

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
NAIROBI
COMMERCIAL & TAX DIVISION
MILIMANI LAW COURTS
MISC. APP NO. E1088 OF 2024

**AIRTEL NETWORKS KENYA
LIMITED.....CLIENT**

VERSUS

**NGATIA & ASSOCIATES
ADVOCATES.....ADVOCATE**

RULING

Reference and cross-reference

1. The client filed the reference by way of chamber summons dated 4.6.2025, seeking *inter alia*, an order to set aside the ruling and reasons delivered on 22.5.2025 by the Taxing Officer, **Hon. Louser Chembeni Adisa**, in respect of the Advocate's Advocate/Client Bill of Costs dated 18.12.2024.

2. The application is brought primarily under **Rule 11 of the Advocates**

Remuneration Order. It is supported by the affidavit sworn by the applicant's legal officer, **Lillian Mugo** on 4.6.2025 and written submissions.

3. The advocate opposed the application through a replying affidavit sworn by **Fredrick Ngatia, S.C.** on 13.7.2025 and written submissions. He further filed a cross-reference by way of chamber summons dated 18.9.2025.

Client's case

4. The client's case is that the taxing officer fundamentally erred by awarding the respondent Kshs. 374,016,433. Its main contentions are: -

- (1) that the taxation was based on **Supreme Court Petition No. 12 of 2016** instead of **Civil Appeal No. 61 of 2012.**

- (2) that the instruction fees awarded were manifestly excessive given that the appeal was struck out *in limine*.
- (3) The matter did not proceed by way of a trial hence getting up fees was not payable as **schedule 6 para. 3 of the Advocates Remuneration Order** does not provide for getting up fees with respect to hearing and determination of an interlocutory application as the ones filed in the High Court. It relied on **Addax Kenya Limited v National Environment Management Authority & Another [2019] eKLR**
- (4) The taxing officer disregarded its submissions and authorities without offering reasons.
- (5) The taxing officer failed to consider previous payments made towards the taxed costs and overstated the

amount due and occasioned a miscarriage of justice.

(6) The taxing officer misdirected herself by allowing disbursements despite the bill of costs being unsupported by any relevant documentation such as receipts.

(7) The taxing officer erred in assessing VAT at Kshs. 51,588,473.50 by relying on the decision in **Pyramid Motors v Lang'ata Gardens Ltd [2015] eKLR** which is contradictory to her findings.

5. The client further submitted that, by referring to the wrong proceedings, the bill was not taxed and ought to be resubmitted to a different taxing officer for taxation. For this submission, it relied on **Steel Construction & Petroleum Engineering (EA) Ltd v Uganda Sugar Factory Ltd [1970] EA at 143.**

6. The client faulted the taxing officer for considering factors which were not before her, including representation before the High Court and the Supreme Court, warranting the setting aside of the decision. In support, it relied on **Kamunyori & Company Advocates v Development Bank of Kenya Limited [2020] eKLR, Joreth Ltd v Kigano & Associates [2002] 1 EA 92, Kenya Airports Authority v Otieno Ragot & Company Advocates [2024] eKLR.**
7. The client asserted that **Civil Appeal No. 61 of 2012** did not proceed to substantive hearing and that the preliminary determination made in limine, as directed by the Supreme Court, cannot be equated to a full hearing of the appeal, as claimed by the advocate.
8. The client therefore submitted that the taxing officer incorrectly assessed the

value of the subject matter and failed to consider relevant factors in determining the value of the subject matter including the stage at which the fees are being taxed (**Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR**) and the nature and responsibility of counsel (**Republic v Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W’Njuguna & 6 Others [2005] eKLR.**)

Advocate’s Cross- Reference and Response

9. Through his cross-reference, the advocate objected to the taxing officer’s finding that the value of the subject matter was "**not ascertainable.**" He contended that the erroneous finding led to a reduction of his claim by Kshs. 90,000,000/- which was taxed off.

10. The advocate urged the court to enhance the instruction fees based on the factors set out in **Schedule 6 Rule 1 (b) of the Advocates Remuneration Order**. He also urged that upon re-assessment of the instruction fees, corresponding enhancement be made in relation to items 75 and 76 being 1/3 getting up fees as well as 50% for advocate-client costs as per schedule 6(B) of the ARO, 2014 respectively. That VAT at the rate of 16% be assessed by the court in relation to the enhanced fees.

11. The advocate contended that the value was clearly determinable from the Memorandum of Appeal and the underlying Arbitral Award of approximately Kshs. 2.1 Billion, and as such, the instruction fees should be enhanced to Kshs. 250,000,000/-.

12. The advocate submitted that the error by the taxing officer is plainly reviewable as it constitutes an error going to the root of the taxation exercise, misapplying the criteria under the ARO, 2014. He also submitted that the failure to properly consider the first and most significant factor vitiates the taxation.

13. The advocate argued that the client's reference is incompetent for failure to comply with **Rule 11(1) of the Advocates Remuneration Order** because its notice of objection failed to specify the items objected to. He relied on **Machira & Co. Advocates v Arthur K. Magugu & another [2012] KECA 245 (KLR), Chadha (Sued as the Executrix of the Estate of Kulwant Singh Chadha (Now Deceased) v Chaundri & Associates [2024] KEELC 13442 (KLR), Lubelellah & Associates v Gilbi**

**Construction Company Ltd [2024
KEELC 4742 (KLR) and Murgor &
Murgor Advocates v Kenya Airports
Authority [2024] eKLR.**

14. The advocate gave an overview of the litigation history. He contended that **Civil Appeal No. 61 of 2012** was considered during a full hearing on the merits as directed by the Supreme Court in **Petition No. 16 of 2016**. That the predominant issue was whether the arbitral award of Kshs. 541,005,922.81/- which was to accrue interest at the rate of 16% per annum from 8.5.2009 until payment in full should be reinstated.

15. The advocate argued that the value of the subject matter was clearly ascertainable from the memorandum of appeal which sought the reinstatement of the arbitral award as awarded. That by the time the judgment was delivered at the

Court of Appeal on 9.5.2024, the award inclusive of interest stood at Kshs. 1,840,047,362.63/- on a straight-line basis or Kshs. 5,043,332,880.59/- inclusive of interest calculated with annual rest. That the amount outstanding at date of delivery of the Court of Appeal judgment were set out before the taxing officer and verifiable.

16. The advocate submitted that the getting up fees is justified and an acknowledgement of the detailed and substantial preparatory work undertaken. In support, he relied on **Omboko v County Assembly of Busia & Another [2022] KEELC 12781 (KLR), National Bank of Kenya Limited v Rachuonyo & Rachuonyo Advocates [2021] KEHC 6582 (KLR).**

17. The advocate asserted that the client does not dispute the increase in advocate-client costs on any legal and factual basis.

He relied on **Charles M. Kamweru t/a Kamweru & Co. Advocates v Maisha Flour Mills Ltd (Miscellaneous Application 24 of 2017) [2021] KEHC 443 (KLR) (29 October 2021) (Ruling), Rachier & Amollo Advocates v Kenya Bureau of Standards (Miscellaneous Cause E248, E237, E238, E239 and E249 of 2022 (Consolidated) [2023] KEHC 3683 (KLR) (Commercial & Tax) and National Bank of Kenya v Rachuonyo & Rachuonyo Advocates [supra].**

18. On the disbursements, the advocate submitted that para. 74 of the ARO only requires receipts when directed by the taxing officer. He relied on **Lucy Waithira & 2 others v Edwin Njagi T/A E. K. Njagi & Company Advocates [2017] KECA 272 (KLR).**

19. The advocate submitted that VAT is payable. He also disputed the alleged payment of Kshs. 99,000,000/- and claimed that only Kshs. 33,700,000 has been paid in relation to legal services rendered in the run up to the Supreme Court not in respect of the **Civil Appeal No. 61 of 2012.**

Analysis and Determination

20. Not identical twin issues arise for determination; whether; a) the court should set aside the taxation ruling or b) enhance the instruction fees and corresponding adjustments to the getting up fees and the advocate-client fees.

21. In a reference, the key principle is that the court will not interfere with a taxing officer's decision unless it is shown that there was an error of principle such as considering irrelevant factors or failing to

consider relevant factors. **First American Bank Ltd v Shah & another [2002] 1 EA 64**

22. The court has considered the bill of costs and the advocate's affidavits. The subject of the bill of costs is **Civil Appeal No. 61/2012 Nyutu Agrovvet Limited v Airtel Networks Ltd.**

23. Item 2 of the bill of costs dated 18th December 2024 states that the subject relates to the instructions to represent Airtel at the Court of Appeal in **Civil Appeal No. 61/2012 Nyutu Agrovvet Limited v Airtel Networks Ltd.**

24. In the impugned ruling, the taxing officer stated as follows: -

“...the bill emanates from instructions to represent the Respondent in Petition number 12 of 2016 - Nyutu Agrovvet Limited v Airtel Networks K. Limited.’

25. The Supreme Court **Petition No. 12 of 2016** is mentioned in item 1 of the bill of costs with respect to perusing the orders made on the rehearing of **Civil Appeal No. 61/2012**.

26. There is no contest between the client and the advocate that Supreme Court **Petition No. 12 of 2016** is not the subject of the bill of costs. Both parties submitted that the taxing officer erroneously referred to the petition instead of **Civil Appeal No. 61/2012** and arguments on misdirection on the subject matter or value thereof or that no taxation took place as the taxing officer referred to the wrong proceedings, portend error in principle. Hence, parties' request for the court to remit the advocate-client bill of costs for taxation or to adjust the taxation.

27. Thus, the court finds that the taxing officer misdirected herself as to the

proceedings which formed the subject of the bill of costs. Which misdirection, to the court's mind, constitutes an error of principle. This is because in a taxation decision, it is open to 'the taxing officer to consider only such factors as may exist in the actual case before him'. ***First American Bank Ltd v Shah & another [supra]***

28. In the circumstances, and from the submissions by the parties, it is appropriate for the advocate-client bill of costs to be remitted for fresh taxation before a different taxing officer.

29. The parties will be afforded an opportunity to address the issues with regard to, but not limited to, the subject matter, value of the subject matter, the instruction fees, getting up fees and the other items before the taxing officer. Making it inappropriate to address those

issues at this juncture as it would be prejudicial to the taxation. **KTK Advocates v Rift Energy Corporation & 4 others (Miscellaneous Application E653 of 2020) [2022] KEHC 14361 (KLR) (Commercial and Tax) (19 October 2022) (Ruling)**

Conclusion and Orders

30. In conclusion, the court makes the following orders which determines the reference and the cross-reference: -

- (1) The reference dated 4.6.2025 is partially allowed.**
- (2) The taxation ruling dated 22.5.2025 is set aside.**
- (3) The advocate-client bill of costs dated 18.12.2024 is remitted for**

taxation before a different taxing officer.

(4) Each party shall bear its costs.

Dated, signed and delivered at Nairobi this 22nd day of January, 2026 through Microsoft Teams online application

F. Gikonyo M

Judge

In the presence of:

SC. Ngatia for Respondent

SC. Oraro/Oduor for Applicant

CA- Godfrey