers that the Petitioner was seeking were declaratory in nature."Taxing Master's Ruling, para. 11).

35. This finding effectively meant that the Taxing Master treated the petition as a constitutional matter devoid of a quantifiable value, thereby invoking Schedule 6(1)(j) which applies where the subject matter's value is not ascertainable.

36. The question for this Court, therefore, is whether that conclusion was supported by the pleadings and record. The Applicant has contended that the petition did in fact quantify its claims for compensation based on land value, buildings, movable assets, and loss of livelihood (as noted at para. 2 of the Taxing Ruling itself). This acknowledgment in the Ruling shows that the Petition contained monetary components, even though the Taxing Master ultimately dismissed them as not determinative.

37. The Court of Appeal in Joreth Ltd. v Kigano & Associates [2002] eKLR provided the authoritative standard: that the starting point must always be the pleadings, judgment or settlement, and discretion can only be exercised where no such value can be ascertained.

38. Applying these authorities, the key inquiry is whether the pleaded amount of KES 914,595,037.00 had a factual and evidential foundation or was merely speculative. As the Taxing Master observed, the underlying judgment dismissed or rejected several heads of claim for lack of proof (Taxing Master's Ruling para. 12–15). She further noted that the claim was predominantly a public law petition, distinct from private law claims involving monetary compensation or profit computation (Taxing Master's Ruling, Para. 15). However, from the pleadings, there is a claim for monetary compensation.

39. In the present case, the Taxing Master explicitly found that the Petition's prayers were declaratory and that "no monetary value was claimed" within the meaning of the Remuneration Order (Taxing Master's Ruling, para. 11). While that phrasing may not have been perfectly precise (since monetary figures were pleaded), her reasoning was that those figures were not judicially ascertained or awarded, hence non-determinative for purposes of taxation.

40. This Court therefore finds that although the Petition mentioned the figure of KES 914,595,037.00, the value of the subject the same could judicially be ascertainable within the meaning of Joreth and Muthoka because the claim remained unproven and declaratory in nature. Consequently, the Taxing Master was entitled to exercise discretion under Schedule 6(1)(j).

41. It follows that the application of Paragraph 1(j) as opposed to Paragraph 1(c) did constitute an error of principle, since the subject matter was concretely valued in the pleadings and judgment. The discretion exercised was thus outside the bounds of the law, provided it did not merit the test of reasonableness and proportionality, which will be examined under Issue No. 4.

Issue Number 4: Whether the Instruction Fee and Getting-Up Fee Were Manifestly Low or Excessive

42. The Advocate/Applicant contends that the instruction fee of KES 950,000, as taxed by the Taxing Master, was manifestly low and failed to reflect the magnitude, complexity, and value of the subject matter, which they pegged at KES 914,595,037.00. It was further argued that, had the proper schedule Paragraph 1(c) as read with Paragraph 1(b) of Schedule 6 been applied, the fee would have amounted to KES 13,918,925.56.

43. Conversely, the Respondent/Client maintains that the amount awarded was reasonable and proportionate in view of the character of the underlying proceedings a constitutional petition whose primary reliefs were declaratory and not monetary. The Respondent relies on the reasoning that the monetary values pleaded were speculative and unproven, hence incapable of forming the basis for taxation.

44. From the Ruling and Reasons for Taxation dated 4th July 2024, it is clear that the Taxing Master took into account the nature of the Petition, the pleadings, the judgment, the complexity of the matter, and the work done. She expressly held that: "The prayers sought in the Petition were of a declaratory nature which fall under Schedule 6(j) of the Advocates (Remuneration) Order 2014... The Court must ensure that the Advocate's instruction fee represents reasonable compensation for professional work done."

45. The Taxing Master further considered the Premchand Raichand principles, emphasizing that costs should not rise to a level that impedes access to justice, nor fall so low as to amount to an injustice to counsel. She found that, though the matter required diligence and research, it remained a public law claim, distinct from private commercial disputes, and therefore the instruction fee of KES 950,000 was appropriate and fair.

46. The law is settled that a court will only interfere with a taxed amount where it is shown to be manifestly excessive or manifestly low, or where an error of principle has occurred see Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR and First American Bank of Kenya Ltd v Shah & Others [2002] 1 EA 64. The Applicant has not demonstrated that the fee awarded fell outside the range of judicial discretion or resulted in a miscarriage of justice.

47. Regarding Item 22 (Getting-Up Fees), the Taxing Master correctly noted that the Advocates (Remuneration) Order, 2014 provides that the getting-up fee is one-third of the instruction fee where a matter proceeds to hearing. The Ruling expressly stated: "This item relates to getting-up fees. The ARO 2014 provides for the same at one-third of the instruction fees. This is justified as the matter proceeded for trial. The item is taxed as one-third of KES 950,000."

48. The resultant getting-up fee of KES 316,666.67 was therefore a direct mathematical application of the prescribed formula, and no element of discretion or error of principle arises. The Applicant's challenge to this item is consequently without merit.

49. Having examined the totality of the taxation, this Court finds no evidence that the instruction or getting-up fees were manifestly low, capriciously assessed, or based on irrelevant considerations. On the contrary, the Taxing Master's reasoning was consistent with law, precedent, and the factual context of the Petition.

50. Accordingly, the Court finds that both Item 1 (Instruction Fees) and Item 22 (Getting-Up Fees) were properly taxed, and no grounds have been shown to warrant interference.

Conclusion and Holding

51. Having carefully reviewed the Reference, the Taxing Master's Ruling, the pleadings, and the submissions by both parties, this Court finds there were errors of principle on the part of the Taxing Master that would warrant interference. The instruction fee of KES 950,000 and getting-up fee of KES 316,666.67 were not reasonable under Schedule 6(j) of the Advocates (Remuneration) (Amendment) Order, 2014.

52. Consequently, this Reference dated 12th July 2024 is merited and is hereby directed to be returned for taxation by a new taxation master.

53. Each party shall bear its own costs of this Reference.

It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF DECEMBER, 2025.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Ms. Cheptanui for the Applicant

Ms. Odongo for the Respondent

Philomena W. _____ Court Assistant