REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISC. APPLICATION NO. E943 OF 2024

BETWEEN

PROF. TOM OJIENDA &

ASSOCIATES.....APPLICANT/ADVOCATES

AND

B.N. KOTECHA & SONS

LIMITED.....RESPONDENT/CLIENT

RULING

Introduction & Background

1. By the Chamber Summons dated 7th May 2025, the Respondent/Client is challenging the decision of the Deputy Registrar delivered on 25th April 2025 regarding the taxation of the Applicant/Advocates Advocate-Client Bill of Costs dated 5th November 2024. The Deputy Registrar taxed the Bill of Costs at Kshs.2,820,220.70 and the Client is not satisfied with how Items Numbers 1, 2, 8, 22 and Disbursements in the Bill of Costs were

taxed and seeks that the same be set aside and taxed afresh before a different Taxing Officer/Deputy Registrar

2. The application is supported by grounds on its face and the supporting affidavit

of the Client's director, Hemal Kotecha sworn on 7th May 2025. It is opposed

by the Advocates through the replying affidavit of their Managing Partner, Prof. Tom Ojienda sworn on 27th May 2025. The parties have also supplemented their arguments by way of written submissions which I have considered together with the pleadings and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. I note that the Advocates assail the Reference on technical grounds that the same is premature and incurably defective because under **Para. 11(2)** of the ***Advocates Remuneration Order,*** an aggrieved party must wait for the Taxing Officer to record and forward the reasons for the decision before filing a reference. That although the Client requested reasons via a letter dated 29th April 2025, it failed to wait for those reasons before lodging the Reference. The Advocates submit that without these

reasons, the court has nothing to fault or approve in the Deputy Registrar's decision.

4. In response, the Client maintains that the Reference is properly before the court because whereas **Para. 11** of the ***Order*** calls for seeking reasons before filing a reference, the Client states that this is not mandatory if the ruling is already comprehensive and contains the said reasons. The Client agrees that it did write to the Deputy Registrar seeking further reasons, but received no response and proceeded to file the Reference within the 14-day timeframe to avoid being

time-barred.

5. **Para. 11(1) and (2)** of the ***Order*** provides that:

> *(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.*
>
> *(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.*

6. I am inclined to agree with the Client that this court has always held that once a Ruling contains reasons on its face for the manner in which the Deputy Registrar taxed the items in the Bill of Costs, then it is unnecessary to seek further reasons (see **Robert Maua t/a Mauwa & Company Associates v JRS Group Limited [2023] KEHC 20862 (KLR)** and **National Oil Corporation Limited v Real Energy Limited & Business Premises Rent Tribunal [2016] KEHC 7679 (KLR)**].
7. What is important is that the reasons are clearly set out in the Ruling and the parties together with the court have sight of the same. This will enable the court make an informed determination on the merits of the Ruling and the Reference and determine whether or not the discretion of the Deputy Registrar was exercised on sound legal principles. Further, no prejudice will be occasioned upon the parties if such a determination is made on its merits.
8. Turning now to the merits of the Reference, the Client's primary argument is that the Deputy Registrar used the wrong Schedule to calculate the instruction fees. The Client contends that for winding-up proceedings, **Schedule 6(1)(f)(i)** of the ***Order*** applies, which provides a fixed fee of Kshs.25,200.00/= but that instead, the

Deputy Registrar applied **Schedule 6(1)(b)** based on the value of the subject matter, leading to an excessive award. That the Deputy Registrar increased the instruction fee from an already miscalculated sum to Kshs.1,000,000.00/= without proper justification or demonstration of the matter's complexity or novelty.

9. The Client then states that the award of Kshs.333,333.33/= for getting-up fees was an error and it states that the matter involved setting aside a statutory demand and did not proceed to a full trial with *viva voce* evidence, which is a prerequisite for such an award. The Client further claims the Deputy Registrar erred by awarding amounts for "drawings" without following the specific definition of what constitutes a drawing under the ***Order*** and further objects to the award of disbursements, arguing they were awarded without the Advocates providing receipts as proof of payment. The Client also accuses the Deputy Registrar of ignoring its written submissions and in summary, contends the entire award is manifestly excessive and based on errors of principle, justifying the court's intervention to set it aside.

10. In response, the Advocates defend the Deputy Registrar's use of **Schedule 6(1)(b)** for calculating instruction fees. They argue

that **Schedule 6(1)(f)(i)** is inoperable because it was based on the ***Companies (Winding-Up) Rules***, which were repealed by the ***Companies Act*** in 2015 and therefore, the Deputy Registrar was correct to use the schedule based on the value of the subject matter.

11. They depone that the value of the subject matter was ascertainable at Kshs.12,851,021.16/=, the matter was important and complex, as the Client faced the threat of being declared insolvent, which required intensive research and delicate preparation. That the Deputy Registrar correctly exercised her discretion, following principles from **Joreth Limited v Kigano & Associates [2002] KECA 153 (KLR)** and **First American Bank of Kenya Ltd v Shah & 2 others [2002] KEHC 1277 (KLR)** which allow for judicial discretion in ensuring fair compensation beyond the strict scale.
12. The Advocates refute the claim that getting-up fees are only for *viva voce* hearings stating that the same covers significant preparatory steps like drafting pleadings and preparing the case for a hearing on the merits, which occurred in this matter. Regarding the objections to the other items, the Advocates state the Deputy Registrar rightly applied the ***Order*** and that the

burden is on the Client to prove the she misdirected herself, which it has failed to do. On Disbursements, the Advocates state that the Deputy Registrar relied on the precedent in **Kithi & Co. Advocates v Greenwoods Limited [2024] KEHC 5473 (KLR)** and was satisfied that the disbursements were proved by way of receipts.

13. In conclusion, the Advocates maintain that the Deputy Registrar made no error of principle, properly exercised her discretion, and the Client has not provided sufficient grounds for the Court to interfere with the Ruling.

14. I do not think it is in dispute that in a reference to the court from the taxation by the Taxing Officer, the court will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. That where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases (see **Kipkorir,Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] KECA 325 (KLR).**

15. This was reiterated in **Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [2006] KEHC 3504 (KLR)**where Ojwang' J.,(as he was then) held as follows:

> *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 is somewhat too high or too low; it will only interfere if it thinks the award is 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.*

16. Before the Deputy Registrar, the issue was whether the instruction fees should have been assessed under **Schedule 6(1)(b)** or **6(1)(f)(i)** of the ***Order***. The former provides in part that "*To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to*

present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and…" whereas the latter provides that "*to present or oppose proceedings under Rule 5(1) of the Companies (Winding-up) Rules Kshs 25,200/=*"

17. The Deputy Registrar went with the former because *"….section 1023(4) of the Companies Act repealed the winding up rules envisioned under schedule 6(1)(f)(i) While I acknowledge that schedule 6(1)(f)(i) has not been amended, it is also settled law that where the value of the subject matter is ascertainable, then that forms the basis of ascertaining the instruction fees"* . I find this conclusion to be logically flawed and a clear error of principle because the fact that the procedural rules for winding up companies were repealed does not automatically invalidate the fee structure specifically prescribed for such work under the ***Order*** which is a standalone piece of subsidiary legislation. If Parliament intended to remove winding-up proceedings from **Schedule 6(1)(f)(i),** they would have formally amended the ***Order***. It was not within the Deputy Registrar's jurisdiction to "declare" certain provisions of the ***Order*** inapplicable or inoperative based on an external statute. Until that happens

through the legislature, the schedule, as written, remains the prescribed fee for that type of work.

18. As the court held in **Kimani Kagwima & Co. Advocates v Jimtec Services Limited [2022] KEHC 75 (KLR)**, *"[a] taxing master was bound by the law and had no power to oust or completely disregard a legal provision of law and thus proceed to have the Bill of Costs taxed under Schedule 6."* Thus, the Deputy Registrar had a duty to apply the ***Order*** as it reads. By using **Schedule 6(1)(b)** instead of **6(1)(f)(i),** she started with a baseline assumption that the fee should be calculated on a percentage of the value of the subject matter. The correct approach would have been to start with the fixed fee of Kshs.25,200.00/= under **Schedule 6(1)(f)(i),** and then exercise her discretion to increase that fee if the complexity or nature of the work justified it. She stated that the dispute concerned assets valued at Kshs.12,851,021.16/=, that the basic instruction fee is Kshs.357,020.00/= and that taking into account the nature of the claim, the work done, labor involved, nature and importance of the matter and in exercise of discretion, she increased the amount to Kshs.1,000,000.00/=. While I agree with her discretion, it is clear that any increase ought to have been from Kshs.25,200.00/= and

not a percentage value of the subject matter. In any case, rather than remitting the same for re-taxation, I would increase the instruction fee to Kshs.200,000.00/= considering the same factors.

19. On getting up fees, I am in agreement with the Deputy Registrar that that a 'hearing' does not only entail the calling of witnesses and the adduction of *viva voce* evidence. I will therefore award the same at one-third of the getting up fees which comes to Kshs.66,666.66/=. On disbursements, I also find that the Deputy Registrar was properly guided by the court's decision in **Kithi & Co. Advocates(supra)** and made a factual determination that the same had been proved and her assessment remains.

Conclusion and Disposition

20. The upshot is that the Client's reference dated 7th May 2025 is allowed to the extent that the instruction fees is now retaxed by the court at Kshs.200,000.00/= and consequently, getting up fees is retaxed at Kshs.66,666.66/=. All other assessed Items remain the same with costs of the Reference assessed at Kshs.15,000.00/=.

DATED SIGNED and DELIVERED virtually at NAIROBI this 19TH DAY OF MARCH 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Ndinya holding brief for Ms. Awuor for the Advocate/Respondent.
2. N/A for the Client.
3. Amos- Court Assistant