

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC MISC. CIVIL APPLICATION NO. E049 OF 2024**

**IN THE MATTER OF A REFERENCE FROM THE DECISION OF THE**  
**TAXING OFFICER HON. MAUREEN NYIGEI DELIVERED ON 3<sup>RD</sup>**  
**JULY 2025 IN THE ADVOCATE/CLIENT BILL OF COSTS**

**BETWEEN**

**MWAMU AND COMPANY**  
**ADVOCATES.....APPLICANT/ADVOCATE**

**-VERSUS-**

**CHRISTOPHER**  
**OLANG.....RESPONDENT/CLIENT**

Arising from the services rendered by the Applicant to the  
Respondent in

**KISUMU CMC ELC NO. E029 OF 2021**

**CHRISTOPHER OLANG.....**  
**.....PLAINTIFF**

**-VERSUS-**

**YONA ORAWO OBUYA.....**  
**DEFENDANT**

**RULING**

**Background**

The Applicant filed a suit on behalf of the Respondent against one Yona Orawo Obuya (hereinafter referred to as “the Defendant in the primary suit”) through a plaint dated 16<sup>th</sup> February 2021 in Kisumu CMC ELC No. E029 of 2021 seeking a permanent injunction

restraining the Defendant in the primary suit from encroaching, trespassing, or dealing in any way whatsoever with all that parcel of land known as Title No. Kisumu/Korando/21(hereinafter referred to as “the suit property”), and an order of eviction of the Defendant in the primary suit from the suit property. The Respondent’s case against the Defendant in the primary suit was that the Defendant, who owned an adjacent parcel of land, Title No. Kisumu/Korando/22 had encroached on the suit property. The Defendant in the primary suit filed a defence in which he denied the Respondent’s claim in its entirety. At the trial of the primary suit, the Respondent gave evidence and closed his case, while the Defendant did not give evidence at the trial. In a judgment delivered on 15<sup>th</sup> May 2023 in the primary suit, the court entered judgment for the Respondent against the Defendant in the primary suit with costs. The Respondent filed a party and party bill of costs for taxation against the Defendant in the primary suit. The party and party bill of costs from the ruling delivered on 30<sup>th</sup> July 2024 was not opposed and was taxed by the taxing officer Hon. K.Cheruiyot SPM at Kshs. 206,990/-.

The Applicant and the Respondent disagreed on the fees payable to the Applicant for the services rendered to the Respondent in the primary suit. On 7<sup>th</sup> November 2024, the Applicant filed its advocate and client bill of costs dated 7<sup>th</sup> October 2024 for taxation in this miscellaneous cause. The bill of costs, which had 29 items, was drawn in the sum of Kshs. 656,890/- of which the instruction fee (Item 1) was charged in the sum of Kshs. 600,000/-. Apart from the instruction fees, the other items in the bill of costs consisted mainly of service, preparation of the affidavit of service, court attendance, and disbursements.

In her ruling delivered on 3<sup>rd</sup> July 2025, which is the subject of this reference, the taxing officer taxed the Applicant's bill of costs at Kshs. 168,132/- from which she deducted Kshs. 127,300/- she found to have been paid by the Respondent, leaving a balance of Kshs. 40,832/- as the amount due and payable by the Respondent to the Applicant. The taxing officer taxed the instruction fees at Kshs. 100,000/-. The taxing officer noted that there was no specific amount claimed by the Respondent against the Defendant in the primary suit, but appreciated the fact that there were several court attendances before

the suit was ultimately heard and determined. The taxing officer taxed all the fees for service at Kshs. 1,400/- since the Applicant did not indicate the actual amount incurred. Court attendances for mention were taxed at Kshs. 1,400/-. The amounts claimed for disbursements were taxed in accordance with the actual payments made by the Applicant, according to the court record.

### **The reference**

The Applicant was aggrieved with the said taxation and preferred this reference. In its Chamber Summons application dated 14<sup>th</sup> July 2025, the Applicant has challenged only the taxation of the instruction fees. The Applicant has urged the court to set aside the same and re-tax it itself or remit the bill of costs for a fresh taxation before a different taxing officer. The Applicant contended that the taxing officer erred in her taxation of the instruction fees by failing to consider the complexity of the primary suit and the time spent by the advocate in preparing the pleadings. The Applicant contended further that the taxing officer failed to apply the principle set in Schedule 6 Part B of the Advocates Remuneration Order that requires instruction fees as between an advocate and client to be increased by half. The

Applicant averred that the party and party bill of costs in the primary suit was taxed at Kshs. 206,990/-. The Applicant averred that its bill of costs should have been taxed at Kshs. 310,485/- in accordance with Schedule 6 Part B of the Advocates Remuneration Order.

The Applicant's application was opposed by the Respondent through a replying affidavit sworn on 16<sup>th</sup> September 2025. The Respondent averred that the Applicant's bill of costs was taxed at Kshs. 168,132/- and not at Kshs. 40,832/- as claimed by the Applicant. The Respondent averred that the contention by the Applicant that the party and party costs should be increased by half while assessing the advocate and client bill of costs without interrogating the bill was not sound in law. The Respondent averred that the subject matter of the primary suit was a piece of land measuring 1/16 of a hectare valued at less than Kshs. 500,000/-. The Respondent averred that the taxing officer applied the correct principles of taxation while taxing the Applicant's bill of costs, and as such, there is no need to disturb her ruling.

The court did not direct the parties to file written submissions. However, the Applicant filed written submissions dated 4<sup>th</sup> September

2025 and also made oral submissions on 24<sup>th</sup> September 2015 when the application came up for hearing. The Respondent neither filed submissions nor appeared in court at the hearing of the application. In his oral submissions, the Applicant's advocate told the court that the Applicant was contesting the taxation of the whole bill of costs.

### **Analysis and determination**

In Kipkorir, Tito & Kiara Advocates v. Deposit Protection Fund Board [2005] eKLR, the court stated as follows:

**“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.”**

In Republic v. Kenyatta University & Another Ex parte Wellington Kihato Wamburu [2018] eKLR, the court cited with approval the Ugandan Supreme Court case of Bank of Uganda v. Banco Arabe Espanol SC Civil Application No. 23 of 1999, where the court stated that:

**“Save in exceptional circumstances, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is**

generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

In Kamunyori & Company Advocates v. Development Bank of Kenya Limited Civil Appeal No. 206 of 2006[2015]eKLR, the court stated as follows:

**".. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error**

**of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instruction fee is arrived at on the wrong principles, it will be set aside"**

In Joreth Limited v Kigano & Associates [2002]eKLR, the court stated that:

**"C.K. Njai Esq. had declined to take into account the valuation letters proffered by Mr. Kigano to enable him to assess the capital value of the suit premises for the purposes of assessing the instruction fee. He said:**

**"Under item No. 1, the applicant charges Shs.13,500,000/=. In arriving at this amount, he has estimated the value of the suit land at Shs. 1 billion. Two "opinions of value" have been tendered giving the average value of suit land as 1.2 Billion. These valuations or opinions as they are referred to are not (in the) pleadings. They cannot be relied on here. For a money value the subject matter of a suit to be the basis of assessing instruction fees, that value has to be ascertainable from the pleadings, judgment, or settlement. (See Schedule VIA1)."...**

**....In our view C.K. Njai quite correctly rejected the "opinions of value" as proffered by Mr. Kigano from the bar. These opinions are not evidence. In any event these relate to properties known as L.R. Nos. 4920/1 and 4921/1 as well as L.R. Nos. 4920 and 4921. The letter of 21st July, 1998 addressed to Mr. Kigano by Mr. R.K. Lang'at is really not a valuation..."**

**...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...**

**...What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle."**

In Republic v. Minister of Agriculture & 2 others, Ex parte Samuel Muchiri W Njuguna & 6 others [2006] eKLR where the court stated that:

**“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.”**

In Supreme Court Petition No. E011 of 2023, Kenya Airports Authority v. Otieno Ragot & Company Advocates, the Supreme Court stated as follows in paragraphs 63, 64, 66, 67 and 68 of the judgment:

**“[63] Schedule VI Part B relates to Advocate-Client costs, that is, it provides for the manner in which advocates costs/fees should be assessed/taxed. Part B stipulates that -**

***“B-ADVOCATE AND CLIENT COSTS***

***As between advocate and client the minimum fee shall be -***

***(a) the fees prescribed in A above, increased by one-half; or***

***(b) the fees ordered by the court, increased by one-half; or***

***(c) the fees agreed by the parties under paragraph 57 of this order increased by one-half; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.”***

**[64] Equally, our consideration of the interpretation of Part B of Schedule VI will be confined to the issue of assessment of instruction fees thereunder. More specifically, how such instruction fees should be computed where the Party-Party costs have been taxed/assessed under Part A and a certificate of costs/taxation issued thereto. Majority of the decisions of the superior courts below have interpreted Part B as a mathematical formula which should be applied to the taxed Party-Party costs under Part A of Schedule VI. Indeed, the impugned majority judgment of the Court of Appeal is categorical that once instruction fees in PartyParty costs in a particular suit are assessed/taxed under Part A, and a certificate of costs to that effect is issued, the assessment of**

instruction fees in Advocate-Client costs in the same suit simply requires the application of the formula stipulated under Part B, that is, the fees, in this case the instruction fees, taxed or ascertained under Part A increased by one-half. Besides, the impugned majority judgment found that where Party-Party costs are taxed under Part A, the Taxing Officer is devoid of any discretionary power when it comes to the assessment of instruction fees in Advocate-Client Bill of Costs.

[66] Looking at Part B, which provides in part that the minimum fees as between an advocate and client shall be the fees prescribed in Part A increased by one-half, it is clear that in assessing Advocate-Client costs/fees under Part B, including instruction fees therein, the Taxing Officer is required to take into account Part A. As to whether this means that such a Taxing Officer is simply to increase the instruction fees determined/ascertained in Part A by one-half or 50%, we are not persuaded in the least. This is because Rule 16 of the Advocates Remuneration Order provides as follows:

***“16. Discretion of a Taxing Officer***

***Notwithstanding anything contained in this Order, on every taxation the Taxing Officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of***

***justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the to have been incurred or increased through over caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.” [Emphasis added]***

**[67] Rule 16 herein above should be read together with Section 2 of the Advocates Act, which interprets the word costs as follows:**

***“Costs’ includes fees, charges, disbursements, expenses and remuneration; ...”***

**It follows that contrary to the impugned majority judgment, a Taxing Officer is clothed with discretion when determining/assessing instruction fees even where the Party-Party costs have been taxed. This is evident in the phrase “on every taxation the Taxing Officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party...” The said position is further buttressed by the marginal note to the Rule 11 which makes reference to, “Discretion of a Taxing Officer”.**

**[68] The Black’s Law Dictionary, 8th Ed. (2004) p. 1406 defines judicial discretion as:**

***“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”***

**Bearing the above in mind, we find that the proper interpretation of Schedule VI Part B is that in assessing fees thereunder, including instruction fees, a Taxing Officer is required to exercise his/her discretion guided by the prescribed scale of fees in Part A. To our minds, that does not mean, as the impugned majority judgment found, that a Taxing Officer is simply to apply the mathematical formula to the instruction fees ascertained in the taxed Party-Party costs. Failure to evaluate a disputed item under taxation and determine it judiciously is contrary to the clear provisions of Rule 16 of the Advocates Remuneration Order. Besides, a Taxing Officer being a judicial officer exercising a judicial mandate cannot be said to be performing such mandate mechanically or merely as a formality.”**

I have considered the Applicant’s application together with the affidavit filed in support thereof. I have also considered the Respondent’s replying affidavit filed in opposition to the application. Finally, I have considered the submissions by the Applicant, both written and oral. The burden was on the Applicant to satisfy this

court that while taxing the Applicant's bill of costs, the taxing officer made an error of principle warranting interference by this court. The Appellant claimed that the taxing officer erred by failing to increase the costs that were awarded to the Respondent in the taxation of the party and party costs in the primary suit by half while assessing the Applicant's costs. I find that all the authorities relied on by the Applicant in support of its argument on this issue are not reflective of the current position of the law. The Supreme Court settled the law on this issue on 2<sup>nd</sup> August 2024 in Petition No. E011 of 2023, Kenya Airports Authority v. Otieno Ragot & Company Advocates. The Supreme Court held that while taxing the advocate and client bill of costs under Part B of Schedule 6 of the Advocates Remuneration Order, the taxing officer is required to exercise his/her discretion guided by the fees prescribed in Part A of the Schedule. The court stated that the taxing officer, while undertaking that exercise, is not expected to simply add ½ to the fees ascertained in the taxation of the party and party costs as argued herein by the Applicant. What the taxing officer was supposed to do was to tax the itemised advocate and client bill of costs that was filed by the Applicant under Part A of

Schedule 7 (not Schedule 6 as wrongly argued by the Applicant) of the Advocates Remuneration Order. After she had ascertained the amount payable under Part A, she should have increased it by 50% as provided in Part B of Schedule 7 of the Advocates Remuneration Order. She was not supposed to simply take the party and party costs that was taxed at Kshs. 206,990/- and increase it by 50% to arrive at the advocate and client costs payable to the Applicant as contended by the Applicant. The error committed in this case by the taxing officer is that after she assessed the fees payable to the Applicant under Part A of the Advocates Remuneration Order to be Kshs. 138,700/-, the taxing officer failed to increase the same by 50% under Part B of Schedule 7 of the Advocates Remuneration Order. By failing to increase the fees assessed under Part A by 50%, the taxing officer treated the Applicant's bill of costs as if it were a party and party bill of costs, which is an error of principle.

I find no merit in the Applicant's contention that the sum of Kshs. 100,000/-, which was awarded to the Applicant as instruction fees, was inadequate and was not a fair compensation for the professional services rendered, having regard to the complexity of the primary

suit and the time and labour expended in the matter. From the evidence on record, the primary suit was a straightforward trespass claim in which only one witness, the Respondent herein, gave evidence. There was nothing complex, and no skill or knowledge out of the ordinary was required. As observed by the taxing officer, no specific amount was claimed in the suit, and the value of the suit property on which the Defendant in the primary suit had encroached was not given. I am not persuaded that an award of instruction fees of Kshs. 100,00/- in a suit of that nature can be said to be manifestly low as to amount to an error of principle.

The Applicant also took issue with the sum of Kshs. 127,300/-, which the taxing officer found to have been paid by the Respondent to the Applicant. I am unable to fault the taxing officer on that finding. As mentioned earlier, the primary suit was filed through a plaint dated 16<sup>th</sup> February 2021, judgment was entered on 15<sup>th</sup> May 2023 and a ruling on the taxation of the party and party bill of costs was delivered on 30<sup>th</sup> July 2024. This means that the Applicant acted for the Respondent in the primary suit between February 2021 and July 2024. During the taxation of the Applicant's bill of costs, the

Respondent produced a total of 9 receipts for payments made to the Applicant between 20<sup>th</sup> January 2021 and 15<sup>th</sup> October 2023. The total amount paid was Kshs. 127,300/-. The payments were for the services rendered by the Applicant to the Respondent in an ELC suit. The Applicant argued that some of the payments were not related to the primary suit. The burden was on the Applicant to prove that, apart from the primary suit, there were other suits in which it was acting for the Respondent at the material time. The Applicant did not discharge this burden. I therefore find no reason to disturb the finding by the taxing officer that the Respondent had paid to the Applicant a deposit of Kshs. 127,300/- on account of legal fees for which he was entitled to a credit.

From the foregoing, it is my finding that the taxing officer made only one error of principle, namely, failing to increase the fees found due to the Applicant under Part A of Schedule 7 of the Advocates Remuneration Order by 50% as provided under Part B of the same schedule.

In Kipkorir Titoo & Kiara Advocates v. Deposit Protection Fund Board[2005]1KLR528, the court stated as follows:

**“And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - D'Sonza v Ferrao [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires.”**

In First American Bank of Kenya Ltd v. Gulab P Shah & Others (2002)1 E.A. 61, the court stated that:

**“I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”**

I am of the view that the error committed by the taxing officer can be corrected by the court without usurping the powers of the taxing officer, which had already been exercised. The taxing officer assessed the fees payable to the Applicant under Schedule 7 Part A of the Advocates Remuneration Order to be Kshs. 138,000/-. The taxing officer was supposed to increase this amount by 50% under Schedule

7 Part B of the Advocates Remuneration Order. That increase brings the total fees payable to the Applicant to Kshs. 207,000/-. To this, the taxing officer was supposed to add 16% VAT in the sum of Kshs. 33,120/-. The total legal fees that was payable to the Applicant was Kshs. 240,120/- exclusive of disbursements. The disbursements amounted to Kshs. 7240/-. The total legal fees, together with disbursements, come to Kshs. 247,360/-. To this will be deducted the advance payment of Kshs. 127,300/-. The balance payable to the Applicant is Kshs. 120,060/-.

### **Conclusion**

In conclusion, the ruling and order made by the taxing officer, Hon. Maureen Nyigei, on 3<sup>rd</sup> July 2025 are set aside, and substituted with an order taxing the Applicant's bill of costs dated 7<sup>th</sup> October 2024 at Kshs. 120,060/-. The taxing officer shall issue a new certificate of taxation to the Applicant.

**Dated and signed at Kisumu on this 17<sup>th</sup> day of December 2025**

**S. OKONG'O  
JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Omondi T. for the Applicant  
The Respondent in person  
Ms. J. Omondi-Court Assistant

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