

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC. APP. NO. E486 OF 2023

OSAMBA OTIENO & CO. ADVOCATES.....APPLICANT/ADVOCATE

-VERSUS-

KABETE DAM LIMITED.....1ST CLIENT/RESPONDENT

WINLOUKE PROPERTIES LIMITED.....2ND CLIENT/RESPONDENT

WIDNES HOLDINGS LIMITED.....3RD CLIENT/RESPONDENT

PINNACLE PROJECTS LIMITED.....4TH CLIENT/RESPONDENT

*(Being a Reference from the Ruling of the Taxing Officer, Hon. Adisa, delivered
on 5th December 2024).*

RULING

1. Before me is a Chamber Summons application dated 9th December 2024 filed by the Advocate/applicant pursuant to the provisions of Part I Section 11(2) & (4) of the Advocates (Remuneration) Order, 2009, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B & 3A of the Civil Procedure Act, Article 50 of the Constitution of Kenya, 2010, and all other enabling provisions of the law. The applicant seeks orders that this Honourable Court reviews and varies the decision and Ruling of the Taxing Officer delivered on 5th December 2024, and for this Court to determine the value of the subject matter and proceeds to re-tax the Advocate - Client bill of costs dated 28th October 2021.
2. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Mr. Richard Osamba Otieno, an Advocate of the High Court of Kenya and learned Counsel for the applicant. Mr. Otieno averred that on 30th July 2024, Honourable Lady Justice

Njoki Mwangi referred the Advocate/applicant's bill of costs for fresh taxation, limited to the issue of instruction fees and for determination of the client/respondent's Notice of Motion dated 21st August 2023, noting that the contest before the Court concerned the correct value of the subject matter, being either Kshs.80,000,000/= as claimed by the client/respondent or Kshs.180,000,000/=, as claimed by the Advocate/applicant.

3. He stated that both parties were in agreement that the subject value of Kshs.240,000,000/= relied upon by the Taxing Officer in the earlier Ruling was erroneous, prompting the Court to direct a fresh taxation to determine instruction fees based on the contested figures. Mr. Otieno deposed that following the referral, the Taxing Officer delivered a Ruling on 5th December 2024 dismissing the client/respondent's application and taxed the Advocate/applicant's instruction fees at Kshs.400,000/=, thereby taxing off a sum of Kshs.5,302,100/=. He contended that the instruction fees awarded are manifestly low in light of the value of the subject matter of Kshs.180,000,000/= and that the Taxing Officer failed to adhere to settled principles of taxation.
4. Counsel claimed that the Taxing Officer erred in principle by failing to properly ascertain the value of the subject matter from the pleadings on record, contrary to the express directions of Honourable Lady Justice Njoki Mwangi. He asserted that the Taxing Officer disregarded the Court's guidance that where there is no judgment, the subject value must be derived from the pleadings, and instead exercised discretion improperly and capriciously, resulting in a miscarriage of justice. Mr. Otieno maintained that the Taxing Officer's discretion is judicial and must be exercised on settled principles, which was not done in this instance. He contended that the Taxing Officer went beyond the scope of the Judge's directions, failed to determine the correct value of the subject matter, and ignored binding authorities.

5. He stated that this Reference has been brought timeously under Rule 11 of the Advocates Remuneration Order and that unless the orders being sought herein are granted, the Reference will be rendered nugatory.
6. In opposition to the Reference, the respondents filed a replying affidavit sworn on 14th March 2025 by Mr. David Kabubii Kuria, a Director of the 1st, 2nd & 3rd respondent companies. Mr. Kuria averred that the Taxing Officer in her Ruling considered the question of instruction fees in the context of **HCCOMM NO. E063 of 2019**, noting that the applicant had only filed a Notice of Change of Advocates and an objection. He deposed that the Taxing Officer, in exercise of her discretion, awarded instruction fees of Kshs.400,000/= on a *quantum meruit* basis, taking into account the limited work done by the applicant, including drafting two letters, attending three negotiation meetings, and six Court appearances, while the bulk of the pleadings had been filed by another law firm, Javan Mwamba & Company Advocates.
7. He emphasized that the Taxing Officer applied established legal principles and relevant authorities, and awarded fees commensurate with the work done and prevailing conditions. Mr. Kuria asserted that the applicant has been paid Kshs.500,000/=:, with a balance of Kshs.35,862.00 pending a VAT invoice, and that the Taxing Officer's award was reasonable and just. He noted that Courts generally do not interfere with a Taxing Officer's exercise of discretion unless there is a manifest error or misapplication of principle that substantially affects the outcome. He contended that the applicant has failed to demonstrate that the Taxing Officer acted injudiciously, applied a wrong principle, or awarded fees unreasonably in relation to the work done. He maintained that the applicant's Reference lacks merit and urged this Court not to interfere with the Taxing Officer's findings.

8. This Reference was canvassed by way of written submissions. The applicant's submissions were filed on 22nd March 2025 by the law firm of Osamba Otieno & Company Advocates, whereas the respondents' submissions were filed by the law firm of San Advocates Kenya, on 6th April 2025.
9. Mr. Osamba, learned Counsel for the applicant, relied on the case of **Peter Muthoka & another v Ochieng & 3 others** [2019] KECA 597 (KLR) and submitted that the exercise of discretion in taxation matters is judicial in nature and must be guided by fixed principles rather than by being exercised arbitrarily, capriciously, or whimsically. He argued that the starting point for determining instruction fees is the pleadings, judgment, or settlement to ascertain the value of the subject matter, and that failure to follow this formula constitutes an error in principle, as reinforced by the Court of Appeal in the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board** [2005] KECA 325 (KLR). Counsel contended that in the impugned Ruling, the Taxing Officer failed to determine the value of the subject matter from the pleadings, ignoring clear references in the plaint and statement of defence to the deed of settlement, which specified entitlements of Kshs.50,000,000/= in property and Kshs.40,000,000/= in cash to the shareholders.
10. Mr. Osamba cited the Court of Appeal case of **Joreth Ltd v Kigano & Associates** [2002] KECA 153 (KLR) and the case of **First American Bank of Kenya Ltd v Shah & 2 others** [2002] KEHC 1277 (KLR), and asserted that the Taxing Officer improperly limited the Advocate/applicant's work to filing a Notice of Change of Advocates and a Preliminary Objection, disregarding extensive work detailed in items 4 to 35 of the applicant's bill of costs, contrary to prior Ruling by Honourable Noelle Kyanya and established principles that instruction fees are earned once a defence is filed, regardless of the stage of the suit. He cited the case of **Steel Construction & Petroleum Engineering**

Limited vs Uganda Sugar Factory (1970) EA 141 and concluded by submitting that the errors in principle warrant interference by the Court, which has the discretion to reassess the instruction fees, providing finality to the matter and conserving judicial resources.

11. Mr. Sichangi, learned Counsel for the respondent submitted that the Taxing Officer in exercising her discretion, properly considered that the principal suit was still at an interlocutory stage, with the applicant having carried out only limited work, including filing a Notice of Change of Advocates, a Preliminary Objection, drafting two letters, attending three negotiation meetings, and appearing in Court on six occasions. He contended that the applicant failed to provide substantive documentary evidence from the principal file to challenge the findings. Counsel cited the case of **Republic v Minister for Agriculture; W'Njuguna & 8 others (Ex parte)** [2006] KEHC 3504 (KLR), **Moronge & Company Advocates v Kenya Airports Authority** [2014] KECA 816 (KLR) and **Kenya Airports Authority v Otieno Ragot and Company Advocates** [2024] KESC 44 (KLR), and asserted that considering the actual work done, the Taxing Officer reasonably awarded instruction fees on a *quantum meruit* basis.
12. Mr. Sichangi argued that the Taxing Officer properly considered relevant factors in awarding compensation for instruction fees, and no exceptional circumstances exist to justify setting aside her assessment. He submitted that the exercise of discretion by the Taxing Master was judicious, fair and reasonable, and that the applicant has not demonstrated any error or misapplication of principle. Counsel further stated that the applicant's Reference lacks merit and should be dismissed.

ANALYSIS AND DETERMINATION

13. I have considered the Reference filed herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the respondents and the written submissions by Counsel for the parties. The issue that arises for determination is whether the Ruling by the Taxing Officer should be set aside and for this Court to retax instruction fees.
14. The Court can only interfere with the Taxing Officer's decision where there has been an error in principle and not solely on questions of quantum, as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. The Court of Appeal in the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board** [2005] KECA 325 (KLR) held as hereunder in this respect –

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.

15. From the instant Reference, it is evident that the applicant was duly instructed to act for the respondents in **HCCOMM NO. E063 of 2019**. While the respondents contend that the applicant only filed a Notice of Change of Advocates and a Preliminary Objection, having taken over the matter after pleadings had been filed, this position is not controverted by the applicant. The basis of the applicant's case however, is that the Taxing Officer failed to identify or anchor the assessment of instruction fees on the value of the subject matter as disclosed in the pleadings.
16. A perusal of the Taxing Officer's Ruling delivered on 5th December 2024 reveals that in arriving at an instruction fee of Kshs.400,000/=, she limited her consideration to the nature of the matter, the skill exercised by Counsel and the

time spent in research and preparation of the Preliminary Objection. This Court however notes that the said approach disregards settled principles of law governing instruction fees. It is trite that an Advocate becomes entitled to instruction fees once retained and upon taking steps to execute the instructions, irrespective of the stage the proceedings have reached. This principle was firmly enunciated by the Court of Appeal in the case of **Joreth Ltd v Kigano & Associates** [2002] 1 E.A. 92 as hereunder -

In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.

17. In the case cited by the respondent's Counsel herein of **Kenya Airports Authority v Otieno Ragot and Company Advocates** (supra), the Supreme Court of Kenya in a petition filed before it cited with concurrence and approval the factors to take into consideration when determining the value of the subject matter, as per the Court of Appeal decision in **Peter Muthoka & another v Ochieng & 3 others Civil Appeal No.328 of 2017** [2019] eKLR, as follows -

“.....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.” (Emphasis added).

18. Bearing in mind the above decisions, this Court is persuaded that the Taxing Officer fell into error in principle by failing to ascertain and apply the value of the subject matter as the primary basis for determining instruction fees, and instead resorted to discretionary considerations prematurely. As a result, this Court finds that such failure to first identify the value of the subject matter, as required by law, vitiated the exercise of discretion and resulted in an award that was not grounded on the mandatory statutory framework. Consequently, the assessment of instruction fees was flawed and warrants interference by this Court.
19. The applicant has urged this Court to reassess the instruction fees, providing finality to the matter and conserving judicial resources noting that the issue has now been addressed by two different Taxing Officers. However, in order for this Court to assess the instruction fees the applicant is entitled to, it will need to have the benefit of the pleadings filed in **HCCOMM NO. E063 of 2019**, which it does not, which means that the matter has to go to another Taxing Officer for taxation of instruction fees.
20. In the circumstances, this Court finds that the instant application is merited and it is allowed in the following terms –
 - i) **The Taxing Officer’s Ruling delivered on 5th December 2024 is hereby set aside.**
 - ii) **The applicant’s bill of costs dated 11th June 2023 is hereby referred to another Taxing Officer other than Hon. Kyanya and Hon. Adisa for fresh taxation of Item No. 1 on instruction fees, on a priority**

- basis since the said bill of costs has already been taxed twice, with the taxation being set aside; and**
- iii) Costs are awarded to the applicant.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 23rd day of January 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of;-

Mr. Osamba for the Advocate/applicant

No appearance for the Clients/respondents

Ms B. Wokabi – Court Assistant.