REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISC. CIVIL APPLICATION NO. E978 OF 2023

IN THE MATTER OF: THE ADVOCATES ACT

AND

IN THE MATTER OF: THE ADVOCATES (REMUNERATION) ORDER 2006/2009

AND

IN THE MATTER OF: TAXATION OF AN ADVOCATE-CLIENT BILL OF COSTS

BETWEEN

IBRAHIM, ISAACK & CO. ADVOCATES……ADVOCATE /RESPONDENT

-VERSUS-

FARAH AWAD & SONS LIMITED……CLIENT/APPLICANT

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RULING

The Reference

1. The subject of this ruling is the Chamber Summons Reference dated 26.03.2025 (the Reference) brought by **Farah Awad & Sons Limited** (hereafter the Client/Applicant) under Order 42, Rule 6 of the Civil Procedure Rules (CPR) and Paragraph 11(1) and (2) of the Advocates (Remuneration) Order.

2. The Reference seeks the following prayers:

(i) Spent.

(ii) Spent.

(iii) <u>THAT</u> this Honourable Court be pleased to set aside the ruling and decision of the Taxing Officer delivered on 4.03.2025 in HCCC Misc. No. E978 of 2023, taxing the Advocate-Client Bill of Costs dated 5.07.2023 at Kshs. 1,308,633.12 on the grounds that the same is erroneous in law and fact.

(iv) <u>THAT</u> this Honourable Court be pleased to remit the Advocate-Client Bill of Costs dated 5.07.2023 to a different Taxing Officer for fresh taxation with appropriate directions, including that the subject matter value adopted by the Taxing Officer (USD 600,000 or Kshs. 51,600,000/-) is unsubstantiated by the pleadings or the agreement in Civil Case No. 661 of 2012.

(v) <u>THAT</u> in the alternative, this Honourable Court be pleased to re-tax the said Advocate-Client Bill of Costs and determine the reasonable instruction fees payable to the Applicant (the Respondent

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herein) based on the true nature and value of the dispute in Civil Case No. 661 of 2012.

(vi) <u>THAT</u> costs of the Reference be awarded to the Respondent.

3. The Applicant has supported the Reference by the grounds found on the body of the Reference and in the Supporting Affidavit sworn on 26.3.2025 by Muhamud Farah Awad, the Director of the Client/Applicant. The deponent has stated that the Client/Applicant instructed **Ibrahim, Isaack & Co. Advocates** (hereafter the Advocate/Respondent) to institute **Civil Case No. 661 of 2012** (the suit) on its behalf against M/S Zhongmei Engineering Group Limited, seeking damages for misrepresentation and breach of a cooperation agreement dated 20.11.2011 (the Agreement), which Agreement did not make provision for compensation to the tune of USD 600,000 or any specific sums; that the Advocate/Respondent did not prosecute the suit to full hearing, necessitating Clinet/Applicant to engage a different firm of advocates to take over the conduct of the matter; that the nature of legal services provided by the Advocate/Respondent were limited to the filing of the plaint

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and minimal preliminary steps and that the dispute did not entail any complex research issues.

4. It is the deponent's assertion that the Advocate/Respondent subsequently filed an Advocate-Client Bill of Costs dated 5.07.2023 (the Bill of Costs) seeking a sum of Kshs. 18,620,521.96 from the Client/Applicant, which Bill was opposed; that the Bill was taxed at a sum of Kshs. 1,308,633.12 as shown in a ruling delivered on 4.03.2025 and that the taxing officer erred and applied wrong principles in his assessment of instruction fees and by adopting a subject matter value of USD 600,000 in calculating instruction fees at Kshs. 709,000/- and getting up fees at Kshs. 236,333.33 in the absence of any demonstration of substantive work undertaken by the Advocate/Respondent and in the absence of any documentation supporting the use of USD 600,000.
5. The deponent has further faulted the taxing officer for reasoning that the subject matter of the dispute involved a special license and recovery of the abovementioned sum, when in fact the claim was purely founded on a breach of the Agreement, with unquantified damages being sought;

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that there was therefore no basis for the taxing master's application of the sum of USD 600,000 in assessing instruction fees and therefore, the assessment made on this particular item is excessive and unjust.

6. The Client/Applicant has urged this court to exercise its discretion in the Applicant's favour, by allowing the Reference as prayed.

The Replying Affidavit

7. The Advocate/Respondent has opposed the Reference through a Replying Affidavit sworn by **Enock N. Namude**, on 14.09.2025 in which it is deposed that the Reference lacks merit; that the taxing officer properly and judiciously exercised his discretion in assessing the instruction fees upon considering the value of the subject matter which was ascertainable from the pleadings filed in the suit and that the Advocate/Respondent was entitled to the costs taxed since it had rightfully earned the instruction fees sought.

8. It is further deposed that the instruction fees was reasonably taxed, upon the taxing officer considering all relevant factors including the documentation used in preparing for the suit and the time spent in prosecuting the

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matter; that the Advocate/Respondent participated in the pre-trial conference in the suit and was prepared to handle the hearing when the Client/Applicant decided to engage a different firm of advocates and that the amount taxed on instruction fees was drawn to scale and is therefore reasonable.

9. The Advocate/Respondent stated that there is no material placed before this court to warrant a disturbance of the taxing officer's ruling and therefore the Reference ought to be dismissed with costs and the taxing officer's decision upheld.

Submissions

10. Parties filed submissions. In urging that the Reference be allowed as prayed, the Client/Applicant has cited the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** where it was held that the decision of a taxing officer can only be disturbed where he or she either acted on wrong legal principles or misapplied the law. It was argued that the taxing officer departed from the relevant principles by adopting the value of USD

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600,000 in determining the subject matter, in the absence of any material to that effect thereby committing a grave error of principle that warrants an interference by this court.

11. The Client/Applicant cited **Joreth Ltd v Kigano & Associates [2002] KECA 153 (KLR)** where the Court of Appeal reasoned that the value of the subject matter ought to be identified from the pleadings, judgment or settlement, and where the same cannot be ascertained, then a taxing can exercise his or her discretion in assessing the instruction fees payable, upon taking into account factors such as the nature and importance of the case and the parties' interests. The Client/Applicant also relied on **Peter Muthoka & another v Ochieng & 3 others [2019] KECA 597 (KLR)** in which the Court of Appeal echoed the above finding, adding that discretionary power of a taxing officer can only be applied where the value of the subject matter is undeterminable.

12. It was argued that in the absence of anything to indicate that the value of the subject matter in the suit could be ascertained, the learned taxing officer ought to have reasonably exercised his discretion in assessing instruction

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fees; that the said assessment therefore ought to be disturbed and that in applying Schedule 6, Part B of the Advocate (Remuneration) Order 2009, the Advocate/Respondent would be entitled, at most, to a sum of Kshs. 75,150/- under the above item.

13. Further to the foregoing, it is the Client/Applicant's argument that the learned taxing officer erred in assessing getting up fees when the same were never payable, since the matter never proceeded for hearing under the Respondent's representation.

14. The Advocate/Respondent has submitted that the assessment undertaken by the learned taxing officer on the instruction fees was guided by the relevant legal principles and that the Applicant has not shown the manner in which the taxing officer erred in his decision or misapprehended the law or awarded a sum that was manifestly high or low. The Advocate/Respondent relied on **Premchand Raichand Limited and Another v Quarry Services of East Africa Limited and Another (1972) EA 162** where it was held that a court cannot interfere with the decision of a taxing

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officer unless it is demonstrated that such decision was based on an error of principle.

15. It was submitted that contrary to the averments made in the Reference, the value of the subject matter herein are discernible from the record as the value of the property known as Transmara/Moyo/39 measuring approximately 145ha (the property), the special license and the Agreement and that in assessing the instruction fees, the learned taxing officer considered the value ascertained from the documentation.

16. The Advocate/Respondent cited **First American Bank of Kenya v Shah and others [2002] E.A.L.R 64 at 69,** which echoes the applicable principles for interfering with a taxation decision, and contends that the Client/Applicant has failed to demonstrate that the learned taxing officer did not properly and reasonably exercise his discretion in assessing the instruction fees.

17. It is further contented that the pre-trial conference had already been undertaken and the matter certified ready for hearing, when the Applicant changed its legal representation and that in the circumstances, the learned

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taxing officer acted correctly in assessing getting up fees of Kshs. 236,333.33 pursuant to Schedule 6, Paragraph 2 of the Advocates (Remuneration) Order 2009. The case of **KTK Advocates v Forest Lodge Limited [2025] KEHC 4693 (KLR),** where the court upheld a taxation decision upon finding that it had not been demonstrated that any error of principle had been committed, was cited to demonstrate that the circumstances of this case warrant an interference with the decision of the taxing officer. The Advocate/Respondent has urged this court to dismiss the Reference with costs to it.

Analysis and Determination

18. I have considered the Reference and the opposing Replying Affidavit, parties' submissions and the authorities relied on. The issue raised in the Reference is simply that the taxing officer erred in law and fact by adopting unsubstantiated subject matter of USD 600,000 as the basis of calculating instruction fees thereby awarding high taxed costs.

19. It is my understanding that the issue requiring my determination is whether the Client/Applicant has

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demonstrated the legal basis for interfering with the decision of the taxing officer.

20. In **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd [1972] EA 162**, the unique nature of the taxation proceedings was stated thus:

> ***"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, and particularly where he is an officer of great experience, merely because it thinks the award somewhat is 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."***

21. The Court of Appeal in the above decision stated the relevant principles to guide the exercise of discretion by taxing officers in the assessment of costs as follows, that, (as paraphrased):

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"(a) Costs should not be allowed to rise to such a level as to limit access to the courts to the wealthy only;

(b) A successful litigant ought to be fairly reimbursed for the costs he has had to incur;

(c) The general level of remuneration of advocates must be such as to attract recruits to the profession; and

(d) So far as practicable there should be consistency in the awards made."

22. Factors that would trigger the interference of a taxing officer's decision are well settled. In **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** the Court of Appeal held thus:

"On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs."

23. The Court went ahead to reason that an error of principle would include an excessive award on costs or an overemphasis on factors such as the nature and complexity

of the matter at hand, with the above legal position being reaffirmed in the case of **Moronge & Company Advocates v Kenya Airports Authority [2014] eKLR**.

24. To my mind, the Client/Applicant is challenging items 1 and 2 constituting the instruction fees and getting up fees, respectively. In respect to **item 1 of the Bill of Costs,** on instruction fees, the Advocate/Respondent sought the Bill of Costs to be taxed at Kshs 7,000,000 on the basis of the claim for fraudulent misrepresentation and a breach of contract for USD 600,000. The Client/Applicant on its part proposed that the same be taxed at a sum of Kshs. 87,000/-. The learned taxing officer taxed that item at a sum of Kshs. 709,000/- under Schedule 6, Paragraph 1(b) of the Advocates Remuneration Order 2009 with the reasoning that the value of the subject matter was the special license over the property, as well as the recovery of the sum of USD 600,000 sought in the suit, for a breach of contract. The Client/Applicant holds the view that in making the above assessment, the learned taxing officer committed an error of principle and arrived at an unjustifiably high figure.

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25. From the record, the suit giving rise to this Reference was filed before the High Court-Commercial and Tax Division. Consequently, the applicable provision of the Advocates Remuneration Order is **Schedule 6** which was applied by the learned taxing officer, and which caters to costs in respect of proceedings in the High Court.

26. The legal position is that instruction fees are to be assessed upon consideration of the value of the subject matter which can be ascertained either from the pleadings, judgment or settlement entered into between the parties. However, when the value of the subject matter cannot be ascertained, the taxing officer is permitted to exercise his or her discretion in taxing the instruction fees. This is the position the Court of Appeal took in the case of **Peter Muthoka & another v Ochieng & 3 others [2019] KECA 597 (KLR)** where that Court stated that:

> ***"It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject***

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value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either

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the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.

What we have said is in direct harmony with what this Court stated in JORETH LIMITED -vs- KIGANO & ASSOCIATES [2002] IEA 92,

"We would at this stage, point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess Instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and direction by the trial judge and all other relevant circumstances."

27. In the instant Reference, the Client/Applicant annexed a copy of the Plaint to. While I have noted that some pages of

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the Plaint are missing from the annexed copy, I perused the remaining pages and was able to establish that the suit was founded on fraudulent misrepresentation and a breach of contract, in respect of the Agreement and that the same sought unquantified damages plus costs of the suit. I have also read the Agreement and special license which were equally annexed to the Reference and which were mentioned in the Applicant's pleadings. I did not come across anything in the available pages of the Plaint to indicate that provision had been made for compensation of USD 600,000 or for any specific monies. It is thus apparent that the value of the subject matter could not be ascertained from the pleadings.

28. In the circumstances, I am of the view that the principles laid out in **Peter Muthoka & another v Ochieng & 3 others** would apply. In the absence of anything to ascertain the value of the subject matter from the pleadings, there was no basis for the learned taxing master to apply the sum of USD 600,000 in assessing the instruction fees. The calls for the exercise of the discretion by the taxing officer upon taking into account factors such as the nature and

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importance of the matter, the interest of the parties and the general conduct of the proceedings in assessing instruction fees.

29. In respect of item 1, and going by my reasoning above, I am persuaded that the Applicant has reasonably demonstrated that the assessment on instruction fees was based on an error of principle and that the learned taxing officer did not invoke his discretion appropriately.

30. In respect of **item 2 of the Bill of Costs**, being the getting up fees, the Advocate/Respondent sought a sum of Kshs. 2,310,000/. On this issue, the Client/Applicant submitted that the costs under this item ought to be based on the assessment of instruction fees. The learned taxing officer taxed the same at Kshs. 236,333.33, being 1/3 of the instruction fees assessed.

31. The relevant provision on getting up fees is **Paragraph 2** of **Schedule 6** of the Advocates Remuneration Order, which expresses that:

"Fees for getting up or preparing for trial

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In any case in which a denial of liability is filed 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:

…"

32. Upon my consideration of the above provision coupled with my earlier finding on the subject of instruction fees, I am satisfied that the assessment of getting up fees would be affected since the same was based on an assessment of the instruction fees, which I have deemed erroneous. As such, the assessment on the getting up fees would likewise necessitate interference by this court.

33. Consequently, it is imperative that the decision of the taxing officer be interfered with, specifically in respect of items 1 and 2.

34. It is my finding, therefore, that the Chamber Summons Reference dated 26.03.2025 succeeds in terms of prayers

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(iii) and (iv), thus resulting in the grant of the following orders:

(i) That the ruling delivered by the Deputy Registrar on 4.03.2025 be and is hereby set aside.

(ii) That the Advocate's/Respondent's Advocate-Client Bill of Costs dated 5.07.2023 be and is hereby placed before a different taxing officer other than Hon. Eric Wambo (Deputy Registrar) for re-taxation only in respect of items 1 and 2.

(iii) That parties shall bear their own costs of this Reference.

35. Orders shall issue accordingly**.**

Dated, signed and delivered this 19th February 2026.

S. N. MUTUKU
JDUGE

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