



REPUBLIC OF KENYA



**Estate of Paul Njoroge Muita & another v Gitahi (Civil Appeal
E748 of 2007) [2026] KEHC 609 (KLR) (Civ) (29 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E748 OF 2007

AC MRIMA, J

JANUARY 29, 2026

BETWEEN

THE ESTATE OF PAUL NJOROGE MUITA 1ST APPELLANT

WAINAINA KABUBI MUITA 2ND APPELLANT

AND

FREDRICK ORESMUS GITAHI RESPONDENT

RULING

The application:

1. The application by way of Chamber Summons dated 4th April 2025 is the subject of this ruling. It was instituted by The Estate of Paul Njoroge Muita and Wainaina Kabubi Muita, the Applicants/Appellants on the basis of Rule 11(2), (4) and 76 of the Advocates (Remuneration) Order. It was supported by the Affidavit and a Supplementary Affidavit both deposed to by Wainaina Muita on 4th April 2025 and 23rd June 2025 respectively.
2. The application sought the following orders: -
 1. That the decision dated 9th July 2024 be expunged as the said ruling is materially defective as it does not meet the threshold of a Ruling of the court and a different taxing master be appointed to tax the matter afresh.
 2. That in alternative to prayer 1 above, the decision by the Learned Taxing Master dated 9th July 2024 be set aside as it was based on an error of principle and the awarded fee was manifestly excessive hence the Respondent's notice of taxation dated 14th May 2024 be taxed afresh;



3. That the Respondent's notice of taxation be held in limbo until after the 2nd Appellant/ 2nd Applicants herein exhaust the appellate process with an active appeal at the Nairobi Court of Appeal being Miscellaneous Civil Application number E075 of 2024 The Estate of Paul Njoroge Muita and another-v- Fredrick Oresmus Gitahi.
 4. That in the alternative to prayer 2 above and in the event of the applicant's reference dated September 2024 before the Court of Appeal being decided in the Respondent's favour, the notice of taxation dated 14th May, 2024 be re-taxed as computed hereinunder;
 - a. Item 1 to be taxed at KES. 75,000.00/= in line with the fee chargeable under Schedule 6(1)(b) of the Advocates Remuneration Order (2014) as the value of the subject matter is undisclosed in the pleadings and unknown, vis-à-vis the fact that the main appeal was determined in a summary manner without going to full trial, and also the matter was not complex.
 - b. Item 2 to be subject to review subsequent to paragraph (a) above and in line with Schedule 6(1)(b) of the Advocates Remuneration Order (2014).
 5. That costs of this Application be provided for.
3. As can be discerned from the grounds and affidavits in support of the application, the Applicants' case rested heavily on three aspects being that the impugned taxation did not meet the legal threshold, that the taxation was unprocedurally conducted and that the taxation should not have proceeded because of the active appeal before the Court of Appeal. It was the Applicants case that their Advocates electronically received the notice of taxation dated 14th May 2024, which was slated for 23 May 2024. That the Advocates attended Court and informed the Taxing Master of the existence of the pending Court of Appeal matter being, Miscellaneous Civil Application number E075 of 2024, which sought leave to appeal out of time. He stated that the Counsel argued for the notice of taxation to be stayed pending the ruling of the Court of Appeal, as his right to respond to the taxation would come alive after the Court of Appeal's ruling.
 4. The Applicants affirmed that the Taxing Master, upon being made aware of these facts, stayed the Notice of Taxation, holding that since an application touching on the same subject matter and parties was before a higher Court, he had no powers of interfering with the same in any way whatsoever. On that basis, he proceeded to issue 23rd July 2024, as the new date for the matter, on the belief that the Court of Appeal would have rendered its ruling by then. The Applicants contended that the Court of Appeal failed to deliver its ruling on the initial date, issuing several other dates that never materialized. It was his case that the CTS indicated the matter was coming up for Ruling on 23rd July 2024, but the Taxing Master proceeded on leave from 22nd July 2024. That, the Advocates, being unaware of the Taxing Officer's absence, logged into Court on 23rd July 2024 and spent the whole day waiting in the lobby only to learn later that via SMS communication that the Taxing Master was away on leave and that the notice of taxation was concluded, which meant he was locked out.
 5. The Applicants then claimed that they learnt that the ruling was delivered on July 9, 2024 (not July 23, 2024, as the CTS had indicated), but the CTS was updated to 'ruling delivered' only on August 13, 2024. It was further contended that the registry's failure to issue the ruling notice effectively locked them out from the 14-day time limit to file an objection. The Applicant referenced a decision by the Honourable Justice Mutua, who he said had faulted an impugned Ruling as it failed to specify the quorum present and offered no reason for moving the matter from July 23, 2024, to July 9, 2024, terming these material defects.



6. In the end, the Applicants maintained that the Taxing Master committed a grave error of principle. He argued that the taxing master proceeded to tax based on a subject matter whose value was unknown, which resulted in manifestly erroneous high and unjust figures. He noted that the appeal was determined in a summary manner without going to full trial and was not complex. The Applicant proposed that Item 1 of the bill should be re-taxed at KES 75,000.00, in line with the fee chargeable under Schedule 6(1)(b) of the Advocates Remuneration Order (2014) for cases where the subject matter value is undisclosed or unknown.
7. In the supplementary affidavit, he deposed that dating a ruling is not delivering it. Citing section 112 of the *Evidence Act*, he stated the Respondent is required to provide the Court with proof of delivery, such as a notice of electronic delivery, coram (the record of judges/magistrates' present), and the name of the court assistant present when the ruling was allegedly delivered. With respect to the prior judgment by Mutuku J. he clarified that the learned judge allowed his notice of objection from 9th September 2024, to be deemed as duly filed, and did not order him to file a new one. He stated that the judgment did not direct the taxing master to respond to the objection, because the judge had already found that the ruling was never delivered

The Submissions

8. In their written submissions dated 20th June 2025, the Applicants contended that the taxing master's ruling was delivered improperly. They stated the delivery was a moving target and was done privately. They called to their aid the decision in *Bweko -vs- Kenya Orient Insurance Ltd* where it was observed that electronically delivered judgment need to have notice of delivery, coram of delivery and evidence of delivery even if to one party. They applicants argued that the ruling was invalid because it lacked a proper coram, prima facie evidence of an undelivered judgment
9. On the claim that the award was manifestly excessive, it was the Applicants' case that even if the ruling were procedurally valid, the amount awarded (KES 347,000/-) was unconscionable. They Relied on the Supreme Court's decision in *Kenya Airports Authority v. Otieno Ragot & Co. Advocates*, to advance the position that that the Advocates Remuneration Order exists to compensate and not to enrich a party. They requested the bill be re-taxed, suggesting Item 1 should be KES 75,000.00. As regards the validity of the supporting affidavit, the jurat having omitted the place where it was sworn, the Applicants cited the case of *Microsoft Corporation v Mitsubishi Computer Garage Ltd* and *Another* as well as Order 19 Rule 7 of the Civil Procedure Rules and argued that this omission was a defect in mere form and not substance, which the Court could overlook.

The Respondent's case:

10. Fredrick Oremus Gitahi, challenged the application through his Replying Affidavit deposed to 21st May 2025. From the outset, it was his case that the application was frivolous, vexatious and an abuse of the Court process. He contended that the application was incompetent because it was anchored on wrong provisions of the law and that prayers in the main body were at variance with the provisions under which the application was brought. He deposed that the application owed its life to the orders of Justice S.N. Mutuku issued on 3rd April 2025, which had enlarged time for the Applicants to file a notice of objection and have the Tax master respond to it.
11. It was his case that the Applicants had not taken any step to obtain the reasons from the taxing master as directed by the Court. He deposed that the Applicants were not entitled to benefit from equity because they were in clear violation of the Court's directive, and the Court should shut its doors on the Applicants for ignoring clear orders. The Respondent further claimed that the Applicants had



used the lifeline given by the Court to re-litigate issues already determined instead of obtaining the Tax master's reasons and filing a reference. He characterized the present application not as a reference but a lamentation against the ruling.

12. In a different line of argument, the Respondent maintained that the issues raised concerning how and when the ruling was delivered and the presence of parties during proceedings had already been raised and decided upon by Hon. Mutuku J and raising them again, even in a different fashion, was barred by the doctrine of res judicata. He deposed further that the Applicants' claim that the proceedings were halted to await the outcome of Misc Appl. No. E075/24 was misleading. He noted that an appeal does not operate as a stay of proceedings and that the Applicants did not present any stay order to the Taxing master to halt the taxation. Citing Order 42 Rule 6(1), he clarified that Misc. Appl. E075/24 before the Court of Appeal was for extension of time to file an appeal and would not act as a stay of proceedings in law.
13. It was his case that the Applicant failed to respond to the notice of taxation on 14th May 2024, and during the hearing on 23rd May 2024. He stated that the Learned Judge had found that the matter proceeded for taxation on 23rd May 2024, and a ruling date was set in the presence of both parties.
14. The Respondent concluded by stating that the affidavit supporting the chamber summons was sworn at an unknown place, rendering it incompetent. He asked the court to dismiss the application with costs

The submissions

15. The Respondent urged his case further through written submissions dated 4th July 2025. He argued that the application must fail because the Applicant's affidavit is incurably defective for failing to specify the place where it was sworn, a mandatory requirement under Section 5 of the Oaths and Statutory Declaration Act. He claimed the defect could not be cured by Article 159 of *the Constitution*. He further argued that if the supporting affidavit collapses, the supplementary affidavit must also be struck out, as it could not exist on its own.
16. On the merits of the application, it was his submission that the application is based on wrong legal provisions and that the Court has not been moved correctly to grant the orders sought. He contended that a party challenging a taxing master's decision must invoke Rules 11(1) and 11(2) of the Advocates Remuneration Order simultaneously. He pointed out that the Applicants failed to invoke Rule 11(1) (which relates to requesting reasons from the taxing master) and has instead cited incorrect provisions. Support to that end was drawn from the Supreme Court case in Daniel Kimani Njihia -vs- Francis Mwangi Kimani, to front the position that an application founded on the wrong legal framework is liable to be struck out.
17. On the claim of the bar of res-judicata, the Respondent asserted that the issues raised concerning how the taxing master's ruling was delivered had been previously raised before and decided upon by Justice Mutuku. He asserted that the applicants are engaging in re-litigation, an abuse of court process. As regards the failure to attach the Taxing Master's reasons, the Respondent argued that it rendered the application incompetent because the applicants did not seek for or attach the Tax master's reasons. He stated that the applicants failed to serve their notice of objection on the taxing master as required by Rule 11(1) and, as a result, could not have obtained the necessary reasons a fatal omission. To buttress its claim, he relied on the High Court's position in China Young Tai Engineering Company Limited -vs- Lubulellah & Associates Advocates 2022 KEHC 11041 (KLR) where it was observed that the omission to file the decision of the taxing master was fatal to the case.
18. The Respondent concluded by urging the Honourable Court to dismiss the application with costs.



Analysis:

19. Having appreciated the parties' pleadings as well as their rival positions as argued in the submissions, the issues that arise for determination are as follows: -
 - i. Whether the application is incompetent on account of the jurat in the supporting affidavit.
 - ii. Depending on (i) above, whether the application is fatally defective for citing the wrong legal provisions and/or failing to attach the Taxing Master's reasons.
 - iii. Depending on (ii) above, whether the issues surrounding the delivery of the ruling are res judicata.
 - iv. Depending on (iii) above, whether the Taxing Master's ruling dated 9th July 2024 was delivered irregularly and unprocedurally.
 - v. What are the appropriate reliefs in the circumstances?
20. This Court will now consider the above issues in seriatim.

(a) Whether the application is incompetent on account of the jurat in the supporting affidavit:

21. The Respondent argued that the omission of the place of swearing in the jurat is a fatal, incurable defect under Section 5 of the Oaths and Statutory Declaration Act. The Applicants, citing Order 19 Rule 7 of the Civil Procedure Rules and the Microsoft Corporation case, claimed it is a defect of form.
22. In this Court's view, the Respondent's position is overly technical and inconsistent with the constitutional imperative under Article 159 to administer justice without undue regard to procedural technicalities. As correctly pointed out by the Applicants, the provisions of Order 19 Rule 7 are spot on. The omission of the place of swearing, while an error, does not go to the substance of the affidavit. It does not prejudice the Respondent or mislead the Court. It is a defect in form that can be and is hereby excused. In any event, the Respondent reserved his right to cross-examine the deponent and/or the Commissioner for Oaths on the contents of the affidavit and the jurat.
23. The upshot is that the contention is hereby overruled.

(b) Whether the application is fatally defective for citing the wrong legal provisions and/or failing to attach the Taxing Master's reasons:

24. The Respondent's most compelling objection is that the application is incompetent for failing to follow the procedure in Rule 11(1) of the Advocates Remuneration Order, (requesting reasons) and attaching them, as required for a reference under Rule 11(2).
25. The foregoing argument would be correct for a standard reference challenging the quantum or discretion of a Taxing Master. However, the Applicants' primary grievance is different. Their first prayer is to expunge the ruling as materially defective on the grounds that it was never properly delivered. The Applicants' case is that the prior orders by Hon. Mutuku J. already established this defect and deemed their objection filed. If a ruling is found to be a nullity due to non-delivery, one cannot be expected to seek reasons for a decision they were never procedurally made aware of.
26. The Applicants' reliance on *Bweco -vs- Kenya Orient* regarding the prerequisites of a valid e-delivery underscores that their challenge is to the ruling's validity, not just its contents. Therefore, the authorities relied upon by the Respondent are distinguishable, as they apply to regular references, not



to a situation where the very delivery of the ruling is the central defect, especially after a prior High Court order has allegedly pronounced on the issue.

27. Even if it were to be said that the Applicants quoted the wrong provisions of the law, such error would not be fatal to their application. In Civil Appeal E179 of 2024, *Maiyo -vs- Too* KEHC 14286, the Court of Appeal observed that procedural defects in citing the law should not trump substantive justice. The learned judges remarked as follows;

.... The Respondent submitted that the Application is fatally defective since it has been brought under the wrong provisions of the law...

...the mere citation of wrong legal provisions does not render an application fatally defective. Courts will look at the substance of the application and the spirit of Article 159(2) of *the Constitution* which promotes alternative dispute resolution and substantial justice over mere technicalities.

28. In the premises, the application is properly before the Court as it challenges the validity of the ruling itself.

(c) Whether the issues surrounding the delivery of the ruling are res judicata:

29. The Respondent claimed that the issue of the ruling's delivery was decided upon by Hon. S.N. Mutuku, J. The Applicants agree but state that the decision was in their favour; that the learned judge faulted the ruling and found it was never delivered. The Applicants claimed, therefore, that they are acting on Hon. Mutuku J.'s findings, not re-litigating them.

30. The Respondent has not provided evidence to contradict the Applicants' specific assertion that Hon. Mutuku J. found the ruling defective. Based on the record, the Applicants' version is more plausible; it is unlikely they would return to Court citing a previous order that was decided against them. This application appears to be the logical next step flowing from Hon. Mutuku J.'s prior findings, not a challenge to them.

31. The plea of res judicata is, therefore, not sustained.

(d) Whether the Taxing Master's ruling dated 9th July 2024 was delivered irregularly and unprocedurally:

32. With the preliminary objections dismissed, this Court now turns to the merits of the application. According to the Applicants, the matter was set for 23rd July 2024 and their Advocate attended the virtual Court on that day, only to find the Taxing Master was on leave. Later, they discovered a ruling had been delivered earlier on 9th July 2024, without notice. The CTS was only updated much later. The Respondent does not substantively deny this sequence. His only response is that a ruling date was set in the parties' presence, which does not address the allegation that the ruling was delivered on a different, uncommunicated date.

33. The Court, in its Ruling of 3rd April 2024, conclusively spoke to the Applicants' case and the anomalies in the impugned Ruling. In its orders No. 5, the learned judge observed thus;

5. In the absence of evidence showing coram for 9th July 2024, this court is not able to know whether any of the parties was present or not or the reasons why the ruling was delivered on 9th July 2024 instead of 23rd July 2024, the date that was communicated to both parties on May 2024. By reason of these anomalies, I will and do hereby exercise my discretion and allow prayers (a) and (b) of the Chamber Summons dated 3rd December 2024. Each party shall bear own costs for this Application.



34. This Court is in agreement with the above findings. Delivering a judgment or ruling on a date not notified to the parties is a fundamental breach of procedural fairness. It vitiates the proceedings and renders the decision a nullity, as it robs the aggrieved party of their right of appeal or objection. The Applicants' submission that the ruling lacked a proper coram and was delivered privately is proved by the above findings of the Court. Inevitably, the ruling dated 9th July 2024 was delivered unprocedurally and in breach of the Applicants' right to a fair hearing. It is therefore invalid.
35. Finally, the Applicants' challenge on the value of the award is a challenge not ripe for this Court's consideration. It shall await the outcome of the ruling that will be regularly rendered.

Disposition:

36. As I come to the end of this decision, I wish to sincerely apologize for the late delivery of this decision. The delay was largely caused by my engagement at the Judicial Service Commission where I sit as a Commissioner.
37. Based on the foregoing, the Chamber Summons dated 4th April 2025 is merited since the procedural defects justify the nullification of the impugned ruling.
38. In the premises, the following final orders hereby issue: -
- (a) The Learned Taxing Master's ruling dated 9th July 2024, arising from the Respondent's Notice of Taxation dated 14th May 2024, is hereby set aside in its entirety.
 - (b) The Respondent's Notice of Taxation dated 14th May 2024, be and is hereby remitted for taxation afresh before a different Taxing Master.
 - (c) Costs shall be in cause.
- Orders accordingly.

ELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY,2026.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr Simiyu, Learned Counsel for the Applicants.

Mr Omwenga, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

