Tom Ojienda & Associates v Kwale International Sugar Co Ltd (Miscellaneous Application E941 of 2024) [2026] KEHC 1540 (KLR) (Commercial and Tax) (13 February 2026) (Ruling)

Neutral citation: [2026] KEHC 1540 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E941 OF 2024

FG MUGAMBI, J

FEBRUARY 13, 2026

BETWEEN

PROF TOM OJIENDA & ASSOCIATES ..... ADVOCATE

AND

KWALE INTERNATIONAL SUGAR CO LTD ..... CLIENT

RULING

Background and Introduction

1. For determination is the Client's Chamber Summons dated 17th April 2025, which seeks to set aside the decision of the Taxing Officer delivered on 8th April 2025 and have the Bill of Costs remitted for re-taxation by a Taxing Officer other than Hon. Noelle Kyanya. The impugned Ruling arose from the Advocate's Bill of Costs dated 11th November 2024, which was taxed at Kshs. 28,141,646.40/=. Dissatisfied with that outcome, the Client has lodged the present appeal.

2. I have considered the application which is supported by the affidavit of Benson Nzuka sworn on 17th April 2025 together with the replying affidavit sworn by Prof. Tom Ojienda, S.C on 2nd May 2025 in opposition to the Reference as well as the parties' respective submissions.

Analysis and Determination

3. Before addressing the merits of the reference, it is necessary to consider a preliminary objection raised by the Advocate, who contends that the Client's reference was filed prematurely. The Advocate argues that although the Client had formally requested the Taxing Officer to provide reasons for the ruling, the Client did not wait for those reasons to be issued and instead proceeded to lodge the reference. In the Advocate's view, this action violates Rule 11(2) of the Advocates Remuneration Order (ARO), which stipulates that a reference may only be filed after the taxing officer's reasons have been furnished.

4. The Client contests this argument, and contends that Rule 11 requires a party to lodge a reference within 14 days of receiving the Taxing Officer's reasons. In the present matter, the Deputy Registrar issued a ruling on 8th April 2025, which was comprehensive and self-contained, with the reasons for the taxation. As an additional safeguard, the Client wrote to the Deputy Registrar on 10th April 2025 requesting further clarification, but no reply was provided. Consequently, the Client proceeded to file the reference within 14 days of the Ruling, in full compliance with Rule 11.

5. I am satisfied that the Client's application cannot be deemed premature. The established jurisprudence of this Court, notably in National Oil Corporation Limited V Real Energy Limited & Another, [2016] eKLR and Evans Thiga Gaturu V Kenya Commercial Bank Limited, [2012] eKLR, affirms that the objective of Rule 11(2) is to ensure that a party is furnished with adequate reasons to enable a meaningful challenge to a taxation decision. Where the taxing officer has already set out comprehensive reasons within the ruling itself, any further request for reasons is superfluous. It would be unreasonable to expect the taxing officer to provide explanations beyond those already contained in the ruling.

6. The Client maintains that the Ruling was sufficiently detailed and self-explanatory, and that their subsequent request for additional reasons was made purely out of caution. The lack of a response did not occasion any prejudice, as the reference was filed within the statutory timeframe. It follows, therefore, that the objection based on prematurity is devoid of merit.

Instruction Fees:

7. The Client takes issue with the Taxing Officer for applying Schedule 6(1)(b) of the ARO instead of Schedule 6(1)(f), which specifically governs insolvency matters and prescribes a fee of Kshs. 25,200/- for presenting or opposing winding-up proceedings against a company. The Client further contends that the Taxing Officer acted improperly by inflating the instruction fees from the incorrectly assessed figure of Kshs. 10,887,229.26 to Kshs. 12,000,000/- without justification.

8. They maintain that no evidence of complexity or novelty in the matter was demonstrated, and that the Taxing Officer failed to consider that the applicable minimum fee under the Remuneration Order was Kshs. 25,200/-, from which any upward adjustment should properly have been made.

9. In reply, the Advocate maintains that the Taxing Officer acted correctly in assessing instruction fees. They point out that the officer relied on the guiding authority of Joreth Limited V Kigano & Associates, (2002) eKLR to determine the value of the subject matter from the pleadings, which was ascertainable at Kshs. 712,481,950.65. On that basis, the Taxing Officer properly applied Schedule 6(1)(b) of the ARO, which governs proceedings commenced by petitions where liability is contested, as was the case here with the petition dated 2nd July 2019.

10. The Advocate also rejects the Client's contention that Schedule 6(1)(f) was applicable, arguing that it has been rendered inoperative by Section 1023(4)(a) of the *Companies Act*, which repealed the Companies (Winding-Up Rules) upon which Schedule 6(1)(f) was anchored. It would therefore be illogical to expect the Taxing Officer to rely on a provision that no longer had legal force. Moreover, Schedule 6(1)(b) expressly applied to proceedings instituted by petition where a denial of liability is filed, as occurred through the Notice of Motion dated 22nd October 2019.

11. On the issue of increased instruction fees, the Advocate contends that the adjustment from Kshs. 10,887,229.26 to Kshs. 12,000,000/- was justified. They argue that the Taxing Officer considered the significance of the matter to the parties, particularly the serious consequence of the Client potentially being declared insolvent, which warranted the enhancement of fees. The Advocate therefore insists that the increase was properly grounded and not dependent solely on novelty or complexity.

12. I have considered the submissions of both parties on this issue. Section 1023 of the *Companies Act*, No. 17 of 2015 expressly provides for repeals and revocations. Section 1023 (4) provides in part as follows:

> " On the repeal of section 342 of the *Companies Act*, the following rules are revoked:
>
> (a) the Companies (winding up Rules);
>
> (b) the Companies (Winding-up Fees) Rules;"

13. The effect of this repeal was to abolish the procedural and fee framework that had previously governed winding-up proceedings. Even then, Schedule 6(1)(f) of the ARO, which was intact, had specifically provided the scale of fees to winding-up proceedings under the *Companies Act*, particularly petitions filed pursuant to the Companies (Winding-Up Rules). In my considered view, the operation of Schedule 6(1)(f) was entirely dependent on the continued existence of those Rules. Once Section 1023(4) of the *Companies Act*, 2015 repealed the Companies (Winding-Up Rules) and the the Companies (Winding-up Fees) Rules, Schedule 6(1)(f) was rendered inoperative, as the substantive framework upon which it was anchored ceased to exist.

14. I do not therefore fault the Taxing Officer for applying Schedule 6(1)(b) of the ARO which is guided by the value of the subject matter in dispute. The Taxing Officer applied the value of the subject matter, which she determined to be Kshs. 712,481,950.67/= as per her Ruling of 17th April 2020.

15. Furthermore, I find that the adjustment of instruction fees from Kshs. 10,887,229.26 to Kshs. 12,000,000/=, against the Kshs. 20,000,000/= sought by the Advocate, was reasoned and justified. The Taxing Officer emphasized the significance of the subject matter, which involved the threat of insolvency, but balanced this against the principle articulated in Premchand Raichand Ltd & Another V Quarry Services of East Africa Ltd & Another, [1972] EA 162, where the court cautioned that costs should not be set so high as to impede access to justice. On that basis, she found Kshs. 12,000,000/= to be a fair and reasonable figure.

16. Guided by the decision in First American Bank of Kenya v Shah & Others, [2002] 1 EA 64, I am mindful that the discretion of a taxing officer ought not to be interfered with lightly. Such interference is only warranted where it is shown that the taxing officer proceeded on the basis of an error of principle or that the fee awarded was so manifestly excessive as to occasion an injustice.

17. In the present matter, that threshold has not been satisfied. Moreover, I take the view that in proceedings of such substantial value, where the reality of insolvency loomed large, the responsibility imposed upon Counsel was heightened. The diligence required and the intellectual effort expended to safeguard the client from potentially dire consequences went beyond the demands of an ordinary insolvency action. In these circumstances, the taxing officer's assessment cannot be faulted.

18. Equally, as reiterated in Republic V Medical Practitioners & Dentist Board & 2 Others ex-parte Mary A. Omamo-Nyamogo, [2017] KEHC 9241 (KLR) and Republic V Minister for Agriculture; W'Njuguna & 8 Others, (ex-parte) [2006] KEHC 3504 (KLR), taxation is not a rigid mathematical exercise but a discretionary process informed by the taxing officer's experience and judgment. The mere fact that I might have applied similar principles and arrived at a different or lower figure is not sufficient ground to interfere. Accordingly, this ground of challenge fails.

Getting-Up Fees:

19. On the issue of getting up fees, the Client contends that the Taxing Officer erred in principle by awarding such fees in respect of the notice of motion application filed in the insolvency cause to set

aside the statutory demand. The Client argues that the application was neither a trial nor an appeal within the meaning of Schedule 6(2) of the ARO, and it did not proceed by way of viva voce evidence.

20. In Mits Electrical Company Limited V National Industrial Credit Bank Limited, Misc Appln No. 429 of 2004, Kasango J. held that getting up fees contemplate a situation in which there is a full trial at which evidence is adduced. The learned Judge emphasized that such fees are only awardable where counsel is involved in the preparation of witnesses and witness statements, which was not the case there, as the application was supported solely by affidavit evidence and no viva voce testimony was taken.

21. A similar position was adopted in Kenya Agricultural & Livestock Research Organisation (formerly Kenya Agricultural Research Institute) V Njama Limited, [2017] KEHC 9873 (KLR), where the court disallowed getting up fees on the basis that the matter was determined without witnesses giving oral evidence, relying instead on affidavits and legal submissions. The court observed that while parties and their advocates were evidently well prepared, Schedule 6(2) expressly provides for "fees for getting up or preparing for trial," and preparation for applications does not fall within that scope. The court concluded that only when it is demonstrated that an advocate prepared for trial, involving witnesses and viva voce evidence, does entitlement to getting up fees arise.

22. This reasoning was further reinforced by Ojwang J. (as he then was) in Republic V National Environmental Tribunal Ex-Parte Silversten Enterprises Limited, [2010] eKLR. The learned Judge held that because there was no trial, no preparation of witnesses who would have given viva voce evidence, and no witness statements prepared by counsel, getting up fees were not awardable.

23. Taken together, these authorities establish a consistent principle that getting up fees are only applicable where there is preparation for a full trial involving oral testimony and witness examination. Since the application to set aside the statutory demand was determined on affidavit evidence and submissions without a trial, the award of getting up fees was erroneous in principle.

24. In response, the Advocate submits that Schedule 6(2) of the ARO vests discretion in the Taxing Officer to award getting up fees if satisfied that there was preparation for trial. This position was clarified in C.N. Kihara & Company Advocates V Maendeleo ya Wanawake Organization (MYWO), [2021] eKLR, where the court held that no fees are chargeable for getting up and preparing for trial until the case is confirmed for hearing, but further emphasized that even in instances where the case is not ultimately heard, the Taxing Officer retains discretion to award such fees if it is demonstrated that the matter was prepared for trial.

25. The Advocate further argues that the Client's assertion that getting up fees are only applicable in viva voce proceedings is not supported by law. A line of authorities has established that preparation for trial encompasses more than oral testimony. In Shamshudin Khosla & Others V Kenya Revenue Authority, [2011] eKLR, Ojwang J. (as he then was) cited with approval the Court of Appeal decision in Haider bin Mohamed el Mandry & 4 Others V Khadijah Binti Ali Bin Salem alias Bimkubwa, [1956] EA 313, where Briggs JA observed that getting up fees in ordinary litigation overlap with instruction fees.

26. While instruction fees represent the advocate's formal commitment to act upon receiving instructions, getting up fees relate to the subsequent steps taken in preparing pleadings and other vital process documents for lodgement and service.

27. On this reasoning, the Advocate contends that once counsel took instructions from the client, proceeded to formulate pleadings, lodge and serve the necessary cause papers, there was an element of preparation for trial sufficient to justify the award of getting up fees. The substantial monetary considerations involved in the matter further underscore the appropriateness of such an award.

Accordingly, the Taxing Officer acted within her discretion under Schedule 6(2) of the ARO and the award of getting up fees cannot be faulted.

28. Having considered both positions and the authorities cited, I find that the jurisprudence reveals two strands of interpretation. The earlier authorities, such as Mits Electrical, Njama Limited, and Silversten Enterprises, adopt a restrictive view that confines getting up fees to preparation for a full trial involving viva voce evidence. The later authorities, including C.N. Kihara and Shamshudin Khosla, adopt a broader interpretation, which recognizes that preparation for trial may encompass steps beyond oral testimony, such as the formulation and lodging of pleadings, provided the matter was confirmed for hearing or sufficiently prepared for trial.

29. In reconciling these positions, I am persuaded that while getting up fees should not be awarded in every application determined on affidavit evidence, the discretion of the Taxing Officer under Schedule 6(2) must be respected where it is demonstrated that substantial preparation for trial was undertaken. From the submissions filed, it appears that the Advocate lodged their pleadings in preparation for hearing, even though the matter was ultimately determined on affidavit evidence. The Taxing Officer was therefore entitled to exercise her discretion in awarding getting up fees. Accordingly, I find no error of principle in the award of getting up fees, and the Client's objection on this ground fails.

Drawings:

30. The Client argues that the Taxing Officer erred in principle by allowing annexures and authorities to be charged under Schedule 6(4)(a) of the (ARO), despite the fact that these do not qualify as pleadings. Schedule 6(4)(a) expressly provides for fees in respect of pleadings and applications such as statements of claim, plaints, written statements of defence, interlocutory applications, notices of motion, originating summons, affidavits, petitions of appeal, interrogatories, agreements for compromise or adjustment of suits, references to arbitration, or any other pleading not otherwise provided for.

31. Indeed, the common thread across these categories is that they are primary legal documents that require professional skill and intellectual effort of an advocate in their preparation.

32. By necessary inference, only pleadings properly so-called ought to be charged under this heading. The term "drawing" as defined in Black's Law Dictionary (8th Edition), means to prepare or frame a legal document, presupposing that the advocate has drafted the original legal instrument. The fee for drawing is therefore intended to compensate the advocate for the intellectual and professional effort of composing such a document. By contrast, annexures and authorities are mere reproductions of documents already in existence. They are supporting materials attached to affidavits or lists of authorities, but they do not involve the intellectual exercise of drafting. To treat them as drawings under Schedule 6(4)(a) amounts to an error of principle, since they properly fall under the category of copies.

Attendance:

33. The client argues that the Taxing Officer wrongly awarded costs for court attendance under Item 31 without applying the proper scale in Schedule 6 Rule 7(d). Since the attendance on 21st January 2020 lasted three hours, it should have been taxed at Kshs. 5,000/- (the half-day rate), not the higher amount awarded. Therefore, Kshs. 10,000/- should be deducted.

34. The Advocate maintains that the attendance was properly billed at Kshs. 15,000/=. The justification is that Prof. Tom Ojienda, SC, personally attended court on 21st January 2020 for the highlighting of submissions, which lasted practically the entire day.

35. Schedule 6 Rule 7(d) of the ARO prescribes specific categories of attendance, namely, half an hour or less, one hour, or a whole day. The provision does not expressly cater for intermediate durations such as three hours. In such instances, the Taxing Officer is empowered to exercise discretion in determining the appropriate scale, considering both the length of the attendance and the circumstances under which it occurred.

36. It is important to note that the scale is not intended to be a rigid or purely mechanical calculation of time spent. Rather, it also reflects the professional standing of counsel and the significance of the proceedings. In the present case, I am satisfied that the Taxing Officer acted reasonably in applying the higher scale of remuneration considering the seniority of counsel and the substantive nature of the attendance.

Disposition

37. Accordingly, the application dated 17th April 2025 succeeds only to the extent that the Advocates' Bill of Costs dated 11th November 2024 shall be remitted for re-taxation before a Taxing Officer other than Hon. Noelle Kyanya, limited solely to items 6 and 24 relating to drawings. All other grounds of the application are hereby dismissed. Each party shall bear its own costs of the application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF FEBRUARY 2026.

F. MUGAMBI

JUDGE

Delivered in presence of:

Mr Odeyo HB for Ms Awuor for the advocate

Court Assistant: Lillian