REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

MISC APPLN NO. E944 OF 2024

BETWEEN

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

VERSUS

UNIFRESH EXOTICS (K) LIMITED ..... RESPONDENT/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 5th November 2024, which was taxed at Kshs.

7,384,258.40/=. 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 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 increasing instruction fees by more than 3-fold from Kshs. 879,455/= to Kshs. 3,000,000/= without justification. They maintain that no evidence of complexity or novelty in the matter was demonstrated, and that the Taxing Officer ought to have taxed instruction fee at Kshs. 879,455 /= which is reasonable in the circumstances of the case and did not warrant any enhancement and considering that the matter had not even been certified ready for hearing leave alone being heard.

8. 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. The Advocate further contends that the adjustment from Kshs. 879,455/= to Kshs. 3,000,000/= was justified. They argue that the Taxing Officer considered the significance of the matter to the parties as well as the colossal sum involved.

9. I have carefully considered the submissions advanced by both parties on this issue. From a close reading of the impugned Ruling, it is evident that the Taxing Officer correctly identified the value of the subject matter as pleaded in the plaint, namely USD 420,000. The officer then proceeded to convert this figure using the prevailing exchange rate, and thereafter applied the provisions of ***Schedule 6(1)(b) of the Advocates Remuneration Order (ARO)*** to compute the instruction fees. In my assessment, this approach was consistent with the applicable principles of taxation, and I find no fault in the

methodology employed by the Taxing Officer in arriving at the base figure for instruction fees.

10. The subsequent adjustment of the instruction fees was apparently predicated upon the Taxing Officer's assessment of the complexity of the matter. This adjustment was undertaken in light of the guiding principles set out in ***Premchand Raichand Ltd & Another V Quarry Services of East Africa Ltd & Another, [1972] EA 162***, which emphasize the need for fairness, proportionality, and reasonableness in the taxation of costs. Furthermore, I am guided by the decision in ***First American Bank of Kenya V Shah & Others, [2002] 1 EA 64*****,** which underscores that the discretion vested in a taxing officer should not be interfered with lightly. Judicial intervention is only warranted where it is demonstrated that the taxing officer acted on the basis of an error of principle, or where the fee awarded is so manifestly excessive as to occasion injustice.

11. Instruction fees are intended to compensate counsel for the skill, labour, and responsibility that would be involved in preparing and prosecuting a matter, considering factors such as the value of

the subject matter, the complexity of the issues, the novelty of the arguments, and the extent of preparation required. In the present case, the Advocate has candidly acknowledged that the claim arose from a claim of negligence. It is further undisputed that no defence, witness statements, documentary evidence, or trial-related materials were ever filed in court. Where a matter has not progressed beyond the pleadings stage, the intellectual input expended by counsel must necessarily be regarded as limited.

12. The jurisprudence is clear that instruction fees should not be inflated merely on account of the monetary value of the claim, but must reflect the complexity encountered. In the instant matter, there is no evidence of exceptional difficulty, novelty of legal issues, or voluminous documentation expected that would justify a threefold increase in a negligence claim. I find that the increase was wholly unwarranted.

Getting-Up Fees:

13. On the issue of getting up fees, the Client contends that the Taxing Officer erred in principle by

awarding such fees. In support of this contention, reliance was placed on ***Mits Electrical Company Limited V National Industrial Credit Bank Limited, Misc Appln No. 429 of 2004, Kenya Agricultural & Livestock Research Organisation (formerly Kenya Agricultural Research Institute) V Njama Limited, [2017] KEHC 9873 (KLR)***, and ***Republic V National Environmental Tribunal Ex-Parte Silversten Enterprises Limited, [2010] eKLR.***

14. Taken together, these authorities establish a consistent principle that getting up fees are only applicable where there has been preparation for a full trial involving oral testimony, cross-examination, and the marshalling of witnesses. Where a matter is determined purely on affidavit evidence and written submissions, without the necessity of viva voce proceedings, the award of getting up fees is erroneous in principle.

15. 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. However, the court 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 sufficiently prepared for trial.

16. 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 from 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, and that the

distinction lies in the subsequent steps taken to prepare the matter for hearing.

17. It is therefore clear that while instruction fees represent the advocate's formal commitment to act upon receiving instructions, getting up fees are intended to compensate for the additional work of preparing pleadings, organizing evidence, and undertaking other preparatory steps necessary for trial. The two are conceptually distinct, though they may overlap in practice.

18. 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, recognizing 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.

19. In reconciling these positions, I am convinced that the discretion of the Taxing Officer under ***Schedule 6(2)*** may not have been properly exercised in this case. Clause 2 of Schedule 6 provides that:

> ***"In any case in which a denial of liability is filled or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation."***

20. I say so because there is no demonstration that substantial or any preparation for trial was undertaken. From the uncontested evidence on record, the Advocate had no notice of the Client's defence and did not lodge any pleadings in preparation for hearing beyond the Plaint. There was no indication of witness preparation, discovery, or trial readiness. In these

circumstances, the award of getting up fees was not supported by the facts and amounted to an error of principle. This ground of objection is therefore merited.

Drawings:

21. 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. The Advocate confirms having drawn and filed a plaint and a trial bundle and as such maintains that the amount on drawings was justified.

22. ***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. This list contains primary legal documents that require professional skill and

intellectual effort of an advocate in their preparation.

23. 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.

Disposition

24. In light of the foregoing analysis, I am satisfied that the Client's application dated 17th April 2025 is meritorious and accordingly succeeds. The

Advocates' Bill of Costs dated 5th November 2024 is hereby remitted for re-taxation before a Taxing Officer other than Hon. Noelle Kyanya, to be undertaken in strict conformity with the principles and determinations set out in this ruling. For avoidance of doubt, 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