

**IN THE COURT OF
APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) NO. 279 OF**

2009 (CORAM: ODUNGA, JA)

BETWEEN

**SAMMY MUTUA MAKOVE
(COMMISSIONER OF INSURANCE).....APPELLANT**

AND

**KENYA REINSURANCE CORPORATION
LTD, STATUTORY MANAGER
UNITED INSURANCE COMPANY LIMITED.....1ST
RESPONDENT MBUU HOLDINGS LIMITED.....
2ND RESPONDENT KIKI INVESTMENTS LIMITED.....
.....3RD RESPONDENT KIRAGU FAMILY
HOLDINGS.....4TH RESPONDENT GEORGE
NGURE KARIUKI.....5TH RESPONDENT
PETER J. MWANGI.....6TH
RESPONDENT JOHN K. MBUU.....
....7TH RESPONDENT JANE W.
MICHUKI.....8TH RESPONDENT
ANTONY NAHASHON NGUNJIRI
(T/A A. N. NGUNJIRI & CO. ADVOCATES.....9TH
RESPONDENT CHARLES LUTTA KASAMANI
T/A KASAMANI & CO. ADVOCATES.....10TH
RESPONDENT CHRISTINE ORARO &
COMPANY ADVOCATES & 186 OTHERS11TH RESPONDENT**

*(Being a reference from taxation by the Taxing Officer (Hon. J. N.
Wambilyanga) on 17th April 2025*

in

Civil Appeal (Application) No. 279 of 2009)

RULING

1. On 17th April 2025, the Deputy Registrar of this Court taxed

the 149th, 150th, 151st, 152nd and 153rd respondents' bill of costs in

the sum of Kshs 1,763,391.00. The bill in question had sought Kshs 92,120,833.00. The said respondents (I will refer to them as Objectors for the purposes of this reference) had sought Kshs 85,500,000 in respect of instructions fees. The appellant countered that figure with its proposal of Kshs. 300,000.

2. The learned Deputy Registrar, in her capacity as this Court's

Taxing Officer, expressed herself as follows:

“From the submissions made by the respondents/applicants, I find the proposed amount to be excessively high. While it is standard practice for the taxing master to consider the value of the subject matter when taxing, it is not the sole determinant. Attention must also be given to the party or institution being ordered to bear the costs. The bill must not be taxed so exorbitantly as to discourage access to the Court. Additionally, the taxing master must take into account the issues raised before the Court. Guided by the principles established in Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] EA 162, I concur that costs should not escalate to a level that hinders access to justice due to the financial burden incurred. In this case, I find that relying on the insolvency margin as the value of the subject matter would be unfair to the appellant, based on the principles established in the cited cases. Therefore, I believe it is just for the taxing master to exercise its discretion. The amount proposed by the

applicants is excessively high for the work done by Counsel, while the amount proposed by the appellant is unreasonably low. After careful consideration, I conclude that a sum of Kshs

1,500,000/= is appropriate and hereby award it as instruction fees.”

3. In arriving at her decision, the learned Deputy Registrar considered: the fact that the value of the subject matter is not the sole determinant of costs and that consideration must also be taken of the party or institution being ordered to bear the costs and that the bill must not be taxed so exorbitantly as to discourage access to the Court. She then found that relying on the insolvency margin as the value of the subject matter would be unfair to the appellant and concluded that the amount proposed by the Objectors was excessively high for the work done by Counsel, while the amount proposed by the appellant was, similarly, unreasonably low.
4. Regarding items 2, 3, 7, 8, 10, 12, 13, 15, 22, 25, 27, 29 and 30 which were on receiving and perusals, the learned Deputy Registrar, relying on paragraph 9(3) of the third schedule, taxed them off although they were not objected to.
5. Dissatisfied with this outcome, in respect of the above items, the

Objector’s advocates by way of a letter dated 23rd April 2025

referred the taxation to the Court (single Judge) as provided under the Rules.

6. The reference was prosecuted by way of written submissions, highlighted by the respective counsel for the parties on 15th December 2025, on which date learned counsel, **Mr Harrison Kinyanjui**, appeared for the Objectors while learned Senior Counsel, **Mrs Lucy Kambuni**, appeared for the respondent.
7. For the Objector, it was submitted and highlighted: that, on the authority of **Kenya Aids NGOs Consortium & Another v Arthur Ingutya & Co. Advocates & Anor [2024] KEELC 1766**, the taxing officer made an error of law and principle when she held that the instructions fees taxed in the sum of Kshs 1,500,000 was reasonable yet it was manifestly and inordinately too low to amount to an injustice to the Objectors, in light of the fact that the appellants' Winding Up Cause had placed the subject matter value therein at Kshs Kshs 1,242,825,501; that, highlighting the case of **Kenya Revenue Authority v Universal Corporation Ltd [2024] KECA 1103**, the discretion of the taxing officer was exercised oppressively against the applicants and in favour of the

appellant/respondent when the taxing officer failed

to specify which factors she had taken into account and generalised her figures; that considering the fact that the record of appeal was in 6 volumes, the sum of Kshs 1,500,000 as instructions fees is manifestly low as to discourage legal practitioners from taking up such appeals; that, on the authority of the case of **Republic v Minister of Agriculture ex parte Samuel Muchiri W’Njuguna [2006] eKLR**, the sum of Kshs 1,500,000 taxed was arbitrary and contrary to the principles laid down in **Joreth Ltd v Kigano & Associates [2002] EA 92**; that the learned Taxing Officer erred in law when she failed to fully appreciate the provisions of paragraph 9(2) of the Third Schedule to the Rules, directing her to consider a reasonable sum of fees, and the general conduct of the proceedings; that considering that the appeal was filed in 2009 but its prosecution stalled compelling the Objectors to apply for its striking out after 10 years, the Kshs 1,500,00 awarded as instructions fees was inordinately low and oppressive.

8. It was further submitted that the learned Taxing Officer erred in principle in declining to award any sum of the Objector’s

perusal fees enumerated in items 2, 3, 7, 8, 10, 12, 13, 15,
22, 25, 27,

29 and 30 of the bill of costs and legitimately arising from the thousands of pages of the 6 volumes of the record; and that the learned Taxing Officer, after conceding that the said items were not opposed declined to award any sum thereon without explaining her decision.

9. I was urged to award between Kshs 10,000,000 and 15,000,000 in respect of the instructions fees and also award the sum claimed in respect of in items 2, 3, 7, 8, 10, 12, 13, 15, 22, 25, 27, 29 and 30 of the bill of costs. In the alternative, I was urged to remand the matter to a Taxing Master of this Court, other than Hon Wambilyanga for re-taxation of the bill of costs.
10. On behalf of the appellant, the Court was urged to frown upon the changing positions by the Objectors on the bill. It was noted that the Objectors now seek enhancement of costs to Kshs 10,000,000- Kshs 15,000,000 thus abandoning the initial exaggerated amount, contrary to rule 5 of the Third Schedule which bars the alteration of bills after lodging save by consent of parties or by the permission of the taxing officer. It was submitted: that the Taxing Officer was guided by rule 9(2) of

the Third Schedule as regards the instructions fees and the
case of

Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] KECA 325 (KLR) was cited in support of the position that whereas the Court will interfere where there has been an error in principle, it will not interfere on questions based solely of quantum save in exceptional cases; that the case of **Joreth Limited v Kigano & Another [2002] E.A. 92** restates the factors for consideration in determining the instruction fees, namely importance of the matter, general conduct of the case, increase or decrease of instruction fees due factors of importance of the matter, interest of parties and other relevant circumstances; and that the taxing Officer was thus guided.

- 11.** The appellant submitted: that this was an interlocutory appeal, against the Order dated 2nd October 2009, declining to grant the appellant leave to file a supplementary affidavit in Winding up Cause No. 22 of 2006; that the Commissioner of Insurance in execution of his statutory mandate of regulation did not seek recovery of any monies from anyone but rather only set out grounds for liquidation under section 123 of the ***Insurance Act***; that the Court should be persuaded by the

holding in **R. Billing & Co. Advocates v Kundan Singh
Construction Limited (Now**

KSC International Limited) [2020] eKLR where this Court held that although in order to obtain an order of injunction, the respondent had to show, by affidavit, that it stood to suffer irreparable loss and damage if the three guarantees were called, that was not to say that the sums in those guarantees constituted the value of the claim to demand instructions fees based on them; and that in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** the Court was guided by the fact that the claim was not a monetary claim but a claim for declaratory orders.

12. Regarding the interest of the parties, it was submitted that although the appellant was obliged to join in the appeal all parties who either supported or objected to the winding up petition, regardless of the capacity in which they appeared in the Superior Court, the Objectors are policyholders, who have not disclosed the value of their policies, and merely seek to ride on a perceived whole subject matter value. Further, the Court was urged to take into account the fund or person to bear the costs, in this case, the Commissioner of Insurance, a public office, and regulator of the Insurance Industry. If

exorbitant costs are

awarded in public litigation, and those affected run into hundreds, it was submitted that the regulator will be impeded in the regulatory function. The Supreme Court decision of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR** was cited to emphasise that the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case and ought not to be made merely as a penal measure, while the ***Kipkorir case*** was relied on to stress that advocates' remuneration should never be at such a level as to amount to an impediment to access to justice, as high costs of litigation would make courts a preserve only of the wealthy. It was noted that in **Kensilver Express Ltd & 137 Others vs Commissioner of Insurance & 4 Others [2014] eKLR**, which largely involved the same parties and capacities and Counsel in this appeal, this Court awarded costs of Kshs 30,000/- upon dismissal of a notice of motion and Kshs 30,000/ upon allowing a Notice of Motion. According to the respondent, the instruction fees amount claimed of Kshs 85,500,000/- based on the insolvency margin of Kshs 1,242,825,501 is preposterous, an abuse of this Court and at best demanded in jest.

13. Regarding fees on receiving and perusal, it was submitted that whereas the larger record was for the benefit of the Court, the Objectors had their own filings hence the Taxing Officer properly relied on paragraph 9(3) of the third schedule. Reliance was placed on the case of **Kenya Revenue Authority v Universal Corporation Ltd (Civil Appeal (Application) 150 of 2018 [2024]** where the learned Judge appreciated that the sum relied upon was not the sum in dispute.
14. Based on the foregoing, I was urged to dismiss the reference with costs.
15. I have considered the submissions made before me in this matter.

The Advocates Remuneration Order, as stated by the Supreme Court, in **Kenya Airports Authority v Otieno Ragot & Co. Advocates, Pet. No. E011 of 2023:**

“ ...relates to the remuneration of advocates. As evinced by rule 2 thereof, it relates to assessment of costs incurred in a contentious matter which can be reimbursed to a successful party/litigant by the other party. More specifically, it prescribes and regulates the remuneration of advocates in respect of professional business undertaken, and the

recompense of costs/expenses incurred by a successful party in a suit. The overall objective is to prevent exploitation of parties to a suit/transaction with regard to remuneration of

advocates and compensation of costs or expenses incurred by a successful party as well as maintain the standards of the legal profession. Differently put, it is to ensure that fees/costs paid to an advocate and a successful party are reasonable.”

16. ***M’Inoti, JA***, in ***Kenya Revenue Authority v Universal Corporation Ltd [2024] KECA 1103 (KLR)***, while citing the above case, opined that the purpose of taxation of costs is to ensure fair and reasonable recompense, not to enrich a litigant or its advocate, or to penalise the losing party and that what constitutes reasonable recompense is determined on a case-by case-basis. In ***Ojwang, J’s*** (as he then was) persuasive view in ***Republic v Ministry of Agriculture & 2 Others ex parte Samuel Muchiri W’Njuguna & 6 Others [2006] eKLR***:

“...the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious.”

17. The learned Judge then proceeded to restate the circumstances under which the taxing officer’s exercise of discretion will be interfered with and stated that:

“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..”

18. Mere allegation that the amount taxed was excessive would not justify interference with the Deputy Registrar's exercise of discretion. In fact, rule 112(3) bars any reference based only on quantum. However, the taxed costs might be so manifestly excessive as to amount to an error of principle, a position restated by the Supreme Court of Uganda (**Mulenga, JSC**) in **Bank of Uganda vs. Banco Arabe Espaniol, Civil Application No. 29 of 2019** where it held that:

“...[S]ave 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 which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount...Even if it is shown that the

taxing officer erred in principle, the judge should

interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.”

19. In this case it is contended that the amount of Kshs 1,500,000 awarded in respect of the instructions fees was manifestly and inordinately too low to amount to an injustice considering that the subject matter was 1.2 billion. Paragraph 9(2) of the Third Schedule to the Rules of this Court provides that:

The fees to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.

20. From that rule, the factors that the taxing officer is required to consider are the amount involved in the appeal, the nature of the appeal, its importance and difficulty, interest of the parties, other costs to be allowed and the general conduct of the proceedings. In addition, the taxing officer should consider the fund or person to bear the costs and all other relevant circumstances. By employing the phrase “all other relevant circumstances”, it is my view that the said paragraph

is not exclusive and that the taxing

officer has the liberty to consider any other circumstances as long as they are relevant. Therefore, in situations where the taxing officer considers or takes into account circumstances not expressly set out in the above paragraph, the only objection to the decision would be that the said circumstances were not relevant. However, it is appreciated, as was held in **Republic v Ministry of Agriculture & 2 Others ex parte Samuel Muchiri W’Njuguna & 6 Others** (supra) that:

“...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.”

21. Therefore, while the subject matter as stated in the pleadings is generally recognised as one of the factors to be taken into account, this Court in **Peter Muthoka & Anor v Ochieng & 3 Others [2019] eKLR** explained 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 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.”

See also Supreme Court decision in **Kenya Airports Authority v Otieno Ragot & Co. Advocates** (supra).

22. However, where the Taxing Officer takes into account irrelevant factors, that would amount to an error of principle. Similarly, if he does not take relevant factors into account, it would amount to an error of principle. The Taxing Officer is not expected to just pluck a figure from the air but is expected to exercise the discretion judiciously which means he/she has to do so in accordance with the laid down principles. The only way in which it can be shown that the laid down principles have been taken into account is by the setting out not only the general factors to be considered, but also stating how the application of the said factors impacted on the exercise of the said discretion. The elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. This is my understanding of the decision in **Opa Pharmacy Ltd v Howse & Mc George Ltd [1972] EA 233** where it was stated:

“Whereas the taxing officer is given discretion of taking into account other fees and allowance to an advocate in respect of

the work to which instructions fees apply, the nature and importance of the case, the amount involved, the

interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instructions fees, the taxing officer in this case gave no reason whatsoever for doubling the instructions fees. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The failure to give any reason for the choice, surely, must therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."

23. The same position was adopted in **Republic v Ministry of Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna & 6 Others** (supra) the High Court set out how the discretion of the Taxing Officer should be exercised:

"From the foregoing analysis, it is clear that I am not of the opinion that the taxing officer was properly guided when she conducted the taxation which has been challenged in the two applications - and certainly not, with regard to the item on advocate's instruction fees. Her exercise of discretion was, in my view, and with much respect, done perfunctorily and as a mere formality. It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision,

and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if

these by themselves could permit of assignment of mystical figure of taxed costs. Since the sum awarded as instruction fees herein, namely Kshs20,000,000/=, was not shown to have been guided by the relevant principles, nor was it transparently accounted for, it appeared, in my assessment, as a mystical figure which cannot be allowed to stand."

24. The above position was adopted by the Supreme Court in **Kenya Airports Authority v Otieno Ragot & Co. Advocates** (supra).
25. From the ruling one can deduce the factors that the taxing officer considered. She noted that whereas the value of the subject matter is a factor, it is not the sole determinant one and that attention must also be given to the party or institution being ordered to bear the costs. Further, the bill must not be taxed so exorbitantly as to discourage access to the Court and that the taxing master must take into account the issues raised before the Court. She then found that relying on the insolvency margin as the value of the subject matter would be unfair to the appellant. While appreciating that the amount proposed by the applicants was excessively high for the work done by Counsel, the taxing officer similarly found that the amount proposed by the appellant is unreasonably low. In her view a sum of Kshs 1,500,000 was

appropriate as instruction fees.

26. From paragraph 9(2) of the Third Schedule to the Rules, amongst the factors to be considered are the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.
27. As regards the amount involved in the appeal, the issue must be determined together with the interest of the Objectors. In suits involving different people with divergent interests, the taxing officer ought to determine the interests of the applicants, rather than merely looking at the subject matter of the whole suit. Different parties to a suit may have different interests and stakes in the suit and therefore their entitlement in fees may not necessarily be the same. In this case, it is not contested that the Objectors were policyholders. The value of their respective policies were not disclosed. Accordingly, from the material on record, it is not easy to determine the value of their subject matter. That determination is tied to the conduct of the proceedings. Here, the taxing officer must consider, what the subject matter of the appeal was. An appeal from an interlocutory

application cannot attract the same fees as an appeal against the final determination. To place the fees in respect of the appeal on the same plane as one for interlocutory appeal may well amount to double compensation if both the interlocutory appeal and the final appeal were to be determined in favour of the same party. In this case, the appeal arose from a decision declining leave to admit a supplementary affidavit. In that appeal, it is my view that the subject matter of the Winding Up Cause could not be the basis of taxation of costs.

28. However, while the source of funds and the person to bear the costs are similarly relevant, the Taxing Officer must be cautious and must consider those factors amongst others, including the need to maintain the balance between ensuring that advocates' remuneration is at such level as to attract recruits into the legal profession on one hand, and the duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Accordingly, advocates ought not to be deprived of costs merely because of the impecuniosity of the other party or because the other party is a public body. Parties, whether individuals or public bodies ought always to consider the

ramifications of litigation and the consequences of their claim being unsuccessful and the obligation to pay costs in such eventuality. This is not to scare litigants, but to advise them to consider their options and whether there are more cost effective means of solving their disputes as opposed to litigation.

29. In this case, having considered all the relevant factors, there is no basis upon which I can interfere with the exercise of discretion by the taxing officer as regards the instructions fees. I am not entitled to interfere therewith merely because had I been in her position, I would have awarded a different amount.
30. As regards the items on perusal, the learned taxing officer taxed off the entire amount. Although the fees claimed in respect of the said items were not contested, before me it was submitted that, although the appeal was voluminous, the volumes were meant for the Court and not necessary the Objectors who in any case were familiar with the same having been parties before the High Court. In my view, parties to an appeal are expected to peruse the records served upon them fully and the fact that they were parties in the court below

does not preclude them from perusing the entire record. It may well be possible that they will be

perusing the same twice but since it is the other party who has subjected them to that task, they must be compensated for so doing. In the premises, I do not find any justification why the taxing officer declined to award the Objectors the claims in items 2, 3, 7, 8, 10, 12, 13, 15, 22, 25, 27, 29 and 30 in the bill of costs.

31. Consequently, while I decline to interfere with the learned Taxing Officer's decision on instructions fees, I set aside her decision on the above items and direct that the same be taxed as presented.
32. As none of the parties has wholly succeeded, I make no order as to costs of this reference.
33. It is so ordered.

Dated and delivered at Nairobi this 27th day of February, 2026.

G. V. ODUNGA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed _

DEPUTY
REGISTRAR.