

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**MISCELLANEOUS FAMILY CAUSE NO. E032 OF 2025**

**LAWRENCE MWANGI**

**ZACHARY MURIUKI**

**JANE**

**KAGENDO.....**

.....**APPLICANTS**

**VERSUS**

**FRANCIS NDEGWA MURIUKI**

**LEAH KAGENDO MURIUKI**

**EUNICE WANJIRU MURIUKI**

**MARY**

**WAMUYU**

**NGATIA.....RESPONDENTS**

*[Arising from*

*IN THE MATTER OF TAXATION OF PARTY TO PARTY COSTS IN  
KARATINA PMCSUCC NO. 12 OF 2017 - IN THE MATTER OF  
THE ESTATE OF MURIUKI MITHAMO alias JOHN MURIUKI]*

**RULING**

1. This ruling is in respect of the Chamber Summons dated 14.10.2025. The Reference arose from the taxation of the Bill of Costs dated 27.6.2025 arising from Karatina PMCSUCC No. 12 of 2017 in which the Applicants were the Petitioners.

2. The Applicants seek to set aside the Ruling of the Taxing Officer dated 30.9.2025 that was taxed at Khs. 146,205/=.
3. The Applicants contend that the Taxing Officer erred in taxing a bill of costs based on Schedule 7 paragraph 2 of the Advocates Remuneration Order, 2014 instead of applying Schedule 10 paragraph 1(f) that applied to probate and administration matters.
4. It is further stated that if the taxing master had applied the correct schedule, the instruction fees provided ought to have been in the range of Ksh. 20,000/= or thereabouts and not Ksh. 100,000/= that was allowed.

#### Analysis

5. The court is faced with a simple but poignant issue. The lower court taxed a bill of costs in a succession matter under Schedule 7. The applicants were aggrieved and moved the court. I now have to deal with both the original sin and the subsequent one. While filing the petition, the applicants declared the value of Ksh. 60,000/=.
6. Subsequently, the Respondents filed summons for revocation of the grant, which involved the deceased's property, Konyu/Baricho/1349. The same was heard through viva voce evidence. The applicants were ordered to bear costs. The court subsequently taxed the bill of costs at Ksh. 146,205/=.

7. The ruling is hard to fathom. The instruction fees prayed for were Ksh. 80,000/=; however, an amount of Ksh. 100,000/= is indicated as having been taxed off. There is also a sum of Ksh. 00 indicated below the amount. It is not clear where the power to tax costs in the lower court arose from. Further, the same was done under Schedule 7 of the Advocates (Remuneration) (Amendment) Order, 2014. The schedule covers the costs of proceedings in subordinate courts. It covers where a sum found due (in the case of a wholly or partially successful plaintiff) or the sum sued for (in the case of a wholly successful defendant). This does not apply to succession proceedings.
8. Succession proceedings are provided for under Schedule 10 of the Advocates (Remuneration) (Amendment) Order, 2014. It provides for probate and administration, both contested and non-contested.
9. Thirdly, there is the nagging question of taxation. Taxation is reserved for the taxing master of this court. The lower court does not have the power to tax costs.
10. The power to deal with assessment of costs in the lower court is not governed by rules 10 and 11 of the Advocates Remuneration. The said rules provide as follows:
  10. The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence

of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

11. (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. (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal. (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

11. The question of the power of this court to deal with the challenge of assessment of costs in the lower court, was addressed by Wananda J, in the case of **Maru v Ruto**

(Miscellaneous Application E001 of 2023)  
[2025] KEHC 3947 (KLR) held as follows on challenge of  
assessment of costs in the lower court:

My reasons for stating as above are to be found in my earlier Ruling which I delivered on 8/03/2024 in this matter, and whereof I granted leave to file this matter out of time, and also issued an interim order of stay of execution. In that Ruling, I also dealt with the issue of jurisdiction to handle this matter. In finding that this Court possesses the jurisdiction to review or revisit the assessment of party and party costs by the lower Court, I cited the decision of M. Kasango J, made in the case of Mathiu Elijah Solo v Joseph Murira [2009] eKLR, and also the decision of Mrima J made in the case of Richard Otieno Oloo v Anastacia Anditi Oloo & another [2019] eKLR, and, inter alia, stated the following:

“12.I associate myself fully with the logic and reasoning of Kasango J to the effect that, despite the lacunae on the issue, this Court can very well invoke its inherent powers to check assessments of costs by the Magistrates Court. I therefore find that I have the necessary jurisdiction to entertain the present Application...14.

I agree with the above holding of Mrima J as it bolsters the argument that this Court can also invoke its powers under Section 27 of the Civil Procedure Act to check assessments of costs by the Magistrates Court. I therefore reiterate my finding that this Court possesses the jurisdiction to entertain the present Application.”

3. On the issue of the tautology referred to, in my said Ruling, I agreed with the sentiments of the two Judges to the effect that a challenge against the “assessment of costs” made by the subordinate Court is not technically an exercise that arises from “taxation of costs”.

4. The above is because a challenge against the “assessment of costs” made by the subordinate Court does not fall under the provisions of Rule 11 of the Advocates Remuneration Order and thus should not also be described as a “Reference” within the meaning ascribed therein. Instead, it is Section 27 of the Civil Procedure Act and/or the High Court’s inherent or supervisory powers which can be invoked to cure any “lacuna” in the process or procedure of challenging the “assessment of costs” by the subordinate Courts.

12. Unfortunately, the costs were not assessed but taxed by the court. This was raised by the applicants herein but ignored. The court had no authority to tax costs. The procedure outlined above for assessing costs is to be followed. Secondly, the costs must be on a proper scale, that is, schedule 10. There should never be mixing of schedules. The taxation of party and party costs under Schedule 7 of the Advocates (Remuneration) (Amendment) Order, 2014. Had the court assessing the costs been cognizant of the question of assessment, it would not have gone the long haul the way it did.

13. The court is aware that it cannot upset taxation willy-nilly. However, there has to be a proper taxation. The lower court must proceed on the basis of an assessment of costs. In the case of **M/S Oduk & Co. Advocates v Mideny [2025] KEHC 6825 (KLR)**, TA Odera, J posited as follows:

In the case of *First American Bank of Kenya -vs- Shah and others* (2002) 1E.A 64. It was held that "... The high court was not entitled to upset a taxation merely because in its opinion the amount awarded was high and it would not interfere with a taxation officer's decision unless the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.... Under the advocates remuneration order, some of the relevant factors to be considered were the nature and importance of the matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge....".

15. It is thus clear from the foregoing that the High Court cannot set aside an award of taxation by a taxing master unless it is satisfied that; a. The award is too low or too high to amount to injustice to a party. b. The award took into account irrelevant factors or omitted relevant factors.

14. In this case, there was an error of principle where taxation for probate and administration was conducted by the subordinate court. Secondly, the rule that the lower court costs must be assessed, not taxed, was ignored. The court,

therefore, must exercise its inherent jurisdiction under Article 165(6) and (7) of the Constitution, which provides as follows:

**(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

**(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**

15. The taxation was therefore an illegality having proceeded as a taxation and using a wrong schedule of fees. Such a taxation is therefore a nullity. In **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

**“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**

16. Therefore, the entire edifice collapses and must be set aside. The net effect is that the taxation of costs by the lower court is set aside. The primary matter is remitted to the lower court for assessment as per the law under Schedule 10 of the Advocates (Remuneration) (Amendment) Order, 2014.

17. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

**(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**

**(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

18. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah**

**Awad Gullet v CMC Motors Group Limited**  
**[2018] KECA 158 (KLR)** had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

19. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), as follows:

**18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation**

**22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.**

20. Given that the taxation was set aside based on error of principle and not the inherent merit of the case, each party will bear its own costs.

#### Determination

21. In the upshot, I issue the following orders:-

- (a) The Chamber Summons application dated 14.10.2025 is allowed. The lower court's taxation of costs is set aside. The matter is remitted to the lower court for assessment of costs under Schedule 10 of the Advocates (Remuneration) (Amendment) Order, 2014.
- (b) Each party shall bear their own costs.

**DELIVERED, DATED and SIGNED at NYERI on this 21<sup>st</sup> day of April, 2026.** Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of:-**

No appearance for parties

Court Assistant - Michael