

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISC. APPL NO. E1081 OF 2023

KEVIAN KENYA

LIMITED.....APPLI

CANT

-VERSUS-

MURI MWANIKI & WAMITI

ADVOCATES.....ADVOCATE/

1ST RESPONDENT

PINETREE

LIMITED.....2ND

RESPONDENT

ECOBANK KENYA

LIMITED.....3RD RESPONDENT

RULING

1. The chamber summons dated 10.9.2025 is seeking that the taxing officer's ruling dated 28.8.2025 dismissing its notice of motion dated 25.9.2025 be set aside and that the court allows the motion as prayed.
2. The applicant's major contention is that there is no advocate-client relationship between it and the advocate to provide a basis for the filing of the bill of costs dated 20.12.2023 against it.
3. The applicant faults the taxing officer for relying on a professional undertaking issued by another law firm to find that it bore the responsibility to pay the legal fees.
4. The applicant finds fault in the trial court failure to appreciate that; the professional undertaking was not issued on its behalf; and that a professional undertaking cannot be pursued through taxation proceedings. Thus, holding that there was an advocate-client relationship between it and the advocates based on the professional undertaking was a misconception.
5. The applicant categorically asserted that the advocate was instructed by the 3rd respondent.

Yet, the taxing officer disregarded the letter of instructions issued by the 3rd respondent to the advocates.

6. Accordingly, the applicant concluded that the taxing officer erroneously assumed jurisdiction over the bill of costs whereas such can only be competently initiated and determined through originating summons.

7. The applicant thus argues that the impugned ruling has occasioned a miscarriage of justice by exposing it to taxation proceedings on a bill of costs grounded on a non-existent advocate-client relationship.

8. The applicant urges that the bill of costs dated 20.12.2023 be struck out.

Response

9. In opposing the application, the 3rd respondent filed grounds of opposition dated 23.9.2025, citing 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 would have been to pursue an appeal or appropriate application, and not a reference under Rule II.

(4) The court's entertainment 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

Reference instead of an appeal

10. The respondent argued that the applicant ought to have appealed against the impugned ruling instead of filing a reference.

11. **Para. 11 of the Advocates Remuneration Order (ARO)** provides for the procedure of challenging a decision of a taxing officer in relation to taxation of a bill of costs.

12. **Para. 13 A of the ARO** provides for the powers of the taxing officer. The Court of Appeal has pronounced that the taxing officer has the power to determine the issue of whether an advocate client relationship exists before taxing a bill of costs.

13. In **C.B. Gor & Gor v Oriental Commercial Bank Limited (formerly known as Delphis Bank Limited) [2018] KECA 396 (KLR)** the Court of Appeal observed that a taxing master who is charged with the duty of taxing bills of costs must also have the power to determine an objection as to the competency of the bill.

14. In **Gikeria & Vadgama Advocates v Okali**
(Miscellaneous Application 166 of 2019)
[2022] KEELC 2301 (KLR) (12 May 2022)
(Ruling) the court **(Hon. Angote J.)** observed
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 in which she has taxed a Bill of Costs is by way of a Reference pursuant to paragraph 11 of the Advocates Remuneration Order.”

15. In **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited**
[2017] KECA 431 (KLR) the Court of Appeal noted that a taxing officer’s decision on the issue of retainer had been challenged through a chamber summons pursuant to para. 11 of the ARO.

16. Distilled from case law cited above, the ARO does not provide for an appeal but a reference against a decision of the taxing master including

competence of the bill as well as retainer. Thus, quite opposite to the 3rd respondent's contentions that the applicant ought to have appealed against the impugned ruling instead of filing the reference.

17. The 3rd respondent also argued that by entertaining the application the court would be usurping the taxing officer's jurisdiction.

18. First, a reference is the proper recourse to this court on a decision by the taxing master. The taxing officer determined the issue of retainer. Therefore, this reference is proper.

19. Second, retainer ought to be determined before the taxation of a bill of costs. **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited.**

20. It is precisely for this 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 this reference.

21. Therefore, I reject the contention that entertaining the application amounts to usurping the taxing officer's jurisdiction.

Does an Advocate-client relationship exist between a borrower and the bank's advocates?

22. Relevant to answering this question is the context of the relationship. The applicant had a banking facility from the 3rd 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/-.

23. The advocate filed a bill of costs dated 20.12.2023 for representing the applicant in a credit facility transaction involving preparation and registration of a replacement charge and discharge of charge over the charged property.

24. 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.

25. of pointed relevance in these proceedings is

Para. 31 of the ARO which 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 the borrower, but any commission due to the mortgagee’s advocate for negotiating the loan shall be payable by the mortgagee.”

26. 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. In my considered view, the provision is in two parts; costs of the mortgagee in respect of the transaction; and commission of the mortgagee's advocate in negotiating the loan.

28. The costs of a mortgagee in respect of; '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 by the borrower.

29. Any commission due to the mortgagee's advocate for negotiating the loan shall be payable by the mortgagee.

30. In the former, costs thereof are borne by and charged to the account of the borrower. Legal charges by the bank's advocate are included in these costs. But, that does not create advocate-client relationship between the mortgagee's advocates involved in transaction and the borrower.

31. In my considered view, such costs are recoverable and enforced strictly under rule 31 of the ARO explained above.

32. From the above, I find that there is no advocate-client relationship between the applicant and the advocate.

Disposal

33. In conclusion, 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 and the 2nd respondent.

(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: -

Lundi for Applicant

Ms. Kandie for 3rd Respondent

Marete for Applicant

CA - Ivan/Aggrey