Jethwa ((Suing on her own behalf and as Administrator for the Estate of Hariish Jethwa Banesingh And Mankuverba Vajesingh Jethwa)) v Makomere t/a Wambeyi Makomere & Company Advocates (Miscellaneous Application 47 of 2024) [2025] KEELC 5303 (KLR) (16 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5303 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

MISCELLANEOUS APPLICATION 47 OF 2024

MAO ODENY, J

JULY 16, 2025

BETWEEN

JASWANTKUMARBA B JETHWA ..... APPLICANT

(SUING ON HER OWN BEHALF AND AS ADMINISTRATOR FOR THE ESTATE OF HARIISH JETHWA BANESINGH AND MANKUVERBA VAJESINGH JETHWA)

AND

WAMBEYI KENNEDY MAKOMERE T/A WAMBEYI MAKOMERE & COMPANY ADVOCATES ..... RESPONDENT

RULING

1. This ruling is in respect of the Applicant's Chamber Summons Application dated 18th October, 2024, seeking the following orders:

    a. That the Decision/Ruling of the Taxing Officer (Hon. P. Nyotah, DR) delivered on 03/10/2024 on the taxation of the Applicant's Party & Party Bill of Costs dated 04/04/204 be set aside and taxed afresh by this Honourable Court. (sic)

    b. That in the alternative to prayer (1) above, the Honourable Court be pleased to set aside the decision of the Learned Taxing Officer delivered on 03/10/2024 and remit the matter for fresh taxation before a different taxing master with appropriate directions.

    c. That the costs of this Application be provided for.

2. The Application is supported by the annexed affidavit of Jaswant Kuvarba B. Jethwa, the Applicant sworn on 18th October, 2024, and deponed that she instructed her advocates to file a Party & Party Bill of Costs dated 4th April, 2024 which was drawn at Ksh 4,755,591/= but was taxed on 3rd October, 2024,

at a grossly understated sum of Ksh 163,275/=. It was her deposition that the matter initially came up for taxation on 13th June, 2024, however, the court was not sitting and the matter was rescheduled to 8th August, 2024 and the notice was duly served upon the Respondent.

3. The Applicant further deponed that before 8th August, 2024, her counsel noted that the E-Filing system had changed the date to 15th August, 2024, prompting them to do an Amended Mention Notice and serve the same on the Respondent's counsel.

4. The Applicant stated that on 15th August 2024, an inquiry from the registry confirmed that the matter was in fact taxed on 8th August, 2024, and a ruling was scheduled for delivery on 3rd October, 2024, where the Hon Deputy Registrar indicated that the Applicant failed to prosecute the Bill, yet her advocates were not granted the opportunity. She deponed that the sum awarded by the learned Deputy Registrar in the ruling warrants interference by this Honourable Court.

5. Kennedy Wambeyi Makomere Advocate filed a Replying Affidavit sworn on 7th March, 2025, and deponed that the Application should be dismissed as the Applicant has not stated how each item has been undertaxed.

Applicant's Submissions

6. Counsel for the Applicant filed submissions dated 10th February, 2025, and identified the following issues for determination:

    a. Whether the decision of the taxing master made on 3rd October, 2024 should be reviewed and/or set aside/taxed afresh?

    b. Whether there are reasons to re-tax some items on the Bill?

7. On the first issue, counsel submitted that by taxing the bill of costs ex-parte and failing to invite parties to ventilate the reasoning behind the assessments made in the bill and failure to notify parties of the subsequent dates, merits setting aside the Taxing Master's decision. Counsel further submitted that the taxing master proceeded to award an inordinately low instruction fees in contravention of the principles of taxation and disallowing some items.

8. Counsel relied on the cases of *Sinohydro Corporation Limited v Samson Itonde Tumbo t/a Dominion Yards Auctioneers* [2021] eKLR and *Ishmael & Co Associates v Bajaj Electricals Limited & Wayne Homes* [2020] eKLR.

9. On the second issue, counsel submitted that items 1 and 2 ought to have been taxed as drawn and that items Nos 7, 8, 9, and 10 were not determined. Further that in respect of items 12, 19,26 & 27, the taxing master misdirected herself by concluding that the length of the proceedings could not have taken more than half an hour at the lower scale when, in the real sense, mention would take more than an hour. It was counsel's submission that the Taxing Master erred in law in taxing off items 21, 29, 30, 32 and 36 in what she termed as lack of proof.

10. Counsel cited the case of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] EA 162 and urged the court to allow the application as prayed.

Respondent's Submissions

11. Counsel for the Respondent filed submissions dated 26th May, 2025, and submitted that the prayers sought in the chamber summons are not tenable as the Honorable Magistrate gave the reasons leading to taxation of each item and urged the court to dismiss the Application with costs.

Analysis and Determination

12. The issue for determination is whether this court should set aside; the Ruling of the Taxing Master (Hon. P. Nyotah, DR) delivered on 3rd October, 2024, on the taxation of the Applicant's Party & Party Bill of Costs dated 4th April, 2024.

13. The Supreme Court in the case of *Non-Governmental Organizations Coordination Board v EG & 5 others* (Petition (Application) 16 of 2019) [2023] KESC 102 (KLR) (Civ) (8 December 2023) (Ruling) noted:

> " A certificate of taxation would be set aside, and a single judge could only interfere with the taxing officer's decision on taxation if: There was an error of principle committed by the taxing officer. The fee awarded was shown to be manifestly excessive or was so high as to confine access to the court to the wealthy; (and conversely, if the award was so manifestly deficient as to amount to an injustice to one party).The court was satisfied that the successful litigant was entitled to fair reimbursement for the costs he had incurred, (and the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party). The award proposed was so far as practicable, consistent with previous awards in similar cases.
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> There was no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances. Although the taxing officer exercised unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically. The single judge would normally not interfere with the decision of the taxing officer merely because the judge believed he would have awarded a different figure had he been in the taxing officer's shoes."

14. It is the Applicant's case that by taxing the bill of costs ex-parte and failing to invite parties to ventilate the reasoning behind the assessments made in the bill merits setting aside the Taxing Master's decision. The Respondent opposed the Application on the ground that the Applicant has not stated the items that have been undertaxed.

15. The Ugandan Supreme Court in *Bank of Uganda v Banco Arabe Espanol* SC Civil Application No. 23 of 1999 (Mulenga JSC) stated:

> " Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.
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> Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.
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> Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

16. The Applicant submitted that items 1 and 2 ought to have been taxed as drawn and that items Nos 7, 8, 9, and 10 were not determined. The Applicant contended that in respect of items 12, 19, 26 & 27, the Taxing Master misdirected herself by concluding that the length of the proceedings could not have taken more than half an hour at the lower scale when in the real sense, mention would take more than an hour.

17. In the case of *Kenya Airports Authority v Otieno Ragot & Company Advocates* Petition No. E011 of 2023 SC) the Supreme Court approved the Court of Appeal holding in *Peter Muthoka and Another v Ochieng and 3 Others* NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR that where the value of the subject matter cannot be determined from the pleadings, judgment, or settlement, it is within the discretion of the Taxing Officer to determine such instructions as she may consider just, taking into account among other factors, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstance.

18. The Taxing Master in her ruling stated that:

> " Item 1 is taxed at Kshs. 90,000/ which I consider reasonable. This is because the value of the subject matter cannot be determined from the pleadings or the judgment. The source of the value indicated under the item was not disclosed"

19. The Taxing Master applied the principles set in the case of *Joreth Limited v Kigano & Associates Advocates* [2002] EA 92, she stated that the Applicant did not prosecute the bill hence lost the opportunity to demonstrate how she is entitled to the costs itemized.

20. In the case of *Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W'Njuguna & others* NRB HC Misc. Civil Appl. No. 621 of 2000 [2006] eKLR the court 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."

21. The court would not interfere with the taxing Master's decision only on the ground that the award is too low or manifestly excessive but if the same were based on an error of principle, which would amount to injustice, then the court, would intervene.

22. From the Applicant's supporting affidavit and the submissions, she blames the court for having awarded a very low figure as instruction fees. The Applicant was granted an opportunity to demonstrate why she should be awarded the costs as drawn but did not appear. The Applicant's affidavit confirms that she/her counsel were aware of the dates from the registry and the CTS portal. The Applicant has not demonstrated how the Taxing Master was in error of the principles as set out in the *Joreth Case* (supra).

23. I find that the Application lacks merit and is therefore dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF JULY 2025.

M. A. ODENY

JUDGE