

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**MISC APPL NO. E070 OF 2024**

**KTK ADVOCATES .....**  
**ADVOCATE**

**VERSUS**

**SBM BANK (MAURITIUS) LIMITED .....**  
**..... CLIENT**

**RULING**

1. There are two competing applications for determination.
2. The client filed a reference through a chamber summons dated **5th June 2025**, mainly seeking to set aside the taxation ruling **22nd May 2025** by **Hon. Chembeni Adisa**, Deputy Registrar.
3. The advocate filed a notice of motion dated **24th June 2025**, seeking entry of judgment in terms of the taxed costs of Kshs. 140,705,431/-.
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 advocate opposed the reference through its grounds of opposition dated 22<sup>nd</sup> 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**

6.The client and the advocate filed written submissions dated 14<sup>th</sup> November 2025 and 10<sup>th</sup> December 2025.

7.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)**

8. 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**

9. 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.

10. 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.

11. 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).**

12. Based on the above, I find that the taxing officer had jurisdiction to determine the validity or competence of the bill of costs on the claim of existence of the fee agreement.

13. 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 retainer 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**

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)**

14. From a reading of the correspondence between the advocate and the client, I am satisfied 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.

15. Through a letter dated 8<sup>th</sup> April 2022, the advocate informed the client what the debt

recovery process would entail and that its fees would be USD 30,000/-.

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

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

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

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

20. From my assessment of the above, there was no fee agreement between the advocate and the client in the sense of the Advocates Act.

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

## **Instruction fees**

22. Through the subject bill of costs, the advocate sought instruction fees of Kshs. 90,000,000/- based on the value of the subject matter of USD 38,633,033.90 (Kshs. 6,333,885,907.91/-)

23. 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. 80,758,969/- to be fair and just in this case. Accordingly, item 1 is taxed at Kshs. 80,758,969/-”**

24. The client challenged the taxing officer’s assessment of the instruction fees. It faulted the taxing officer for assessing instruction fees at **Kshs. 80,758,969/-** 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.

25. The advocate challenged the client's proposition that the instruction fees should be assessed at Kshs. 34,000/-. It submitted that the instructions were for a matter of over Kshs. 5 Billion with multiple causes of action against multiple parties.

26. 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.

27. 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.

28. 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.

29. From a reading of the ruling, it is manifest that the taxing officer failed to consider the instruction fees based on the prescribed minimum. She awarded instruction fees based on discretion.

30. Courts have held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it. **Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd [2014] eKLR and Nairobi City County v Tom Ojienda Associates [2018] KEHC 5017 (KLR)**

31. The Advocates Remuneration Order is a complete code on taxation of costs and where it has specified the minimum fee, the discretion of the taxing master is only on increasing such costs as provided in the Order lest they should be accused of introducing own figures in the taxation. **George Arunga Sino TA Jone Brooks Cons Ultants Limited v Patrick JO Geoffrey DO Yogo TA**

**Atieno Yogo Co Advocates [2012] KECA 68  
(KLR).**

32. This policy consideration also ensures litigation or public litigation and the quest for justice are not hurt by exorbitant costs. **[ibid]**

33. Guided by the above, the taxing officer ought to consider that the advocate issued demands, statutory and insolvency notices, the appropriate scale in the ARO applicable and assess the minimum prescribed.

**Applicable scale**

34. I have considered the divergent positions. It is not disputed that the instructions given to the advocate were to provide debt recovery or collection services. This included issuing demands to the borrowers and guarantors, statutory notices of sale and insolvency notices.

35. I have perused **Schedule 6 of the ARO**. It is captioned 'Costs of Proceedings in the High Court' 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.

36. In this case, the instructions were for debt collection, not to institute the bankruptcy/insolvency petitions. The advocate issued the statutory demand notices to the borrowers as a debt collection strategy.

37. 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.

38. Therefore, in my estimation, schedule 6 is not applicable.

39. The applicable scale is schedule 5 on 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.”**

40. Having found that schedule 5 is applicable, the taxing officer ought to apply it in assessing the instruction fees.

#### **The deposit**

41. The taxing officer also ought to consider the deposit paid by the client to be deducted from the awarded sum to be prorated amongst the four separate bills of costs and taxation awards in **Misc Appl.s E067, E068, E069 and E070 of 2024.**

42. To my mind, 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)**

43. Hence, it is appropriate for the advocate-client bill of costs to be remitted for fresh taxation before a different taxing officer of the instruction fee.

**Disposal**

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

- (1) The part of the taxation ruling dated 22<sup>nd</sup> May 2025 relating to the taxation of the instruction fees, is set aside.**
- (2) The advocate-client bill of costs dated 30th January 2014 is remitted for taxation of instruction fee under Schedule 5 of ARO before a different taxing officer.**
- (3) By this ruling, the advocate's application is rendered pre-mature, thus, dismissed but given these circumstances, with no orders as to costs.**

**(4) In the circumstances of this cases,  
each party to bear own costs of the  
client's application.**

**Dated, signed and delivered at Nairobi this 12<sup>th</sup>  
day of March, 2026**

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**F. Gikonyo M**

**Judge**

**In the presence of: -**

**Donald for Advocate**

**Kiragu Kimani/Ondieki for Client**

**CA- Ivan/Aggrey**