REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC MISC APPLICTION NO. 25 OF 2022

IAN MAGARA BWOSIEMO::1ST APPLICANT

BRENDA KWAMBOKA BWOSIEMO::::::::::::::::::::::::::::::2ND APPLICANT

AL RUHIA ESTATES LTD::3RD APPLICANT

VERSUS

MUCHANGI NDUATI NGINGO T/AMUCHANGI NDUATI & CO.ADVOCATES::RESPONDENT

RULING

The application is dated 9th July 2025 and is brought under Rule 11 (1) (2) and (4) of the Advocates Remuneration Order, 2014; Order 21 Rule 9 of the Civil Procedure Rules, Sections 1, 3A of the Civil Procedure Rules seeking the following orders;

1. That the ruling of Honorable Taxing Officers delivered on 26th June 2025 be set aside and taxed afresh by this court.
2. Costs of the application be awarded to the applicant.

It is supported by the affidavit of Manwah Bwosiemo Magara and the grounds set here under that the Honorable Taxing Officer erred when declaring the value of the subject matter at Kshs. 11 million as opposed to Kshs. 1.95million. that the court failed to consider the actual value of the claim and the cash paid to the advocates as initial instruct fees of Kshs. 145,000/=, which was never disputed by Messrs Muchangi Nduati Advocates.

The Applicant submitted that the Deputy Registrar (DR) Hon. Victoria Ochanda, the taxing master of the Honourable Court deliberately substituted the Advocate client bill of cost dated 6th May 2022 withdrawn for miscellaneous Application No. 25 of 2020 which was the subject of the Reference No. 34 of 2023 that was granted leave by court for the Ruling of 26th February 2025. That he ELC. Miscellaneous Application No. 25 of 2020 which was set aside on 262.2025 and the court granted leave for the reference application No.34 of 2023 was deliberately substituted for miscellaneous Application No. 25 of 2022 which was not the subjected for the reference No. 34 of 2023, by the Ruling of lady Justice NA. Matheka judge, on 26th February 2025. That the advocate Muchangi Nduati and Co Advocates were running two parallel court file, for Advocate client bill of cost, which are similar and identical (twins). ELC miscellaneous Application No. 25 of 2022 and ELC miscellaneous Application No. 25 of 2020, which was subjected to Reference No. 34 of 2023 for a fresh taxation of the Advocate client bill of cost No. 25 of 2020.

The Respondent filed a cross reference dated 10th July 2025 and is brought under Rule 11 of the Advocates Remuneration Order, 2014; Order 11 Rule 4 of the Civil Procedure Rules, seeking the following orders;

1. That the taxed costs be deposited in court awaiting determination of the references.
2. That the taxation order made on 26th June 2025 be set aside.
3. The taxation of items 1 to 28 on the applicants bill of costs dated 6th May 2022 be revised /re taxed by the Honourable Court.
4. Costs be provided for.

The application is based on the grounds that items 1 to 28 on the applicants bill of costs dated 6th May 2022 were not taxed to scale and that is an error of principle. The taxing master erred in principle by failing to take into account the Applicant's submissions on the amounts duly paid through mpesa in the case. The ruling on taxation is full of errors and vagueness as to constitute errors in principle.

This court has considered the applications and the submissions therein. The procedure for the challenge of a Taxing Master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:

"(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."

As discussed in my earlier ruling dated 26th June 2026, the principles of varying or setting aside a Taxing Master's decision are set out in the cases of First American Bank of Kenya vs Shah and Others (2002) EA 64 and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92, that the Taxing Master's judicial discretion can only be interfered with when it is established that the there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law. In First American Bank of Kenya vs Shah and Others (2002) E.A.L.R 64 the court held that;

"First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based

on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle".

These principles reiterate the position of the Court of Appeal in Joreth Ltd vs Kigano & Associates (2002) eKLR, where the said Court held that a Taxing Master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the Taxing Master is excessive to amount to an error in principle.

The Applicant in the application contends that being dissatisfied with the Taxing Officer's decision have filed this application. That the Taxing Officer erred in law and in fact when declaring the value of the subject matter at Kshs. 11 million as opposed to Kshs. 1.95million. that the court failed to consider the actual value of the claim and the cash paid to the advocates as initial instruct fees of Kshs. 145,000/=, which was never disputed by Messrs Muchangi Nduati Advocates.

In Republic vs Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna (2006) eKLR Ojwang, J (as he then was) expressed himself as follows:

"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially

have affected the assessment…A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved…Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for…The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs…"

In First American Bank of Kenya vs Shah and Others (2002) E.A.L.R 64 the court held that;

"First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle".

In KANU National Elections Board & 2 others v Salah Yakub Farah [2018] eKLR, it was held that:

"*The principles applicable to a review of a taxing master's decision*

The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in the case of Visser vs Gubb 1981 (3) SA 753 (C) 754H – 755C as follows:-

"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where

it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

Differently put, before the court interferes with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly

wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling. (See Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others [1984] ZASCA 2; 1984 (3) and Legal and General Insurance Society Ltd vs Lieberum NO and Another 1968 (1) SA 473 (A) at 478G.)

It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision. (Johannesburg

Consolidated Investment Co. vs Johannesburg Town Council 1903 TS 111).

The Taxing Master is required to take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The ultimate question raised by the applicant for review/setting aside the taxation is therefore whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case.

The scope of this application requires this court be satisfied that the Taxing Master was clearly wrong before interfering with her decision.

The quantum of such costs is to be what was reasonable to prosecute or defend the proceedings and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles.

It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or

has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.' (Per SMIT AJP in Preller vs S Jordaan and Another 1957 (3) SA 201 (O) at 203C - E.)

Guidance can also be obtained from the Canadian case of Reese vs. Alberta {1993} 5 A.L.R. (3rd) 40in which McDonald J. sets out the general principles applicable to awarding costs, at page 44:-

> *"While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. …*
>
> *The costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees ….plus reasonable disbursements….”*
>
> *In principle, costs are awarded, having regard to such factors as:- (a) the difficulty and complexity of the issues; (b) the length of the trial; (c) value of the subject matter and (d) other factors which may affect the fairness of an award of costs. The law*

obligates the taxing master to take into account the above principles.

Restating the principles of taxation of costs, the Ugandan Supreme court in Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC).stated:-

"Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge.

Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

…The principles guiding the review of taxation in this court were settled in President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another:

"a. Costs are awarded to a successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.

b. A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.

c. The taxing master must strike this equitable balance correctly in the light of all the circumstances of the case.

d. An overall balance between the interests of the parties should be maintained.

e. The taxing master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.

f. And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate the ruling."

The Taxing Master in her ruling dated 26th June 2025 provided that the taxation of the matter would be based on Remuneration (Amendment) order of 2014. She based her calculations on the subject matter being Kshs. 11 Million.

The Advocate Remuneration Order is a remuneration code which stipulates how an advocate is to be remunerated once the advocate is retained to render professional services. It contains a costing of the services ordinarily rendered by advocates. Because it is a code which specifies what a particular service would cost, it has been split into various schedules, each schedule containing the costing of a particular category of services. The First Part of Schedule 1 relates to services rendered by an advocate in relation to sales and purchases of land. The Second Part of Schedule 1 relates to services rendered by an advocate in relation to debentures, mortgages and charges. The third part of Schedule 1 relates to

services rendered by an advocate in relation to negotiation of sale of property by private treaty or loan secured by mortgage.

I have perused the pleadings in ELC No. 210 of 2011 and find that the dispute arose out of a sale agreement where the sale agreement was Kshs. 11 Million. The Applicant/Client maintains it should be Ksh. 1.95 Million which was finally awarded by the court. That the court failed to consider the actual value of the claim and the cash paid to the advocates as initial instruct fees of sh. 145,000/=. I find that the subject matter of the suit was Kshs. 1 Million and it is immaterial what was awarded in the final judgement. The Applicant states that there are parallel references in this matter. I have perused the court record and find that the Respondent withdrew Misc Application No. 25 of 2020 on the 23rd February 2022. The Respondent filed another bill of costs in Misc Application No. 25 of 2022 which was taxed at Kshs 424,902/= on 15th December 2022. The 1st and 2nd Respondents in the bill filed a reference Misc Application No. 34 of 2023 to challenge the tax costs. The ruling on the said reference was delivered on 26th February 2025 by this court ordering the same to be re taxed. The Deputy Registrar did so hence the present reference and cross reference. I find that there are no parallel bill of costs and the taxed costs refer to one and the same matter.

The Advocate stated in his cross reference that items 1 to 28 on the applicants bill of costs dated 6th May 2022 were not taxed to scale and that is an error of principle. The taxing master erred in principle by failing to take into account the

Applicant's submissions on the amounts duly paid through Mpesa in the case. I have perused the said ruling by the taxing master and find that whether or not items are taxed to scale is a matter of discretion and need not necessarily be taxed to scale. She further stated that;

> *"From the submissions indicated in Matheka J's ruling, which was the basis for allowing the revision, was that all the amounts already paid was never put into consideration by the previous taxing master. From the affidavit and submissions KES 397,000 was already advanced. However, receipts and Mpesa statements tabled before the court only amounted to KES 287,300. The figures KES 65,000 and KES 45,000 had neither Mpesa statements or receipts in support".*

I disagree with the Applicant in the cross petition in the amounts already paid as it is clear the same were taken into consideration as per the documentary evidence.

Consequently, I find that there is no error in principle by the Taxing Master's in the assessment of her ruling dated 26th June 2026. I find the reference and cross reference are both not merited and I dismiss both applications with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2026.

N.A. MATHEKA

JUDGE