REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCL MISC NO. E022 OF 2024

NGONYO MUNYUA & CO. ADVOCATES………………………….ADVOCATE

VERSUS

HON. LENNY KIVUTI………. …………………………………………..CLIENT

RULING

1. This ruling aims to determine the chamber summons dated 31 March 2025, filed by the client, which has been brought under the provisions of **Rule 11(1) of the Advocates (Remuneration) Order, 2014,** and the reliefs sought are: -

   a) ***Spent.***
   b) ***That the decision of the deputy registrar/taxing officer on items nos. 1, 2, 3, 5, 7, and 12 dated 13 March 2025, regarding the advocate's client bill of costs dated 27 May***

ORIGINAL

2024, be set aside, and the resultant certificate of taxation quashed.

c) That the court be pleased to re-tax the bill of costs on those items afresh.

2. The summons is premised on the grounds that the taxing officer misunderstood and misapplied the law as outlined in the **Advocates (Remuneration) Order,** leading to a wrong decision. The costs awarded are clearly wrong, illegal, and excessive. A notice of objection to the disputed items was made, and a request for written reasons for the ruling was made through a letter dated 17th March 2025, but it was not responded to. The taxing officer misinterpreted the law, made an incorrect decision, and awarded costs that were illegal, oppressive, and excessive, especially given the advocate's level of involvement in the main case.

3. When served, the advocate vehemently opposed the summons through the replying affidavit deposed by counsel Julia Munyua, sworn on 17 November 2025, where she succinctly states that the taxed bill of costs ensued from instructions given by the client to the advocate to recover his titled prime land measuring five acres located in Syokimau. The advocate filed an amended plaint and defence to counterclaim, attended court, and carried out related legal services.

ORIGINAL

4. Additionally, the client has not shown any error in principle, violation of the *Joreth* principles, or manifest excessiveness by the taxing Master that would justify re-taxation of the bill of costs (BOC). The record clearly shows that the suit involved a complex land matter, with thirty-six registered sub-titles illegally created by the Lands Office. Therefore, the taxing officer's analysis of the extensive research and work involved was appropriate, and her exercise of discretion was justified.

5. Accordingly, following court directions, the summons was argued through written submissions filed by the advocate acting in person, dated 9 February 2026. Significantly, when parties appeared before this court on 28 January 2026, **Mr. Meenye,** for the client, informed the court that he had filed written submissions, and **Ms. Munyua,** for the advocate, stated that she had not been served with such submissions. The court permitted all parties to file their respective written submissions within 14 days; as of the time of writing this ruling, the client has not filed his, and if he does, his submissions will be considered filed out of time.

6. Therefore, when considering the singular issue for determination, **which is whether this court should interfere with the taxing officer's decision,** this ruling shall, later in its analysis and decision, examine the arguments and take into account the law and judicial precedents cited. We proceed.

7. The pertinent legal provision granting this court the authority to hear a reference against the decision of a taxing officer and establishing the procedure for approaching this court as a superior court is located in **Order 11** of the **Advocates (Remuneration) Order ("Order"),** which states:

> ***"(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***

ORIGINAL

> ***subparagraph (1) or subparagraph (2) far 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."***

8. In this case, the client, who was aggrieved by the decision of the taxing officer rendered on 13 March 2025, filed an objection on 18 March 2025, in accordance with **Order 11 (1),** and sought the reasons for the decision. Although the reasons were not provided, the client was later satisfied that the ruling contained sufficient reasons and promptly lodged the reference. Accordingly, the summons is properly before this court.

9. Regarding prevailing jurisprudence, when handling a reference, the persuasive decision of **First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] KEHC 1277 (KLR),** which this court adopts, states that a court should refrain from intervening in decisions made by the taxing officer concerning taxation unless it can be demonstrated that the decision was based on an error of principle or that the fee awarded was so obviously excessive as to indicate a mistake of principle.

ORIGINAL

10. Furthermore, it is well-established law that a superior should not overturn a taxation decision made by the taxing officer simply because it would have awarded a higher or lower amount. Some of the guidelines on assessment of costs have been summarised in the decision of **Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR),** where the Supreme Court of Kenya elaborated thus in **paragraphs 3- 15** of its decision: -

> ***"a. Schedule 6A of the ARO provided for Party-Party costs, that was, the manner in which costs awarded to a successful party as against another party should be assessed/computed/taxed. The essence of such costs was to ensure a successful litigant/party received a fair reimbursement/recompense for the costs/expenses he/she has had to incur on account of a suit.***
> ***b. The subject matter of the suit in issue should be identified first, and then the value thereof determined. Paragraph 1 of Schedule 6A of the ARO stipulated that the value of the subject matter could be determined from the pleading, judgment or settlement of the parties. That meant that the value of the subject matter could be determined from the pleadings or judgment or***

ORIGINAL

settlement of the parties. The basis for determining the subject matter value for purposes of instruction fees was wholly dependent on the stage at which the fees were being taxed. Where it happened before judgment, it was the pleadings that formed the basis for determining subject value. Once judgment had been entered, and for what seemed to us to be an obvious reason, recourse would not be had to the pleadings since the judgment determined conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court. Where, however, a suit was settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it was indubitable that one could not start with the pleadings where there was a settlement.

c. Whilst the determination of the value of subject matter from a judgment and settlement of the parties was quite straight forward, the determination from pleadings was not. The determination of the value of the subject matter,

ORIGINAL

could be difficult, for instance, where the pleadings/suit was struck out at a preliminary stage, such as in the instant case, and the value could only be determined/ascertained upon the conclusion of a trial.

d. The original plaintiffs did not provide any particulars or the value of the parcels that were allegedly compulsorily acquired by the appellant. That information was necessary as a guide to the Taxing Officer in the assessment of reasonable costs. The original plaintiffs simply pleaded or claimed a sum of Kshs.13,932,000,000 as special damages and indicated that the particulars thereto would be availed during the hearing. Therefore, the value of the subject matter could only be determined upon the conclusion of the trial which never happened.

e. A claim in a suit which was struck out at the preliminary stage did not ipso facto render that claim or amount pleaded therein without more the value of the subject matter. The position still remained that the amount therein had not been ascertained or determined, and as such, it could not be applied as the value of a subject matter in a disputed taxation. The application of such a claim or amount as the value of the subject matter would go against the rationale that the

ORIGINAL

fees/costs paid to an advocate and a successful party should be reasonable. Consequently, even where the amount claimed in a pleading which was struck out by a court, as in the instant appeal, the said amount would not act as the value of the subject matter when it came to taxation of instruction fees.

f. Where the value of the subject matter could be determined, the Taxing Officer was required to set out the basic fees prescribed under Schedule 6 Part A. Similarly, where the Taxing Officer assessed instruction fees based on the nature of a matter as stipulated in Paragraph 1, for instance like, bankruptcy proceedings or matrimonial causes she/he was required to set out the basic fees prescribed thereunder. It was after setting out the basic fees that the Taxing Officer could exercise his/her discretion to increase or (unless otherwise provided, like in matrimonial causes) reduce the said basic fees. In exercising such unfettered discretion, the Taxing Officer was required to do so judiciously and not whimsically.

f. In the event that value of the subject matter of a suit could not be determined from either the pleadings, judgment or settlement by the parties, and the nature of the said suit was not

ORIGINAL

provided for in Paragraph 1 of Schedule 6 A, proviso thereunder empowered a Taxing Ofifcer to exercise his/her discretion in assessing instruction fees for such a suit.

g. Schedule 6 Part B relates to Advocate-Client costs, it provided for the manner in which advocates costs/fees should be assessed/taxed. Once instruction fees in Party- Party costs in a particular suit were assessed/taxed under Part A, and a certificate of costs to that effect was issued, the assessment of instruction fees in Advocate-Client costs in the same suit simply required the application of the formula stipulated under Part B, that was, the fees, the instruction fees, taxed or ascertained under Part A increased by one-half. Besides, the impugned majority judgment found that where Party-Party costs were taxed under Part A, the Taxing Officer was devoid of any discretionary power when it came to the assessment of instruction fees in Advocate-Client Bill of Costs.

h. The Taxing Officer was required to take into account Part A. That did not mean that such a Taxing Officer was simply to increase the instruction fees determined/ascertained in Part A by one-half or 50%. That was because rule 16 of the Advocates Remuneration Order provided that

ORIGINAL

notwithstanding anything contained in the Order, on every taxation the Taxing Officer may allow all such costs, charges and expenses as authorized in the Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party. Rule 16 should be read together with section 2 of the Advocates Act, which interpreted the word costs as including fees, charges, disbursements, expenses and remuneration.

h. Judicial discretion was the exercise of judgment by a judge or court based on what was fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant was not entitled to demand the act as a matter of right.

i. The proper interpretation of Schedule 6B was that in assessing fees thereunder, including instruction fees, a Taxing Officer was required to exercise his/her discretion guided by the prescribed scale of fees in Part A. That did not mean, as the impugned majority judgment found, that a Taxing Officer was simply to apply the mathematical formula to the instruction fees ascertained in the taxed Party-Party costs. Failure to evaluate a disputed item under taxation and determine it judiciously was

ORIGINAL

contrary to the clear provisions of rule 16 of the Advocates Remuneration Order. A Taxing Officer being a judicial officer exercising a judicial mandate could not be said to be performing such mandate mechanically or merely as a formality.

j. An Advocate would be entitled to payment of a reasonable fee which is commensurate with the work done. What was a reasonable fee in the circumstance could only be adjudicated by a taxing master by application of his discretion. If the instruction fee in a certificate of Party-Party costs was disputed when it came to the assessment of the same in Advocate-Client costs under Schedule 6B, the Taxing Officer should subject the disputed items to evaluation and judicial determination according to the circumstances of each case. The instruction fees in the Party-Party certificate of costs once disputed must be ascertained and the certificate could not be applied hook, line and sinker in the assessment of instruction fees under Part B."

See also Joreth Limited v Kigano & Associates [2002] KECA 153 (KLR) and Kamunyori & Company Advocates v Development Bank Of Kenya Limited [2015] KECA 595 (KLR)

ORIGINAL

11. Thus, having stated the principles of law, this court will now consider the grievances posited by the client against the taxing officer allegedly on her misapprehension of the provisions of the law as set out in the **Order** and awarded costs that were manifestly high, wrong, illegal and excessive on item 1 (instruction fees to file suit), item 2 (instructions to defend the counterclaim), item 3 (drawing of notice of motion and notice of appointment and making 2 copies thereof), item 5 (fees for getting up or preparing for trial), item 7 (drawing of amended plaint and making 4 copies thereof) and lastly, item 12 (drawing of trial bundle and making 4 copies (50 folios)).

12. In the present matter, the BOC submitted to the taxing officer pertains to an advocate-client bill of costs dated 27 May 2024. Under the prevailing circumstances, the procedure for the taxation of such costs is outlined in **Schedules 6A** and **6B** of the **Order**. According to the prescribed formula, the advocate-client's costs in such a case shall be the party and party costs specified in **Schedule 6A**, augmented by an additional one-half.

13. Respecting item 1, the taxing officer recognised that the value of the subject matter could not be ascertained and acknowledged that although the **Order** made provisions for Ksh. 75,000/-, this dispute concerned land. Referring to **Ngatia & Associates v Interactive Gaming & Lotteries Ltd (Miscellaneous Civil Application 15 of 2016) [2022]**

ORIGINAL

KEHC 12026 (KLR) (3 June 2022) (Ruling), she noted that the documents examined, reviewed, and analysed, which were extensive in volume, showed that a considerable amount of work was involved. Thus, assessed this sum at Kshs. 1,000,000/-.

14. However, and of significance, the advocate only joined the matter at a later stage after the previous counsel, **Ms. Meenye & Kirima Advocates,** had prepared the plaint dated 18 January 2019. The defendant in the main suit defended this plaint on 20 January 2022. The matter remains ongoing; it is probable that another advocate is handling it, and at the time of taxation, it had not yet proceeded to a hearing. Consequently, the taxing officer ought to have taken into account the work undertaken by the advocate upto to the time of taxation, which she clearly overlooked. When faced with similar circumstances, the decision of **Leonard Katunga Mbuvi T/A Katunga Mbuvi & Company Advocates v Acrredo AG & 3 others [2013] KEELC 70 (KLR),** held:-

> ***"As was held in the case of <u>Mayers and Another Vs Hamilton &</u> <u>others (1975) EA 13,</u> an advocate is entitled to claim the minimum instruction fees but he cannot properly claim fees in respect of work he had not done. The entitlement under the instruction fees grows as the matter proceeds. The taxing master should therefore***

have taken into consideration the work that the Respondent herein had done after filing the two Applications."

15. Therefore, the taxing master should have considered the fact that the client would still be required to pay instruction fees to the advocate who drafted the plaint and filed the suit. The advocate ceased to act for the client after filing the amended plaint and defence to counterclaim. Consequently, this court determines that the instruction fees of Kshs. 1,000,000/- awarded to the advocate by the taxing officer is evidently excessive and does justify an inference that it was based on an error of principle.

16. As for item no. 2, the taxing officer appreciated that a counterclaim is a separate suit that warranted the client to defend, and the advocate filed a defence to the counterclaim dated 23 October 2023. In **Kaur alias Kaur v Suri [2024] KEELC 14083 (KLR),** the court held thus:-

"To my mind, the instructions fee that was awarded for prosecuting the suit vide a Plaint cannot be said to suffice for purposes of defending the Counterclaim. For good measure, the Counterclaim was a separate and distinct suit and hence same [counterclaim] attracted instruction fees."

ORIGINAL

17. As previously stated, this case is ongoing, the advocate has ceased to act for the client, and the nature of the dispute in the counterclaim, which concerns trespass, is different from the cause of action in the amended plaint, which relates to fraud. Therefore, guided by **Leonard *(Supra),*** this court finds that the sum taxed at Kshs. 1,000,000/- was excessive and based on an error of principle.

18. Regarding item no. 5, **Schedule 6 A (2)** provides as follows: -

> *"**In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation: Provided that —***
>
> ***(i)this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;***
> ***(ii)no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party***

ORIGINAL

seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;

(iii)in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph."

19. The advocate did not submit its notice of appointment for consideration at the time of filing the BOC. However, based on the cause lists provided, the matter was scheduled for hearing on 26 January 2022, and it is probable that the law firm of **Ms. Meenye & Kirima Advocates** prepared the matter for trial. Thus, the taxing officer should have taken such considerations into account. Moreover, having determined that the instruction fees were excessive, it follows that the getting-up fees of Kshs. 333,333/-, which is one-third of the instruction fees, is evidently excessive. This court finds that the taxing officer erred on principle on this item.

20. Lastly, as for items no 3, 7, 9 and 10, this court finds that they were assessed to scale and has no reason to disturb the assessment by the taxing officer on them.

21. Ultimately, this court finds that the chamber summons dated 31 March 2025 is merited. The ruling and order of the deputy registrar dated 13 March 2025 are set aside, and the appropriate order is that the BOC be remitted for taxation on

ORIGINAL

items no. 1, 2, and 5. Each party bear their respective costs. Consequently, the following final orders are issued:

a. ***The chamber summons dated 31 March is allowed, with each party bearing their own costs.***
b. ***The advocate-client bill of costs dated 27 May 2024 is remitted for taxation before a taxing officer other than Hon. Victoria Ochanda (Ms.) Deputy Registrar.***

It is so ordered.

Delivered and Dated at Machakos this 5th day of May, 2026.

HON. A. Y. KOROSS
JUDGE
05.05.2026

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant

Mr. Meenye for plaintiff/applicant.

ORIGINAL

No appearance for respondent.

ORIGINAL