

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MILIMANI LAW COURTS
MISC. APPL NO. E1075 OF 2023

**KENWEST CABLES
LIMITED.....APPLICAN
T**

-VERSUS-

**MURI MWANIKI & WAMITI
ADVOCATES.....ADVOCATE/
1ST RESPONDENT**

**ECOBANK KENYA
LIMITED.....2ND
RESPONDENT**

RULING

- 1.The applicant, **Kenwest Cables Limited**, filed the chamber summons dated 10.9.2025 under **Section 51 (1) of the Advocates Act, Paragraph 11 of the Advocates (Remuneration) Order**.
- 2.The applicant seeks that the taxing officer's ruling of 28.8.2025 be set aside and that the court allows its notice of motion dated 25.9.2025.
- 3.The application is supported by the affidavit sworn **by Richard Kimani Rugendo**.
- 4.The applicant's gravamen is that there is no advocate-client relationship between it and the

advocate and that therefore, the advocate-client bill of costs dated 19.12.2023 ought to be struck out as against it.

5.The grounds are that through the impugned ruling, the taxing officer held that it taken up the responsibility of shouldering the legal costs. The taxing officer relied on the assertion in the 2nd respondent's replying affidavit invoking a professional undertaking issued by another law firm regarding the legal costs.

6.The applicant contended that the learned taxing officer erred and failed to appreciate that:

(i) The said professional undertaking was not issued on behalf of the applicant and was therefore not binding upon the applicant. In any event a professional undertaking cannot be realized or pursued by way of taxation proceedings.

(ii) At all material times the advocate was instructed by the 2nd respondent a fact that was not denied.

- (iii) The matter before her sought quite simply the production of the instructions issued to the advocate.
- (iv) In the absence of the instructions sought to be produced, the subject taxation would be proceeding based on concealment of pertinent material information.
- (v) The envisaged assignment being the stamping and registration of security documents was obviated by the settlement of the underlying loan and the applicant's decision not to pursue the subject borrowing.
- (vi) There was evidently no retainer between the applicant and the advocate.
- (vii) There was therefore no lawful basis upon which the advocate could sustain an advocate-client bill of costs against it.

7. The applicant faulted the taxing officer for failing to consider its prayer for an order directing the production of the letter of instructions issued to the advocate, which was central to establishing or disproving the existence of a retainer.

- 8.The applicant also faulted the taxing officer for holding that the advocate-client relationship subsisted with the applicant despite evidence that the 2nd respondent was the instructing client, and that dispute between the bank and the applicant could not be determined in taxation proceedings.
- 9.The applicant asserted that it is in the interests of justice that the application dated 25.9.2024 be allowed and the advocate-client Bill of Costs dated 19.12.2023.

Response

- 10.The 2nd respondent filed a grounds of opposition dated 23.9.2025, on the following grounds: -
- (1)The application is premature, misconceived, and bad in law as no taxation has been undertaken nor any ruling delivered by the taxing officer on the Advocate's Bill of Costs.
- (2)In the absence of a taxation decision, there is nothing capable of being referred to this court, and the reference is therefore incompetent and fatally defective.
- (3)The proper procedure available to the applicant, if aggrieved by the pendency or

handling of the subject ruling delivered would have been to pursue an appeal or appropriate application, and not a reference under Rule II.

(4)The court's entertaining of the present application would amount to usurping the statutory jurisdiction of the taxing officer, contrary to the provisions of the Advocates Act and the Advocates (Remuneration) Order.

(5)The application is an abuse of the court process and ought to be dismissed with costs.

Analysis and Determination

11.The main grounds of opposition are that the application is premature, misconceived, and bad in law as no taxation has been undertaken nor any taxation ruling delivered by the taxing officer on the Advocate's Bill of Costs.

12.Linked to the foregoing, but of preliminary significance is the issue that the applicant ought to have preferred and appeal rather than file a reference.

Reference instead of an appeal

13. The applicant has filed a reference through chamber summons. The respondent argued that the applicant ought to have appealed against the impugned ruling instead of filing the reference.

14. I am content as foundational understanding, with the words of **Angote J.** that; ‘The Advocates Remuneration Order does not provide for an “Appeal” against the decision of a taxing officer. The only procedure provided for in challenging the decision of a Taxing Officer...is by way of a Reference pursuant to paragraph 11 of the Advocates Remuneration Order.’ **Gikeria & Vadgama Advocates v Okali (Miscellaneous Application 166 of 2019) [2022] KEELC 2301 (KLR) (12 May 2022) (Ruling)**

15. Nevertheless, fidelity to substantive justice has also seen courts finding that, an appeal against a taxing officer’s ruling which was not purely based on taxation was competent. **Edward Mwangi Macharia v Maina & Maina Advocates [2017] KEHC 1399 (KLR) (Sergon J.)**

16.The lesson learnt from the two decisions is the need to administer substantive justice without undue regard to procedural technicalities. **Article 159 (2) (d) of the Constitution.**

17.My finding, nonetheless, is that the reference application against the taxing officer's ruling is competent.

Of Jurisdiction

18.The law, the way I understand it, is that, the taxing officer has jurisdiction under **para. 13A of the ARO** to determine whether an advocate-client relationship exists in a taxation of a Bill of Costs between an advocate and his/her client. The issue of whether an advocate-client relationship exists ought to be determined first before the bill of costs is taxed. **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] KECA 431 (KLR)**

19.The taxing officer has determined the issue through the impugned ruling. I have found that this application challenging the taxing officer's finding on the issue is competent. Therefore, the reference should be determined before taxation of

the bill of costs. It is for this very reason that the court issued the orders of 2.10.2025 arresting the ruling of the taxing officer on the bill of costs pending the determination of the matter.

20. I am aware that, some other pundits may argue that such reference may be taken as interlocutory and should await the taxation and then it be raised as one of the issues in the reference against the taxation. Deferred or delayed or sequential jurisdiction is not strange in Kenya jurisprudence; it is accepted in criminal cases as well as electoral disputes. This argument was not proffered here; so it is a hint for future debate.

21. In this case, I do not think that, determining this application would amount to usurping the taxing officer's jurisdiction.

Existence of an Advocate-client relationship

22. The applicant faulted the taxing officer for finding that there was an advocate-client relationship between it and the advocate based on a professional undertaking issued by another law firm regarding the legal costs.

23.The applicant insisted that there was no advocate-client relationship and that there was no production of the letter of instructions issued to the advocate. It maintained that the 2nd respondent was the instructing client.

24.The backdrop is that the applicant had a banking facility with the 2nd respondent bank and intended to change the facility which was secured by a charge by Pine Tree Limited. Change of User of the charged property was required. However, the applicant decided not to proceed with the change of the facility due to depressed business. The applicant claims that this was before the change of user could be effected. On 23.11.2023, the applicant received a demand for legal fees of Kshs. 2,203,438/-.

25.**Para. 31 of the ARO** states that: -

“31. Costs of mortgage to be paid by borrower

The costs of a mortgagee for the investigation of title and the preparation, completion and registration of his security or of any discharge or assignment thereof made at the request

of the borrower, whether or not the transaction is completed, shall be payable to [by] the borrower, but any commission due to the mortgagee's advocate for negotiating the loan shall be payable by the mortgagee."

26. Faced with similar circumstances, in **Njuguna Matiri & Company Advocates v National Bank of Kenya [2015] eKLR**, the court (**Hon. Mulwa J.**) interpreted the above provision as follows: -

"In my view, the above provision clearly indicates that the request made by the borrower - can only mean, a request to the bank, not to the Advocates, meaning, the bank ought to debit the borrowers account to the order of the Advocates fees when it becomes payable and or demanded. This is informed by the fact that there exists no privity of contract between a borrower and an advocate for the bank.

It is the borrower who enters into a contract with the bank for advancement of finances against securities that the Bank commissions its lawyers, as its agents to prepare and perfect. In such scenario, the Bank then enters into

another contract between itself and the Advocate for payment of its fees, upon completion, or on whatever terms of payment of legal fees, but not with the borrowers who at this point are strangers to the Advocates.

In National Bank of Kenya Limited -vs- Kangethe George t/a Kangethe & Company Advocates - Misc. Appl. No 718 of 2014 (2012) KLR, in very similar circumstances, the court held that there can be no privity of contract between a borrower and an advocate instructed by the bank. The client was held to be the instructing bank and ordered that an Advocate-client bill of costs be filed.

Authorities in support of the above findings are plenty.”

27. My considered opinion and holding is that, From the above, I find that there is no advocate-client relationship between the applicant and the advocate.

Disposal

28.The upshot is that the application dated 10.9.2025 is allowed in the following terms.

(1)The taxing officer’s ruling dated 28.8.2025 is set aside.

(2)The advocate-client bill of costs dated 19.12.2023 is struck out as against the applicant.

(3)Costs to the applicant.

Dated, signed and delivered at Nairobi through Microsoft Teams online application this 19th day of February, 2026

F. Gikonyo M

Judge

In the presence of: -

Marete for Applicant

Lundi for 1st Respondent

Ms. Kandie for 2nd Respondent

CA - Ivan/Aggrey