REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL MISCELLANEOUS APPLICATION NO. E038 OF 2024

MURI MWANIKI & WAMITI ADVOCATES.....APPLICANT

VERSUS

SANLAM GENERAL INSURANCE LIMITED..... RESPONDENT

RULING

1. This Ruling in in respect of the Chamber Summons dated 21.2.2025. The Bill of Costs dated 16.5.2024 is described to arise from Nyeri CMCC No. 626 of 2007 in which the Applicant as advocate represented the Respondent as client.
2. The Applicant is supported by Grounds on its face and the affidavit of Martin G Mwaniki and seeks an Order that the Ruling of the Taxing Master dated 12.2.2025 be set aside. The Honourable Deputy Registrar taxed the bill at Kshs. 31,842/=.
3. The Applicant contended that the Taxing Master erred in principle in the assessment of instruction fees. That the subject matter was worthy Kshs. 1,791,000,000/- which ought to have been considered instead of Kshs. 895,350,000/-.
4. It was further averred that the Honourable Taxing Master erred in misdirecting herself on the applicable remuneration

order which was Advocates Remuneration Orders for 2006, 2009 and 2014 by only applying the 2006 Order.

5. The Applicant also contended that the taxing master erred in failing to consider that the Applicant had elected to charge the bill of costs under paragraph 5 part II of the Remuneration Order 2006.
6. The taxing master was also faulted for working out the instruction fees based on a party and party bill when this was an advocate client bill and in so doing failed to increase the instruction fees by 50%.
7. The Respondent filed a Replying Affidavit sworn by Mercy Kaima on 18.8.2025. It was deposed that the taxing master correctly established the instruction fees and taxed the bill on scale and there is no justified ground to set it aside.

Submissions

8. The Applicant filed submissions dated 4.6.2025. It was submitted that the taxing master erroneously solely applied the Remuneration Order for 2006 when the Order for 2006, 2009 and 2014 ought to have been applied.
9. It was also submitted that the Applicant had made an election under schedule V paragraph 22 which the taxing master ignored. They cited **Nyamongo & Nyamongo Advocates v Protex (K) EPZ Limited** Machakos HCMCA No. 176 of 2006.
10. The Applicant also submitted that the taxing master erred in principle by taxing off the disallowed items when they had

been proved and placed before her. Reliance was placed on the cases of **Kipkorir, Titoo & Kiara Advocates vrs June Nduta Kinyua & Another (2012) eKLR**.

11. It was submitted that the instructions fees ought to have been increased by one half for the advocate client bill of costs. Reliance was placed on **Central Bank of Kenya v Makhecha & Co. Advocates** (2019) eKLR.
12. On the part of the Respondent, they filed submissions dated 28.8.2025. It was submitted that the bill of costs raised astronomically exaggerated figures of Ksh. 249,976.88 when the lower court case was withdrawn and the decretal sum therein was Ksh. 115,810/=.
13. Based on the above, it was submitted that the taxing master correctly taxed the bill of cost and reliance was placed on **KANU National Elections Board & 2 Others v Salah Yakubu Farah (2018) eKLR.**

Analysis

14. The court has perused the Application, responses thereto and the submissions filed by the parties in support and opposition to their respective positions.
15. The issue is whether the learned taxing officer erred in her taxation of the Applicant's Bill of Costs dated 16.5.2024.
16. 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 were laid down in the case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**., as follows:

(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 practice 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.

17. The position was reiterated in **Karen & Associates Advocates vs. Caroline Wangari Njoroge [2019] eKLR**, in which the Court cited the decision of the Court in **Ochieng, Onyango, Kibet and Ohaga Advocates vs. Adopt Light Ltd. HC Misc 729 of 2006** where the court stated that;

"…The taxing master must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a

brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject…"

18. In the same case, it was held that:

> **"The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in line to the material presented before court."**

19. Therefore, it is settled that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job.

20. The court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every

variable degree, the value of the suit property may be taken into account.

21. Similarly, the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

22. On instruction fees in the case of **Joreth Limited vs. Kigano & Associates [2002] 1 EA 92 at 99** the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement 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 the 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. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. 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. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.

23. While remitting the matter for fresh taxation the learned Judges in the Joreth (supra) gave the following guidelines:

> **1 the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;**
> **2 the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;**
> **3 the taxation of advocates' instruction fees should avoid any prospect of unjust**

enrichment, for any particular party or parties;
4 so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
5 objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
6 where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
7 where responsibility borne by advocates is taken into account, its nature is to be specified;
8 where novelty is taken into account, its nature is to be clarified;
9 where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form.

24. I wish to add that the Taxing Officer ought to disclose what informed the decision to tax the costs in one way as opposed to another. I therefore agree with the decision in **Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna (supra)** that:

> "… It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant's firm position is that it was an exercise of lawful discretion which therefore, this court

should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria…"

25. The court proceeded thus:

> **"…it was necessary to specify clearly and candidly how she exercised her discretion… it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs…complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction…if novelty is involved in the main proceedings the nature of it must be identified and set out in a conscientious mode….if the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming, the details of such a situation must be set out in a clear manner…"**

26. In the ruling the learned Taxing Officer applied Schedule VI of the Advocate's Remuneration Order 2006 as applicable to matters in the subordinate courts. The Applicant's case is that

by the Notice of Election dated 16.5.2024, the Applicant elected to charge under Schedule V pat II of the Order. I note that the instruction fees projected by the Applicant was Ksh. 37,800/= and the court capped the instruction fees at Ksh. 25,200/=.

27. Under the format proposed by the Applicant, the instruction fees under part II was stipulated as follow:

> Such fee for instructions as, having regard to the care and labour required the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances of the case, may be fair and reasonable, but so that due allowances shall be given in the instruction fee for other charges raised under this schedule.

28. The Applicant's submission is that the taxing officer erred in applying instruction fees based on Schedule VII as opposed to Schedule V as elected. As was held in **First American Bank of Kenya vs. Shah and Others (supra),** the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it. In **Opa Pharmacy Ltd vs. Howse & Mcgeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233**, it was held:

"Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave no reason whatsoever for doubling the instruction fee. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The failure to give any reason for the choice, surely, must, therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."

29. The principles guiding taxation were similarly reiterated by the Court of Appeal of Uganda in **Makula International vs. Cardinal Nsubuga & Another [1982] HCB 11** where the Court pronounced itself as follows:

> "The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or

decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it."

30. In the case of **Paul Ssemogerere & Olum vs. Attorney General - Civil Application No.5 of 2001** [unreported] the Court held:

> **"In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that**

> **taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference."**

31. Further, in **Danson Mutuku Muema vs. Julius Muthoka Muema & Others Machakos High Court Civil Appeal No. 6 of 1991** which was cited in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra) Mwera, J (as he then was) held that whereas the Court was entirely right to give the costs within its discretion, the amount allowed being ten times the sum provided for, the Court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The Court further found that since the Taxing Officer was bound to give reasons for exercising his discretion and as none were given in his ruling save to say that he simply exercised his discretion, it was just and fair to set aside the sum he allowed.

32. All these authorities place the interference of the Judge on matters of taxing as an exception and not the general rule. In this case, I note that the taxing master applied instruction fees based on Schedule VII of the Advocates Remuneration Order. The subject matter arose in 2007 and the case was withdrawn. The subject matter was Ksh. 115,810/=.

33. On election under paragraph 22 of Schedule V, a wider discretion was granted upon the taxing master to determine instruction fees based on the care and labour required the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances of the case.

34. Considering the care and labour required the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties and complexity of the matter, I have difficulty agreeing with the Applicant that in any case the instruction fees awarded of Ksh. 25,200/= should be increased. It is in content that the suit was withdrawn.

35. Even though the case of the Applicant was that Schedule VII was used instead of Schedule V, the fact remains that the amount awarded under instruction fees of Ksh. 25,200/= was reasonable and a fair estimate of the fees. The only basis upon which I fault the taxing master is the failure to increase the fees by one half. The Applicant's case was the Ksh. 25,200/= increased by half would give fees of Ksh. 37,580/= and which I award.

36. On the disbursements. It was upon the Applicant to establish how the disbursements arose. The taxing master had

no obligation to give disbursements in relation to copying, printing, drafting and perusing pleadings and letters; or emails when the copies of the pleadings and letters, or emails said to have been drafted, printed copied or perused were not adduced at the time of filing the bill of costs. I therefore find no basis for faulting the taxing master in this regard. Items 2-54 were in my view not supported. In **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna & 6 Others (2006) eKLR** Ojwang, J (as he then was) expressed himself *inter alia* as follows:

> **" ...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved...Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for...The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious**

> **mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs…"**

37. The Reference succeeds on instruction fees only. The Ruling of the taxing master on the items other than the instruction fees is upheld.

Determination

38. In the upshot, I issue the following orders-

(a) The Ruling of the Taxing Master dated 12.2.2025 on instruction fees is set aside and substituted with instructions fees of Kshs. 37,800/=.

(b) Each party shall bear their own costs.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **17th** day of **December, 2025**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Waure for the Applicant

No appearance for the Respondent

Court Assistant – Michael