

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**MISC. APPLICATION NO. E1045 OF 2025**  
**(EMANATING FROM HCCC NO. 1068 OF 1998-**  
**MILIMANI)**

**IN THE MATTER OF TAXATION OF COSTS BETWEEN  
ADVOCATE AND CLIENT**

**BETWEEN**

**GITHOGORI & HARRISON**

**ASSOCIATES**

**ADVOCATES.....ADVOCATE**

**-VERSUS-**

**THIKA**

**COFFEE**

**MILLS**

**LIMITED.....CLIENT**

**RULING**

**Background**

1. At the commencement of this matter, **Githogori & Harrison Associates Advocates** (hereafter the Advocate) filed an Advocate-Client Bill of Costs dated 4.07.2025 (the Bill of Costs) seeking a sum of Kshs. 62,432,346.31 less a paid sum of Kshs. 3,375,000/- leaving a sum of Kshs. 59,057,346.31 in costs, pursuant to instructions received from **Thika Coffee Mills Limited** (hereafter the Client) to

prosecute **HCCC No. 1068 of 1998-Milimani** (the suit) on its behalf.

2. The Client entered appearance in the matter through its advocates vide a Notice of Appointment dated 16.07.2025 and soon thereafter filed an application dated 15.08.2025 seeking to strike out the Bill of Costs. The said application was accompanied by a notice of preliminary objection of like date, challenging the competency of the Bill of Costs as well as the court's jurisdiction to tax the Bill of Costs by dint of Section 45(6) of the Advocates Act, owing to the alleged existence of a fee agreement between the parties herein.
3. The Advocate opposed both the application dated 15.08.2025 and the preliminary objection by way of a replying affidavit sworn by one of its partners, **Harrison Musyoka Lusyola**, on 18.08.2025. The application and preliminary objection were canvassed together.
4. Upon consideration thereof, Hon. Caroline Njue (Assistant Deputy Registrar) by way of a ruling delivered on 4.09.2025, reasoned that in the absence of any valid agreement for fees between the parties, the court is clothed with jurisdiction to

entertain the Bill of Costs. In the end therefore, the learned Assistant Deputy Registrar dismissed both the preliminary objection and the aforesaid application.

### **The Appeal**

5. Being aggrieved by the aforementioned ruling, the Client has sought to challenge it on appeal before this court, vide a memorandum of appeal dated 9.09.2025 featuring the following grounds:

***1) The learned Assistant Deputy Registrar erred in law as she did not have jurisdiction to hear or determine, as she did, the Client's Notice of Motion dated 15.08.2025.***

***2) The learned Assistant Deputy Registrar erred in fact and law by determining that there was no fee agreement between the parties in terms of Section 45(1) of the Advocates Act.***

6. The Client has therefore urged that the aforesaid ruling be set aside and be substituted with an order allowing the application dated 15.08.2025. The Client has similarly sought costs on the appeal.

## **The Reference**

7. The Client has also brought the Notice of Motion dated 16.10.2025 (termed the Reference) under the provisions of Paragraph 11(1) and (2) of the Advocates (Remuneration) Order 2009, Section 45(1) and (6) of the Advocates Act and Order 42 Rule 6(1) and Order 49 Rule 7(2) and (3) of the Civil Procedure Rules (CPR). The Reference is supported by the grounds stated on the face of the application and deponed in the supporting affidavit sworn by the Chairman to the Client's Board of Directors, **Pius Ngugi**.

8. The following constitute the prayers sought therein:

***(i) Spent.***

***(ii) Spent.***

***(iii) This Honourable Court be pleased to deem the Client's Reference, against the ruling of the Assistant Deputy Registrar delivered on 4.09.2025, as proper.***

***(iv) This Honourable Court be pleased to set aside the ruling of the Assistant Deputy Registrar delivered on 4.09.2025 and substitute it with an***

***order striking out the Advocate's Bill of Costs dated 4.07.2025.***

***(v) The costs of this application be provided for.***

9. In his affidavit, the deponent has stated that being aggrieved by the decision rendered by the learned Assistant Deputy Registrar, the Client lodged the appeal referenced hereinabove and that by dint of Section 45(6) of the Advocates Act, the court lacks jurisdiction to tax a bill of costs where an agreement for fees exists between an advocate and client. The deponent has therefore faulted the learned Assistant Deputy Registrar for finding otherwise.

10. It is also deposed that the learned Assistant Deputy Registrar equally erred by determining an application touching on the existence of a fee agreement, in the absence of the requisite jurisdiction.

11. The issues arising in the appeal are similar to those featured in the Reference.

**Directions of the court**

12. When the parties attended court on 20.11.2025 the Advocate argued that in the absence of a ruling on taxation

of the Bill of Costs, it was not necessary for the Client to file a Reference. The Advocate therefore urged that a determination be made on the appeal and further proposed that reliance be placed on the written submissions placed before the Assistant Deputy Registrar on the issue of existence of a retainer agreement. Counsel for the Client was amenable to the above proposal regarding submissions.

13. By the consent of the parties, this court granted prayer (ii) of the Reference which sought an order for stay of taxation of the Bill of Costs, pending hearing and determination of the said Reference.

### **Analysis and Determination**

14. I have considered the material canvassed in respect of the appeal and the Reference. It is noteworthy that the appeal and the Reference both lie against the decision rendered by the learned Assistant Deputy Registrar on 4.09.2025 which the Client seeks to set aside in order to pave the way for a grant of its application dated 15.08.2025 to strike out the Bill of Costs. In my considered view, it is prudent to

determine the appeal, the outcome of which will automatically determine the Reference.

15. My duty as the first appellate court is to analyze and re-evaluate the evidence previously adduced and to draw my own conclusions. In **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, the Court of Appeal held that:

*“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”*

16. To be determined in the appeal is the fundamental question whether the learned Assistant Deputy Registrar acted correctly by dismissing the Client’s preliminary objection and application dated 15.08.2025. Consequently, the court will address the two (2) grounds of appeal raised in the memorandum of appeal, contemporaneously.

17. Turning now to the proceedings which were before the learned Assistant Deputy Registrar, the same show that the Advocate lodged the Bill of Costs seeking a sum of Kshs. 59,057,346.31 upon deducting monies already settled, pursuant to instructions given to it by the Client to prosecute the suit on its behalf.

18. The record shows that the Client filed the application dated 15.08.2025 seeking to strike out the Bill of Costs. In his affidavit supporting the said application and echoing the grounds thereto, Pius Ngugi, Chairman of the Client's Board of Directors, stated that the parties herein executed a fee agreement dated 26.06.2024 setting out the legal fees agreed upon, in relation to legal services rendered by the Advocate. That under Section 45(6) of the Advocates Act, where a fee agreement exists between an advocate and client, the court lacks jurisdiction to tax a bill of costs.

19. The Client subsequently lodged the preliminary objection earlier referenced, similarly challenging competency of the Bill of Costs and the court's jurisdiction to tax the Bill of Costs by dint of Section 45(6) of the Advocates Act.

20. In his reply thereto, **Harrison Musyoka Lusyola**, a partner at the Advocate firm, denied the existence of a retainer agreement between the parties herein. He stated that the Client through its then advocate on record, forwarded a draft retainer agreement dated 19.06.2024 to the Advocate for review. That the Advocate responded with a letter dated 21.06.2024 issued on a 'without prejudice basis,' with a proposal on a suitable exit strategy to the advocate-client relationship.

21. The partner stated that the said letter did not elicit any response from the Client and hence the Advocate continued to act in the various matters involving the Client until the professional relationship between the parties formally terminated on 21.03.2025. That any endorsement on the aforementioned letter by the Client is a mere afterthought and in no way constitutes a binding agreement for payment of fees.

22. It was the partner's assertion that the Advocate firm only came to learn of the Client's handwritten endorsement on 4.08.2024. That in any event, Section 45(6) of the Advocates Act prescribes that a remuneration agreement must be in

writing and bear the signature of the client in question, which was not the case in this case.

23. It was also the partner's assertion that the preliminary objection was therefore aimed at derailing and frustrating the taxation process and that the same was deserving of a dismissal with costs.

24. Upon consideration of the material and written submissions tendered before her, the learned Assistant Deputy Registrar proposed to deal with the preliminary objection. Upon setting out the standing legal position that jurisdiction is everything and that without it, a court cannot perform any further action in a matter, as stated by the Court of Appeal in the renowned case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) eKLR** and **Republic v Karisa Chengo & 2 others [2017] eKLR**, the learned Assistant Deputy Registrar reasoned that the handwritten endorsement by the Client's Director made on 26.06.2025 in respect of the Advocate's letter dated 21.06.2025 did not give rise to a retainer agreement.

25. She further reasoned that it has not been demonstrated that there was a meeting of minds between the parties herein, given that the Advocate stated that it was first informed of the handwritten endorsement accepting the terms of its proposal, on 4.08.2025.

26. Consequently, the learned Assistant Deputy Registrar concluded that no valid fee agreement existed between the parties and that the court therefore had jurisdiction to entertain the Bill of Costs. As such, she proceeded to dismiss the preliminary objection and to strike out the application dated 15.08.2025, prompting the Reference and the appeal.

27. Having laid out the background above, the key contention is whether the learned Assistant Deputy Registrar arrived at a correct finding that the court has jurisdiction to tax the Bill of Costs.

28. It is not disputed that the jurisdiction to tax or assess fees payable between advocates and their clients is bestowed upon the Deputy Registrar (as well as the Assistant Deputy Registrar) as a taxing officer. This is seen under **Paragraph**

**10** of the **Advocates Remuneration Order 2009** which expresses thus:

***“The taxing for the taxation of bills under this Order shall be Registrar or a district or Deputy Registrar of the High Court or, in the absence of a Registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 of the order the taxing Officer shall be the Registrar of trade marks or any Deputy Registrar of trade marks.”***

29. The Court of Appeal in the case of **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited (2017) eKLR** reasoned that a taxing master has the necessary jurisdiction to deal with the question of fact whether a client-advocate relationship (retainer) had been created between the parties, in the following manner:

***“The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing***

***Officer by law. It is derived from the Advocates Act and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered.....***

***The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.***

***As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question.” (Emphasis added).***

30. Having said so, I am now called upon to determine in this appeal, the pertinent question whether an agreement for fees or retainer agreement subsisted between the parties herein, at any given time or at all.

31. Upon my re-examination of the record, I find no contention that the Advocate acted for the Client at all material times and in respect of various legal matters, including the suit which triggered the Bill of Costs.

32. Upon my further re-examination of the record, I have observed that the Advocate annexed a copy of an email emanating from the Client's counsel dated 19.06.2024, to its replying affidavit to the application dated 15.08.2025 before the learned Assistant Deputy Registrar (**Annexure "HML 1"**). The email was addressed to the Advocate and contained attachments of a draft professional undertaking and a draft retainer agreement. Therein, the Client indicated the legal fees in respect of the suit as being Kshs. 15,000,000/-. The draft documents are unsigned and undated.

33.The Advocate also annexed an email correspondence sent to the Client on 21.06.2024, attaching a legal engagement agreement setting the legal fees payable for the scope of work done at Kshs. 22,980,000/- exclusive of VAT, disbursements and court attendances. The said agreement is equally unsigned.

34.From my re-examination of the record, it is apparent that the above correspondences were followed by a 'without prejudice' letter dated 21.06.2024 originating from the Advocate and addressed to the Client, restating its earlier legal fees as being Kshs. 22,980,000/- and further stating that the legal fees payable in relation to the suit specifically, is Kshs. 15,000,000/- out of which a sum of Kshs. 3,375,000/- had been paid.

35.Upon my re-examination of the record, I have observed that the Client on its part annexed a copy of a letter dated 21.06.2024 to its Reference marked as **Annexure "PN 2"**. The said letter appears to have originated from the Advocate and contained proposals on the manner of exiting its representation of the Client. The said letter also contains a handwritten note by the Director of the Client dated

26.06.2024, confirming that the proposed terms are acceptable.

36. Going by the record, it is apparent that the Client later forwarded an email dated 4.08.2025 to the Advocate, indicating its willingness to settle the outstanding legal fees in accordance with the terms set out on 26.06.2024. The abovementioned email correspondence was annexed to the replying affidavit sworn on behalf of the Advocates and is marked as Annexure "**HML 2**".

37. That said, the question remains whether a valid and legally binding agreement for fees existed between the parties, in order for the provisions of **Section 45** of the **Advocates Act**, which generally caters for agreements with respect to remuneration of advocates, to become applicable here. **Sub-section 1** thereof provides thus:

***“(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-***

***(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;***

***(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;***

***(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."***

38. Of particular relevance is **Sub-section 6** which was primarily relied upon by the Client, which expresses thus:

***"(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by***

***virtue of this section shall not be subject to taxation nor to section 48.”***

39. The meaning and interpretation of **Section 45** was expounded in **Kakuta Maimai Hamisi, Peris Pesi Tobiko v Independent Election and Boundaries Commission and Returning officer Kajiado East Constituency [2017] eKLR** with the court stating thus:

***“To constitute a valid and binding agreement for the purpose of section 45 of the Advocates Act, it expressly provides that the same must be in writing and signed by the client or his agent duly authorized in that behalf. In this case, both the two letters are not signed by the client. Whereas an agreement may be formed by a series of correspondences, the client has not exhibited any document by which he signaled his acceptance of the proposed fees by the advocate. In my view, for a document to be said to constitute a valid and binding agreement for purposes of section 45 of the Advocates Act, the same must not only be unequivocal that it signifies what the precise final amount is but must be signed by the person to be charged who in this case is the client. This was the position adopted by Tanui.***

***J, in Raini K Somaia v Cannon Assurance (K) Ltd Kisumu HCMA No 289 of 2003.”***

40. The above position was also stated in the case of **Nzaku & Nzaku Advocates v Tabitha Waithera Mararo [2020] eKLR** cited in the respective parties' written submissions before the learned Assistant Deputy Registrar, where the court rendered itself as follows:

***“An agreement for fees contemplated under section 45, is a contract whose terms and conditions must be clear and unambiguous. There must be consensus or meeting of the mind between the parties and it must also be entered into freely without undue influence or promise.”***

41. As the record shows, it is apparent that the Client on the one part has maintained that an agreement for fees was made between the parties, pursuant to the endorsement of 26.06.2024, hence the subject of costs of the Advocate is not a matter eligible for taxation. On the other part, the Advocate has denied the existence of any agreement for fees between the parties and has maintained that the handwritten endorsement by the Client was an afterthought

and that no prior communication of the same was made to the Advocate.

42. Upon my re-examination of the material tendered before the learned Assistant Deputy Registrar referenced above, while it is apparent that various correspondences were exchanged between the parties on the subject of fees payable to the Advocate, no credible material has been tendered to demonstrate a meeting of the minds and a final settlement on a specific figure in legal fees.

43. Further, it is my considered view that no cogent material has been tendered to demonstrate that a copy of the handwritten endorsement purportedly made by the Client's Director, was communicated to or served upon the Advocate at any time prior to lodging of the Bill of Costs. In fact, it is my observation that while the handwritten endorsement was purportedly made on 26.06.2024, it is not until 4.08.2025 that the Client's counsel sent an email attaching a copy of the letter dated 21.06.2024 containing the handwritten endorsement; by which time the Advocate had already lodged the Bill of Costs.

44. From the foregoing circumstances, I am not persuaded that it has been demonstrated that there was a meeting of minds and a sense of unambiguity in order to give rise to a legally binding agreement for fees.

45. Upon my overall consideration of the totality of the foregoing material therefore, I am inclined to agree with the findings of the learned Assistant Deputy Registrar, that in the absence of any valid agreement between the parties concerning payment of legal fees in respect of the suit, the court has jurisdiction to tax the Bill of Costs.

46. Consequently, I find no merit in the instant Appeal and the Reference dated 16.10.2025, and proceed to dismiss the Appeal and the Reference. Consequently, the ruling delivered by the learned Assistant Deputy Registrar on 4.09.2025 is hereby upheld. In the circumstances, the Advocate shall have the costs of both the appeal and the Reference.

47. It is so ordered.

**Dated, signed and delivered this 27<sup>th</sup> day of January 2026.**

**S. N. MUTUKU  
JUDGE**

**In the presence of:**

1. Mr. Lusyola for the Advocate
2. Ms Tambo for the Client

ORIGINAL