

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
MISC APPL NO. E069 OF 2024

KTK
ADVOCATES
ADVOCATE

VERSUS

SBM BANK (MAURITIUS)
LIMITED CLIENT

RULING

Taxation of matters not specifically provided

1. There are two applications for consideration.
2. The client's reference by way of chamber summons dated 5th June 2025, brought under Rule 11(2) of the Advocates (Remuneration) Order, seeking to set aside the taxing officer's ruling delivered on 22nd May 2025.
3. The advocate's notice of motion dated 24th June 2025, seeking entry of judgment for the taxed sum of KES 1,653,672,292/= plus interest.
4. The client advanced four main grounds for the setting aside of the taxation ruling, being: -

(1)The taxing officer erred in law and principle by taxing the bill of costs yet there is a legal and binding fee agreement between the parties.

(2)Through correspondence dated 18th and 19th August 2022, legal fees were capped at **USD 130,000**, which sum was fully settled on 20th September 2022.

(3)The taxing officer lacked jurisdiction to determine the validity of the said agreement, a function reserved for a Judge under the **Advocates Act**.

(4)The resulting award is manifestly excessive, particularly regarding the instruction fees for insolvency notices, correspondence, court attendances and disbursements.

5. The client proposed a reassessment of the instruction fees at Kshs. 109,000/-.

6. The advocate opposed the reference through its grounds of opposition dated 22nd October 2025, being: -

(1)The application is fatally defective for want of substratum, is filed *in vacuo*, has no legal or factual basis.

(2)The application does not establish any error of principle by the taxing officer.

(3)The application does not establish that the taxation award is manifestly excessive.

(4)The client neither objected to the taxing officer's jurisdiction nor made an application on the purported fee agreement.

Submissions

1.The client and the advocate filed written submissions dated 14th November 2025 and 10th December 2025.

2.The client urged the court to allow its reference and to dismiss the advocate's application. It relied on the following cases: -

(1)First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others [2002] KEHC 1277 (KLR)

(2)Abincha & Co Advocates v Trident Insurance Co Ltd [2013] eKLR

(3)Corporate Insurance Company Ltd v Kang'ethe & Mola Advocates [2022] KEHC 545 (KLR)

- (4) GM Gamma Advocates LLP v Board of Trustees of the National Social Security Fund [2025] KEELC 5965 (KLR)**
- (5) Booth Extrusion Limited (Formerly Booth Manufacturing Africa Limited) v Dumbevia Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2017] eKLR**
- (6) Nairobi City County v Tom Ojienda Associates [2018] KEHC 5017 (KLR)**
- (7) Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR)**
- (8) Republic v Minister for Agriculture & 2 Others Ex-parte Samuel Muchiri W’Njuguna & 6 Others [2006] KEHC 3504 (KLR)**

3. The advocate urged the court to dismiss the client’s reference and to allow its application as prayed. It relied on the following cases: -

- (1) Owners of The Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] KLR 1**
- (2) Machira & Co. Advocates v Magugu [2002] 2 EA 428**

- (3) Otieno Ragot Company Advocates v National Bank of Kenya Limited [2020] KECA 894 (KLR)**
- (4) JA Guserwa & Co. Advocates v Uzuri Foods Limited Nairobi ELR Misc. Appl. No. E078 of 2025, [Unreported]**
- (5) Nairobi HC C & HR Misc. Appl. No. 33 of 2019, Maina & Maina Advocates v Benedict Kabugi Ndungu [Unreported]**
- (6) Nairobi HC Misc. Civil Case No. 52 of 2012, Lubulellah & Associates Advocates v N.K. Brothers Limited [Unreported]**
- (7) Kakamega HC Misc. No. E07 of 2020, Teddy Mulehi Monyo & 2 Others v Peter Gicharu Ngige [Unreported]**
- (8) Machakos HC Misc. Reference No. E047 of 2020, Joseph Tamata Advocates v Mary Nthambi Mbuvi [Unreported]**
- (9) Nairobi HC Misc. Appl. No. 46 of 2015, Abuodha & Omina Advocates v Kakuta Maimai Hamisi [Unreported]**

- (10) **Kajiado HC Misc. Appl. No. 73 of 2019, Ali Mohammed Egal v Maina & Onsare Partners [Unreported]**
- (11) **Kenya Airports Authority v Otieno Ragot & Co. Advocates (Petition Eo11 of 2023) [2024] KESC 44 (KLR)**
- (12) **Kisumu Civil Appeal No. 37 of 2007, George Arunga Sino t/a Jone Brooks Consultants Limited v Patrick J.O. & Geoffrey D.O. Yogo t/a Atieno Yogo & Co. Advocates [Unreported]**
- (13) **Nairobi HC Misc. Cause No. 719 of 2009, Lubulellah & Associates Advocates v Airtime Business Solutions [Unreported]**
- (14) **Nairobi HCCC No. 2255 of 2000, First American Bank of Kenya Ltd v Gulab P. Shah & Others [Unreported]**
- (15) **Siaya HC Misc. Ref. Appl. No. E019 of 2022, Fredrick Onyango Aoro v Mary Auma Were [Unreported].**

Analysis and Determination

Taxing officer's jurisdiction

4.The client contended that the taxing officer lacked jurisdiction to determine the validity of the fee agreement and should have referred the matter to a judge.

5.On its part, the advocate asserted that the taxing officer has the requisite jurisdiction and arrived at the correct conclusion that there was no retainer agreement.

6.. The taxing officer is empowered under **the Advocates Act** and **Advocates (Remuneration) Order** to determine the competence or validity of a bill of costs before it. These are matters of preliminary significance and include whether advocate-client relationship or fee agreement between the parties exist. **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] KECA 431 (KLR).**

7.Accordingly, I find that the taxing officer had jurisdiction to determine the validity of bill of costs or existence of the fee agreement.

Correspondences giving rise to fee agreement

8. The taxing officer considered the correspondence exchanged by the parties regarding the instructions given and the deposit requests issued. The correspondence included signed letters and emails. The taxing officer held that the client failed to establish the existence of a fee agreement since the correspondence were not signed by it. She relied on **Ahmednasir Abdulahi & Co. Advocates v National Bank of Kenya Limited (2) [2006] 1 EA 5**

9. It is settled that “correspondences are capable of giving rise to agreements provided that there was an offer, an acceptance and consideration which can be discerned from the correspondence that would mean that there was an agreement” **Majanja Luseno Company Advocates v Leo Investments Limited another [2017] KEHC 9857 (KLR)**

10. The correspondence between the advocate and the client, show that the advocate was retained for the recovery proceedings in respect of the facilities issued to various borrowers, guaranteed

by various guarantors and cross-guaranteed by some of the borrowers.

11. Through a letter dated 8th April 2022, the advocate informed the client what the debt recovery process would entail and that its fees would be USD 30,000/-.

12. Through another letter, the advocate confirmed that it was amenable to the client's request to discount its fees to USD 27,000/-.

13. Through a letter dated 27th July 2022, the advocate issued a deposit request note for USD 150,000/-. By an email dated 18th August 2022, the client requested a discount. On the same date, the advocate forwarded the revised deposit request note dated 19th August 2022 for USD 130,000/-.

14. The client also exhibited remittance advices confirming payment of USD 157,000/-.

15. The correspondence was only with respect to the deposit of USD 157,000/-.

16. From my assessment of the correspondences above, there was no fee agreement between the

advocate and the client in the sense of section 45 of the Advocates Act.

17. Accordingly, I agree with the taxing officer's finding that there was no binding fee agreement between the advocate and the client.

Instruction fees

7. Through the subject bill of costs, the advocate sought instruction fees of Kshs. 900,000,000/- based on the value of the subject matter being USD 60,499,169.64 (Kshs. 9,918,838,862.48/-).

8. The taxing officer found: -

“The Advocate rightly draws attention to the immense value of the subject matter and the multiplicity of proceedings. In view of the multiple and distinct instructions, the substantial value of the subject matter, and the high level of responsibility assumed by the Advocate, time spent, research done and skill deployed by counsel I find Kshs. 650,000,000/- to be fair and just in this case. Accordingly, item 1 is taxed at Kshs. 650,000,000/-.”

18. The client challenged the taxing officer's assessment of the instruction fees. It faulted the

taxing officer for assessing instruction fees at **Kshs. 650,000,000** based on the value of the subject matter but failed to indicate the specific Schedule or the Advocates Remuneration Order (ARO) relied upon. The client argued that the relevant provisions governing bankruptcy and insolvency proceedings prescribe minimum instruction fees, meaning the value of the subject matter should not have been used as the basis for taxation. The client added that the taxing master also failed to start with the prescribed basic fee before enhancing it.

19. The advocate challenged the client's proposal that fees should be assessed at Kshs. 109,000/-, pointing to the over Kshs. 10 Billion value of the subject matter and the multiple causes of action.

20. The advocate highlighted that in pursuing recovery, it initiated separate processes against principal borrowers, guarantors (both corporate and individual) and issued statutory notices for sale of the charged properties and initiated insolvency proceedings.

21.The advocate submitted that it completed the instructions and that there was nothing else required other than the client to instruct auctioneers to sell the property.

22.The advocate submitted that the value of the subject matter and the instructions were clearly set out in the bill of costs. That they were supported by the contract, charge instruments and documents.

Law on taxation: minimum costs

23.The law is that, the Advocates Remuneration Order a complete code on Taxation of costs falling under it. It is also ‘specific in that minimum amounts to be recovered as costs are stated...’

George Arunga Sino TA Jone Brooks Consultants Limited v Patrick JO Geoffrey DO Yogo TA Atieno Yogo Co Advocates [2012] KECA 68 (KLR),

24.Discretion by the taxing master is ‘only...in respect of any increase...above...minimum specified...’ or as provided in ARO. Otherwise, where a party ‘seeks the minimum amount allowed by the order...the taxing master has no discretion...as to do so would mean introducing his own figure not spelt out in the Bill of Costs

presented for taxation.’ **George Arunga Sino**
[ibid]

25. In the said decision, the policy rationale for providing for minimum costs in the Remuneration Order includes not to ‘allow such high costs as would affect the public in their quest for justice.’

Applying the test

26. From a reading of the ruling, it is manifest that the taxing officer did not assess the instruction fees based on any prescribed minimum or specific schedule. She awarded instruction fees based on discretion.

27. Context and nature of instructions is relevant in determining the applicable schedule and scale for assessment of advocate-client costs. The evidence before the taxing officer was that, following client’s instructions, the advocate issued demands, statutory and insolvency notices. The measures deployed by the advocate were in recovery of the debts owed to the client by the various debtors and guarantors. Based on these, the proper question is: which is the appropriate and applicable schedule and scale in the ARO

upon which to assess the minimum prescribed instruction fee?

28. I have considered the divergent positions taken by the advocate and the client.

Of Bankruptcy proceedings

29. In particular, the client argued that the applicable schedule and scale is the one provided under **Schedule 6 of ARO**, more specifically for 'Bankruptcy proceedings.'

30. I have perused **Schedule 6 of the ARO**. It is captioned '**Costs of Proceedings in the High Court**' and of pointed relevance to these proceedings; Paragraph 1 (e) is captioned '**Bankruptcy proceedings**'. It encompasses the presentation or opposition of a debtor's petition, application or opposition of a discharge. It also encompasses the creditor's application for issue of a bankruptcy notice, to apply or oppose a creditor's petition and an application for or oppose a discharge.

31. In this case, the instructions were for debt collection, not to institute the bankruptcy/

insolvency petitions. The advocate issued the statutory demand notices, statutory notices as well as insolvency notices-as was applicable- to the borrowers and guarantors as a debt collection strategy.

32.The advocate stated that it completed the instructions and that there was nothing else that was required of it other than the client to instruct auctioneers to sell the properties and for the insolvency petitions to be filed.

33.Therefore, although insolvency notices were issued as part of the debt recovery strategy, the instructions to, and work undertaken by the advocate was not bankruptcy proceedings. Accordingly, **Schedule 6(e) of ARO** is not applicable.

Debt recovery: applicable schedule

34.It is instructive that the client in their submissions stated that these bills of costs all relate to the same tasks already paid for, being advice on recovery, demand letters and insolvency notices. See also the submissions by the advocate.

35. Of significance is that, it is not in dispute that the instructions given to the advocate were to provide debt recovery or collection services. This included advisory on recovery, issuing demands, statutory notices of sale and insolvency notices to the borrowers and guarantors as appropriate. The advocate undertook these measures.

36. The applicable scale therefore, is schedule 5 on instruction fees in respect of business the remuneration for which is not otherwise prescribed. Part II on alternative method of assessment provides: -

“1. INSTRUCTIONS

Such fee for instructions as, having regard to the care and labour required, the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances the case, may be fair and reasonable but so that due allowances shall be given in the instruction fees for other charges raised under this Schedule.”

37. Having found that schedule 5 is applicable, the taxing officer ought to have applied it in assessing the instruction fees. I do note however, that she used some of the elements provided under schedule 5 of ARO.

1. In light of my findings above, I do not find any error of principle on the other items. Arguments advanced by the client on the numerous items for correspondence between it and the advocate were founded on **Schedule 6 Part B** which I found to be inapplicable.

Deposit paid

38. The deposit was paid in respect of the various instructions constituting the bills subject of these and other related proceedings.

39. The taxing officer ought, therefore, to have considered the deposit paid by the client and be deducted from the awarded sum on a prorata basis spread amongst the four separate bills of costs and taxation awards in Misc Applications E067, E068, E069 and E070 of 2024.

Error in principle

40. The taxing officer's failure to consider these issues amounts to an error of principle that warrants the court's interference with her decision. **First American Bank of Kenya Ltd v Shah & 2 others [2002] KEHC 1277 (KLR)**

41. Hence, the appropriate course is for the advocate-client bill of costs to be remitted for fresh taxation of the instruction fee before a different taxing officer. The taxation shall be subject to the findings of the court on the issues that were raised and canvassed.

Disposal

42. The client's application dated **5th June 2025**, is partially allowed, in the following terms: -

(1) The part of the taxation ruling dated 22nd May 2025 relating to the taxation of the instruction fees is set aside.

(2) The advocate-client bill of costs dated 30th January 2014 be remitted for taxation of the instruction fee under schedule 5 of ARO, before a different taxing officer.

(3) By virtue of this decision, the advocate's application is rendered premature and is dismissed but with no orders as to costs.

(4) Given the circumstances of this case, each party shall bear own costs of the client's application.

**Dated, signed and delivered at Nairobi through
Microsoft Teams online application this 12th
day of March, 2026**

F. Gikonyo M

Judge

In the presence of: -

Donald for Advocate

Kiragu Kimani/Ondieki for Client

CA- Ivan/Aggrey