

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISC. CIVIL APPLICATION NO. E1079 OF 2023

IN THE MATTER OF: THE ADVOCATES ACT

AND

**IN THE MATTER OF: TAXATION OF COSTS BETWEEN
ADVOCATE & CLIENT**

BETWEEN

**JANE NYABIAGE ODIYA T/A ODIYA & ASSOCIATES
ADVOCATES.....ADVOCAT
E/APPLICANT**

VERSUS

**JEAN MUMBI
NGENGI.....CLIENT/RESPONDENT**

RULING

The Reference

1. The subject of this ruling is the Chamber Summons Reference dated 11th June 2025 (the Reference) brought by **Jane Nyabiage Odiya T/A Odiya & Associates Advocates** (the Applicant) under Sections 1A, 1B and 3A of the Civil Procedure Act (CPA) and Paragraph 11(2) of Schedule 6 of the Advocates (Remuneration) Order.

2. The Reference, which is supported by the grounds set out on its face and in the Supporting Affidavit sworn by Applicant, seeks the following orders:

(i) Spent.

(ii) Spent.

(iii) THAT this Honourable Court be pleased to set aside and/or vary the decision of the Taxing Officer (Deputy Registrar) dated 30th August 2024, rendered in respect of the Advocate-Client Bill of Costs dated 9th November 2023.

(iv) THAT this Honourable Court be pleased to tax afresh Item No. 1 (Instruction fees) based on the valuation of matrimonial property disclosed at Kshs. 154,500,000/- and tabulate a final Bill in favour of the Applicant.

(v) THAT costs of the application be provided for.

3. The grounds relied on by the Applicant are that the Taxing Officer delivered a ruling on 30th August 2024 in respect of the Advocate-Client Bill of Costs filed in the present matter. That the Applicant, being dissatisfied with the ruling, sought and obtained leave of the court to file a Reference out of time, vide a ruling delivered on 27th May 2025 and that the Taxing Officer erred and applied wrong principles in her assessment of instruction fees under Item No. 1 in the Bill of

Costs by failing to consider the value of the subject matter despite the same having been tendered in the supporting affidavit to the Bill of Costs. The Applicant urged the court to exercise its discretion in her favour, by allowing the Reference as prayed.

Replying Affidavit

4. **Jean Mumbi Ngengi** (the Respondent) has opposed the Reference through a Replying Affidavit sworn on 15th July 2025 in which she has deposed that this instant Reference is unmerited and an afterthought. That in her view, the Taxing Officer properly and judiciously exercised her discretion in assessing the instruction fees upon considering all relevant legal principles on assessment. That she had previously instructed the Applicant to act for her in a Matrimonial Cause in 2019 in place of another firm of advocates in which the latter advocate requested payment of legal fees to the tune of Kshs. 150,000/- and that the said amount was settled by the former.

5. The Respondent has asserted that the Applicant only acted for her briefly in the matter and that save for filing an

application dated 2nd October 2019 seeking to amend the Originating Summons in the Matrimonial Cause, the Applicant did not file any substantive pleadings therein or undertake a prosecution of the matter on behalf of the Respondent. That consequently, the Respondent engaged the firm of M/S Maingi Musyimi & Associates Advocates to take over the conduct of the matter in March, 2020 and therefore, the Applicant was not entitled to the sum of Kshs. 2,837,500/- sought in the Bill of Costs, as instruction fees.

6. It is equally the Respondent's assertion that the value of the matrimonial properties in question was not set out in the pleadings to the Matrimonial Cause. That the valuation report which the Applicant now seeks to rely on in the present proceedings should not be considered by this court for purposes of ascertaining the value of the subject matter. That the Matrimonial Cause is yet to conclude and hence the value of the subject matter therein has not been ascertained.

7. The Respondent has stated that no material has been placed before this court to warrant a disturbance of the learned Taxing Officer's ruling on taxation and that the court should

uphold the decision of the Taxing Officer and dismiss the Reference.

The Applicant's Further Affidavit

8. The Applicant swore a further affidavit on 25th July 2025 in which she deposed that this Court (**Ouya J**) in her ruling delivered on 29th May 2025, granted her leave to file an Objection and Reference out of time and reasoned that the Court was satisfied that the learned Taxing Oaster had committed an error of principle by failing to consider the value of the subject matter namely the matrimonial properties in question and therefore it cannot be claimed by the Respondent that the Taxing Officer correctly and reasonably assessed the instruction fees.
9. The Applicant has admitted to receiving instructions from the Respondent to take over the conduct of the Matrimonial Cause from a different firm of advocates, following which she drafted an application seeking leave to amend the Originating Summons in the Cause. That nevertheless, before the same was approved and filed, the Respondent instructed another firm of advocates to take over from the

Applicant. That whilst payment of the sum of Kshs. 150,000/- referenced in the reply is acknowledged, the Applicant has stated that the same merely constituted a deposit of legal fees payable in respect of the Matrimonial Cause.

10. Overall, the Applicant has stated that the subject matter ought to be considered in assessing instruction fees and hence it has been established that the learned Taxing Officer erred in failing to consider the value of the matrimonial properties associated with the Matrimonial Cause and that the question whether or not the learned Taxing Officer had erred in her assessment of the instruction fees is settled through the delivered by the Court (**Ouya, J**) referenced above.

Parties' Submissions

11. The Applicant submitted that in assessing instruction fees, a taxing officer ought to take into account the value of the subject matter and that where the value cannot be ascertained from the pleadings, the taxing officer has discretionary power to ascertain the same, as held by the

Supreme Court in the case of **Otieno, Ragot & Company Advocates v Kenya Airports Authority [2023] KESC 55 (KLR)**.

12.The Applicant submitted that in the present instance, the value of the subject matter is ascertainable by way of a valuation report prepared by Zenith (Management) Valuers Limited dated 14th August which valued the matrimonial properties at an aggregate sum of Kshs. 154,500,000/-. That the said report forms part of the record and was in fact tendered in support of the Bill of Costs and despite the valuation report, the learned Taxing Officer did not consider it but instead proceeded to tax the instruction fees at Kshs. 250,000/-.

13.The Applicant contented, further that the contents of the valuation report have never been refuted by the Respondent and that in the circumstances, it is necessary for this court to disturb the taxation ruling.

14.In her submissions, the Respondent reiterated her earlier averments, that the Reference lacks merit, is an afterthought and an abuse of the court process. The Respondent has maintained that the learned Taxing Officer

correctly applied her discretionary power in assessing the instruction fees.

15. It is the Respondent's argument that the assessment undertaken by the learned Taxing Officer on the instruction fees was guided by the relevant legal principles and that the Applicant has not shown the manner in which the Taxing Officer erred in the taxation decision. The Respondent relied on **Republic v Minister for Agriculture: W'Njuguna & 8 others (Ex parte) [2006] KEHC 3504 (KLR)** where the High Court reasoned that a court cannot interfere with the decision of a Taxing Officer unless it is demonstrated that such decision was based on an error of principle or that any of the costs awarded are manifestly excessive or quite low.

16. It is similarly the Respondent's argument that the Applicant only briefly acted for her in the Matrimonial Cause and did not issue any fee note upon termination of their advocate-client relationship. That at the time of termination of the services thereof, the Respondent had settled the Applicant's legal fees in the sum of Kshs. 150,000/- which factor was considered by the learned Taxing Officer in her assessment.

17. The Respondent relied on the decision in **Peter Muthoka & another v Ochieng & 3 others [2019] KECA 597 (KLR)** where the Court of Appeal held that:

“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with

the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in

combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.”

18.The Respondent also relied on **Joreth Ltd v Kigano & Associates [2002] KECA 153 (KLR)** in which the Court of Appeal reasoned that for purposes of taxation on a bill of costs, the value of the subject matter ought to be determined either from the pleadings or judgment or settlement, adding that if the same cannot be ascertained, the taxing officer is entitled to use his or her discretion in assessing the relevant item.

19.The Respondent has contended that no monetary reliefs were sought in the Matrimonial Cause in order to justify use of the value of the subject properties as a basis for assessing costs. Rather, the reliefs sought therein were purely declaratory in nature, as can be discerned from the pleadings.

Analysis and Determination

20.I have considered the Reference and the grounds supporting it. I have also read the record of the court. The

background of this case is that the Applicant filed an Advocate-Client Bill of Costs dated 9th November 2023 seeking a sum of Kshs. 4,990,283/-, arising from instructions by the Respondent to have the Applicant represent her in **Matrimonial Cause No. 31 of 2018 (O.S.)** between the Applicant and Peter Mwendwa Malonza.

21.The Bill of Costs was taxed at Kshs. 420,530.80 vide a ruling delivered on 30th August 2024 upon considering the legal fees already paid by the Applicant to the tune of Kshs. 150,000/-. It is that ruling that has provoked this Reference.

22.The factors that would trigger the interference of a Taxing Officer's decision on appeal are settled. In **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** the Court of Appeal held thus:

“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.”

23.An error of principle has been defined to include an excessive award on costs or an overemphasis on factors

such as the nature and complexity of the matter at hand.
(See **Moronge & Company Advocates v Kenya Airports Authority [2014] eKLR.**)

24. It is apparent that the only item being challenged in this Reference is *Item No. 1* touching on instruction fees. In that regard, the Applicant by way of the Bill of Costs, sought to have the same taxed at a sum of Kshs. 2,837,500/- upon considering the valuation report undertaken on the subject properties which assessed the value at Kshs. 154,500,000/-. The Respondent's view is that the Applicant was entitled to a sum of Kshs. 150,000/- which had already been paid to her. The learned Taxing Officer ultimately taxed *Item 1* at a sum of Kshs. 250,000/- under **Schedule 6** of the Advocates (Remuneration) Order, 2014.

25. In arriving at the above figure, the learned Taxing Officer relied on **Joreth Ltd v Kigano & Associates [2002] KECA 153 (KLR)** which sets out the various factors to be considered in assessing instruction fees such as, 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.

26. The learned Taxing Officer proceeded to reason that there was nothing on record to indicate that the Applicant had undertaken any novel or necessarily complex work for the Respondent and that upon taking over the conduct of the matter on 22nd August 2019, the Applicant filed an application seeking to amend the Originating Summons, before subsequently being served with a notice of change of advocates by a different firm of advocates who took over from her. The Taxing Officer reasoned that given the time taken in the matter, the scope of work done and the nature of the dispute, a sum of Kshs. 250,000/- would constitute a reasonable assessment on instruction fees.

27. Upon my consideration of the record, it is not in contention that the learned Taxing Officer correctly applied **Schedule 6** of the Advocates (Remuneration) Order, 2014 in assessing the costs sought pursuant to the Bill of Costs. It is also not in contention that the Applicant briefly acted for the Respondent in the Matrimonial Cause during which time she drafted an application dated 2nd October 2019 seeking to

amend the Originating Summons therein. Going by the averments by the respective parties, it is apparent that the Applicant did not file any pleadings thereafter or proceed with the matter any further, on behalf of the Respondent. Further, it is not disputed that the Respondent paid a sum of Kshs. 150,000/- to the Applicant in legal fees in respect of the Matrimonial Cause.

28. Schedule 6 of the Advocates (Remuneration) Order, 2014 provides that instruction fees are to be assessed upon consideration of the value of the subject matter. I am alive to the standing legal position that it is only when the value of the subject matter cannot be ascertained that a Taxing Officer can exercise his or her discretion in taxing the instruction fees, as was stated in the Court of Appeal decision, **Peter Muthoka & another v Ochieng & 3 others [2019] KECA 597 (KLR)** that:

“... ”

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess

instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.

What we have said is in direct harmony with what this Court stated in JORETH LIMITED -vs- KIGANO & ASSOCIATES [2002] IEA 92,

“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 ascertainable the taxing officer is entitled to use his discretion to assess 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, and direction by the trial judge and all other relevant circumstances.”

29.I have read the application dated 2nd October 2019, annexed as **Annexure “JNO 2”**. Among the orders sought in that application is leave to amend the Originating Summons. It is not clear whether the said application was heard and/or determined.

30.I have also noted that the draft Amended Originating Summons annexed as part of **Annexure “JNO 3”**, seeks, among the reliefs sought therein, a declaratory order that the various properties listed therein be deemed to be matrimonial property and that the Respondent be declared as having a beneficial or priority interest in the respective properties.

31.The issue that arises is whether the value of the subject matter could be discerned from the pleadings. Whereas the reliefs sought in the Matrimonial Cause are declaratory and non-monetary in nature, the matter involves various properties whose total value was placed, through a

valuation report, at Kshs. 154,500,000/-. I am thus satisfied that the value of the subject matter was discernible from the pleadings.

32. After careful consideration of the issues presented before me, it is clear to me that it is not disputed that the Applicant's participation in the said proceedings was brief and that her professional role was limited to drafting and possibly filing the application seeking leave to amend the Originating Summons. No material has been placed before this court to ascertain whether leave was granted for filing the amended Originating Summons or to show that the Applicant participated in the Cause at any point thereafter, in order to justify the sum of Kshs. 2,837,500/- sought on instruction fees.

33. I am therefore of the considered view that the learned Taxing Officer cannot be faulted for opting to consider the other additional factors set out in **Joreth Ltd v Kigano & Associates case** and exercising her discretion in assessing the instruction fees, in the circumstances.

34. An issue was raised as to whether the validity of the learned Taxing Office's assessment on instruction fees had been determined by this court (**Ouya, J**) vide a ruling delivered on 29th May 2025.

35. My perusal of the aforesaid ruling shows that what was before the learned Judge for determination was an application filed by the Applicant seeking leave to file an Objection to the taxation ruling, as well as a Reference, out of time. The learned Judge allowed the application. In her ruling, the learned Judge briefly touched on the issue whether the learned Taxing Officer committed an error of principle in her assessment of the instruction fees. In my considered view, the learned Judge did not determine the question of assessment of the instruction fees conclusively. This is not one for consideration before the learned Judge. The issue before the learned Judge was an application for leave to file a Reference out of time and not a determination of the merits thereof. In the circumstances, I am satisfied that the subject of assessment was one properly before this court for determination.

36. Consequently, I find no reason to disturb the learned Taxing Officer's assessment on *Item 1*, the instruction fees. The outcome of my finding above is that the Applicant has not met the threshold required to persuade this court to interfere with the ruling of the Taxing Officer. The Chamber Summons Reference dated 11th June 2025 is therefore dismissed with costs to the Respondent.

37. Orders shall issue accordingly.

Dated, signed and delivered this 16th day of December 2025.

**S. N. MUTUKU
JUDGE**

In the presence of:

1. Mr. Ndong holding brief for Ms Odiya for the Applicant
2. Ms Muthoni Kinuthia holding brief for Mr. Gitonga for the Respondent