REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

MISC APPLN NO.E933 OF 2024

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES ….. RESPONDENT/ADVOCATE

VERSUS

B.N KOTECHA & SONS LIMITED …………………. APPLICANT/CLIENT

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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 Master delivered on 8th April 2025 and have the Bill of Costs remitted for re-taxation by a Taxing Master other than Hon. Noelle Kyanya. The background to the taxation is that the Advocate lodged the Bill of Costs dated 5th November 2024, in the sum of Kshs 46,826,545/=. The same was taxed at Kshs.

35,176,545.26. The Client was dissatisfied with the decision, culminating to the present appeal.

2. I have considered the said 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. The Advocates' first preliminary objection is that the Client's reference is premature. Their argument is that although the Client wrote to the Taxing Master requesting reasons for the ruling, the Client failed to await those reasons and instead proceeded to file the reference. According to the Advocates, this conduct contravenes ***Rule 11(2) of the Advocates Remuneration Order (ARO)***, which requires that a reference be filed only after receipt of the taxing officer's reasons.

4. The Client disputes this contention. They maintain that ***Rule 11*** obliges a party to file a reference within 14 days of receipt of the Taxing Master's reasons. In this case, the Deputy Registrar

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delivered a ruling on 8th April 2025. That ruling was detailed and self-contained, setting out the reasons for the taxation. Out of an abundance of caution, the Client wrote to the Deputy Registrar on 10th April 2025 seeking further reasons for the decision, but no response was forthcoming. The Client therefore filed the reference within 14 days of the ruling, in full compliance with ***Rule 11***.

5. I am persuaded that the Client's application is not premature. Consistent jurisprudence of this Court, including in ***National Oil Corporation Limited V Real Energy Limited & Another, [2016] eKLR*** and ***Evans Thiga Gaturu V Kenya Commercial Bank Limited, [2012] eKLR***, has clarified that the purpose of ***Rule 11(2)*** is to ensure that a party has sufficient reasons to enable them to challenge a taxation decision. Where the taxing officer has already provided comprehensive reasons in the ruling itself, a further request for reasons is unnecessary. The taxing officer cannot reasonably be expected to issue additional reasons beyond those already contained in the ruling.

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6. The Client confirms that the Ruling contained clear reasons and that their subsequent request was merely precautionary. The absence of a response did not prejudice them, and they filed the reference within the statutory period. Accordingly, the objection on prematurity is without merit.

Instruction Fees:

7. The Client next challenges the taxing master's approach to instruction fees. They argue that the taxing master erred in applying ***Schedule 6(1)(b) of the ARO*** instead of ***Schedule 6(1)(c)(viii),*** which governs opposed applications in appeals. Under the latter provision, the applicable fee would have been Kshs. 5,000/=, subject to enhancement. The Client concedes that a reasonable uplift to Kshs. 100,000/= would adequately compensate the Advocate for the work involved.

8. The Client further submits that the application in question was a routine stay application under ***Rule 5(2)(b) of the Court of Appeal Rules***. It did not involve novel or complex issues of law, constitutional interpretation, or significant factual disputes. Despite this, the taxing master increased

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the instruction fee from Kshs. 10,387,229/= to Kshs. 15,000,000/=, a 50% increment which the Client describes as vague and unjustified.

9. The Advocates counter that the application was indeed brought under ***Rule 5(2)(b),*** which invokes the Court of Appeal's original jurisdiction, distinct from its appellate jurisdiction. They rely on ***Trust Bank Limited & Another V Investech Bank Limited & 3 Others, [2000] eKLR***, which established that proceedings under ***Rule 5(2)(b)*** are *sui generis* and cannot be treated as ordinary appellate applications.

10. This position has been reaffirmed in subsequent decisions, notably ***Stanley Kangethe Kinyanjui V Tony Ketter & 5 Others, [2013] KECA 378 (KLR),*** where the Court held:

> ***"In dealing with Rule 5(2)(b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court."***

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11. It follows that proceedings under ***Rule 5(2)(b)*** cannot therefore be taxed under ***Schedule 6(1)(c)(viii),*** which presupposes opposed applications not otherwise provided for. The Taxing Master was therefore correct in treating the matter as a substantive proceeding commenced by Notice of Motion before the Court of Appeal, and in applying ***Schedule 6(1)(a)*** and tabulating the amount under ***Schedule 6(1)(b)*** given that the proceedings were opposed.

12. The Taxing Master also 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. Guided by the decision in ***First American Bank of Kenya V Shah & Others, [2002] 1 EA 64*****,** this Court will not interfere with a taxing officer's discretion unless it is shown that the decision was based on an error of principle or that the fee awarded was so manifestly excessive as to amount to such an error.

13. Here, no error of principle has been demonstrated. The increase to Kshs. 15,000,000/= was reasoned. The Taxing Master explained that the Applicant had sought Kshs. 20,000,000/=, emphasizing the

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importance of the subject matter, which involved the threat of insolvency. She balanced this against the principle in ***Premchand Raichand Ltd & Another V Quarry Services of East Africa Ltd & Another [1972] EA 162***, where it was held that costs should not be so high as to restrict access to justice. On that basis, she found Kshs. 15,000,000/= reasonable.

14. 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 mathematical exercise but a matter of discretion informed by experience. Courts will not interfere merely because they might have awarded a different figure. Interference is warranted only where the award is so high or low as to amount to injustice. That threshold has not been met here. This ground therefore fails.

Getting-Up Fees:

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15. The Client also challenges the award of getting-up fees, arguing that such fees are only payable where a matter proceeds to trial or appeal, as provided under ***Schedule 6 Rules 2 and 3 of the ARO***. Since a stay application does not amount to either, they contend that the Taxing Master erred. They have relied on authorities including ***Mits Electrical Company Limited V National Industrial Credit Bank Limited Misc. Appln No. 429 of 2004, Kenya Agricultural & Livestock Research Organisation V Njama Limited, [2017] KEHC 9873 (KLR)*** and ***Republic V National Environmental Tribunal Ex-parte Silversten Enterprises Limited, [2010] eKLR*****.**

16. The Advocates, however, cite ***Shamshudin Khosla & Others V Kenya Revenue Authority, [2011] KEHC 2685 (KLR)*** to support the award of getting-up fees.

17. The Taxing Master Interpreted **Clause 2** of **Schedule 6** correctly. That clause provides that where liability is denied or issues for trial are joined, a fee for getting-up and preparing the case

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shall be allowed in addition to the instruction fee, being not less than one-third of the instruction fee. The exception is that no such fee is chargeable until the case has been confirmed for hearing.

18. In this matter, the ***Rule 5(2)(b)*** proceedings proceeded to hearing and a determination was rendered. Considering my previous pronouncement on the nature of these proceedings, I do find that the Taxing Master was entitled to award getting-up fees. I therefore dismiss this ground of the application.

19. The Client's final submission is that the Taxing Master erred in principle by allowing annexures and authorities to be charged under ***Schedule 6(4)(a)***. The Client contends that annexures and authorities are not pleadings and therefore fall outside the scope of this provision.

20. ***Schedule 6(4)(a)*** expressly provides for fees in respect of substantive pleadings and applications, including statements of claim, plaints, written statements of defence, interlocutory applications, notices of motion or chamber applications,

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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.

21. The common thread running through these categories is that they are pleadings or primary legal documents which require the professional skill and intellectual effort of an advocate in their preparation.

22. By necessary inference, only pleadings properly so-called ought to be charged under this heading. The distinction lies in the meaning of the term 'drawing' which is defined in the Black's Law Dictionary 8th Edition as *to prepare or frame (a legal document).* As such, a document that is drawn by an advocate presupposes that the advocate has prepared or drafted the original legal document. The fee for drawing compensates the advocate for the intellectual and professional effort of composing such a document.

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23. By contrast, copies are mere reproductions of documents already drawn. These include annexures attached to affidavits and copies of documents reproduced and annexed to pleadings as well as authorities appended to a list of authorities, which itself may be drawn but whose annexed cases are copies rather than original pleadings. In my view, annexures and authorities are therefore supporting materials rather than pleadings in their own right. They do not involve the intellectual exercise of drafting but are instead duplications of existing documents. To allow them to be charged as drawings under ***Schedule 6(4)(a)*** amounts to an error of principle.

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Disposition

24. Accordingly, the application dated 17th April 2025 succeeds only to the extent that the Advocates' Bill of Costs dated 5th November 2024 shall be remitted for re-taxation before a Taxing Master other than Hon. Noelle Kyanya, limited solely to items 3, 12, 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

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