



REPUBLIC OF KENYA



**Emfil Limited v Registrar of Titles, Mombasa & 2 others (Civil Appeal
(Application) 312 of 2012) [2025] KECA 1305 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1305 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 312 OF 2012
GWN MACHARIA, JA
JULY 18, 2025**

BETWEEN

EMFIL LIMITED APPELLANT

AND

THE REGISTRAR OF TITLES, MOMBASA 1ST RESPONDENT

THE COMMISSIONER OF LANDS 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

*(Being a reference from the decision and ruling on taxation by the Deputy
Registrar of this Court (Hon. E. M. Mwamunye) dated 20th March 2025)*

RULING

1. Before me for determination is a Reference by way of a Chamber Summons dated 7th May 2025 brought under Sections 3A & 3B of the [Appellate Jurisdiction Act](#), Rule 117(1) (3) of this [Court's Rules, 2022](#). It seeks orders that: the ruling and reasoning of the learned Taxing Master Hon. E. M. Mwamunye delivered on 20th March 2025 be reviewed and/or set aside; the Court be pleased to refer the appellant's Party to Party Bill of Costs to a different Taxing Master; and that in the alternative, the Court exercises its inherent jurisdiction and tax the appellant's Party to Party Bill of Costs dated 13th July 2022.
2. At the same time, the Applicant filed a reference letter dated 25th March 2025 pursuant to Rule 117(1) of this [Court's Rules, 2022](#). The letter states that the Applicant is dissatisfied with the entire ruling of the Taxing Master dated 20th March 2025.
3. Under Rule 117(4) of the [Court of Appeal Rules, 2022](#), an application for a reference may be made to the Registrar informally at the time of taxation or in writing within seven days thereafter. Therefore, the proper manner of moving the Court in a reference is informally, ordinarily commenced by a letter.



Whereas no harm is done by filing a Chamber Summons as Rule 117(4) is not coached in mandatory terms, there was entirely no reason as to why the Applicant moved the Court both by way of a Chamber Summons and a letter. This is tantamount to duplication of pleadings and does not augur well as the Court should be guided by concise pleadings. That aside, I will go by the reference letter,

4. As a background, the appeal arose from revocation of the Applicant's titles of 119 distinct parcels of land which were acquired in 1987 from a subdivision of the original title, which the Government claimed through Gazette Notice No. 6652 of 2011, citing that they were unlawfully issued to the applicant on land reserved for public use. The revocation contradicted the finding in Mombasa HCCC No. 181 of 2007, *Emfil Ltd vs. Hamisi Mwalimu Mwarandani & 8 Others* where the court had affirmed the Applicant's ownership of the titles, and it granted injunctions against trespassers. Related to this reference, the Applicant's application in Mombasa High Court Miscellaneous Application (JR) No. 84 – *Republic vs. The Registrar of Titles Mombasa & 2 Others: Ex parte Emfil Limited* was later dismissed by the High Court, citing public interest and the presence of squatters. On appeal, the Court of Appeal found that the High Court had erred by transforming the Judicial Review application into a constitutional reference in the middle of proceedings and for relying on unsworn and unproved allegations of fraud. The Court held that the titles were never rebutted by way of an affidavit; that the Registrar of Titles lacked authority to revoke them; and that the Attorney General failed to respond despite multiple opportunities. The Court thus allowed the appeal, declared the revocation unlawful, and reinstated the orders of certiorari, mandamus, and prohibition. The Court emphasized that property rights and due process must be upheld, and that public interest cannot justify unlawful administrative action. Costs were awarded to the Applicant.
5. It is the decision of this Court awarding the Applicant costs that, as a matter of course, prompted the Applicant to file the Party and Party Bill of Costs. The applicant claimed a total of Kenya Shillings Six Million Three Hundred and Four Thousand Seven Hundred and Forty-one and Eight Cents (Kshs.6,304,741.08). The instruction fee was quoted as Kenya Shillings Five Million only (Kshs.5,000,000) while the other items were charged at a total of Ksh 1,304,741.08. A valuation report by Knight Frank Valuers dated 7th December 2022 indicated that the property the subject matter of the litigation was valued at Kenya Shillings Five Billion, Seven Hundred and Thirty-Five Million Eight Hundred and Eighty-Five Thousand (Kshs.5,735,885,000). The Taxing Master in a ruling dated 20th March 2025 awarded the Applicant instruction fees of Ksh 500,000 while other charges totaled Kshs.6,500, thus bringing the total taxed fees to Kshs.506,500. Additionally, the Respondent was required to pay 5% on the taxed fees for the Certificate of Costs.
6. The applicant was dissatisfied with the amount taxed, which is what precipitated the reference. It claims that the amount taxed especially the instruction fee, is too low compared to the work done and the complexity of the matter among other reasons.
7. The Hon. Attorney General represents the Respondents. I heard the reference on 22nd May 2025. When the matter was called out, only learned counsel Mr. Kinyanjui holding brief for Mr. Singh for the Applicant was present. The Court confirmed that indeed the office of the Hon. Attorney General was not only served with a hearing notice, but that was also aware of the hearing date. This fact was emphasized by Mr. Kinyanjui who confirmed that by a letter dated 21st May 2025, counsel for the Applicant had received a letter from the Attorney General's office indicating that one Mr. Kemei, the counsel who was in conduct of the matter was indisposed since 19th May 2025 and were requesting that the matter be adjourned. Mr. Kinyanjui further informed the Court that directions on the hearing of the reference were issued on 7th May 2025 to the effect that the respondent files a replying affidavit and thereafter the parties do file respective submissions within the timelines that were given. As at the date



in Court, the respondent had neither filed the replying affidavit nor submissions, and on that ground, Mr. Kinyanjui submitted that he was opposed to an adjournment.

8. The Court noted that indeed the letter sent from the Attorney General's office indicated that Mr. Kemei was taken ill from 19th May 2025, and that, therefore, there was no reason as to why directions of the Court which were issued way back on 7th May 2025 before Mr. Kemei fell ill were not complied with. Further, the Court noted that the Attorney General's office has many counsel who would have come to Court to represent the respondents; and that, accordingly, there was no reason as to why another counsel from that office did not come to Court. The Court declined to grant an adjournment and directed Mr. Kinyanjui to submit.
9. Immediately Mr. Kinyanjui finished making his submission, learned counsel Mr. Wanga appeared on the platform as holding brief for Mr. Kemei. To my recollection, this was around 10.00 am or thereabouts. He reiterated that Mr. Kemei was unwell and had been unwell for some time, and that, that is why he had also not complied with the directions. The Court restated its earlier observations, more so that the letter from the Attorney General's office was specific as to when Mr. Kemei was taken ill, and that there was no reason at the very least, why directions had not been complied with. While I took issue with Mr. Wanga coming to Court too late after the Applicant had submitted, I granted him an opportunity to submit on behalf of Mr. Kemei but he declined, citing lack of instructions.
10. I have taken the liberty to give this chronology just to set the record straight that the Attorney General was not denied a chance to be heard, but that he elected not to be heard for the reason of his indolence in complying with the Court's directions to file a response to the reference and submissions and for failure to fully instruct Mr. Wanga, the counsel who came to Court on behalf of Mr. Kemei.
11. Mr. Kinyanjui highlighted the Applicant's written submissions dated 17th February 2025. He submitted that the suit involved 139 parcels of subdivided land totaling to approximately 348.7 acres with a commercial value of Kshs.5,735,885,000; that the Taxing Master did not take into account the value of the subject matter and, therefore, she taxed the instruction fees at a cost that is not commensurate with the value of the subject matter; and that a valuation report that is in the bundle of the Applicant's documents was not considered. According to counsel, the Taxing Master in exercise of her discretion opted not to consider the valuation report, yet it is settled that the value of the subject matter should be considered; that accordingly, the Taxing Master erred in principle and in law in not appreciating the value of the subject matter. To buttress the submission, reliance was placed on the dictum in *Shiva Enterprises vs. Mwangi Njenga & Company Advocates* (2020) eKLR where the court emphasized reliance on the value of the property in land cases irrespective of whether or not the same had been a subject of litigation; and *Masore Nyang'au & Co. Advocates vs. Kensalt Limited* [2019] eKLR where this Court emphasized on consideration of the value of the subject matter as well as that, it is not precluded from asking for evidence so as to determine what the value of the subject matter may be for purposes of taxing costs, and which may point at the value of the subject matter.
12. On other items, Mr. Kinyanjui submitted that most of them were unjustifiably taxed off. He took issue with the fact that items 4 to 10, 29 to 163 were considered under the instruction fee, but that the Taxing Master failed to increase the figure of the instruction fee on that account; and that they were not covered under items 164, 166 and 167.
13. Counsel also took issue with the fact that costs under disbursements were entirely taxed off on the ground that there were no documents to support them; that to the contrary, the supporting documents are found at pages 50 to 68 of the List and Bundle of Documents dated 17th February 2025; and that this was an error in principle which calls for review of the taxed costs.



14. Reliance was also placed on the case of *Joreth Limited vs. Kigano & Associates* [2002] 1 EA 92 for the principles that a Taxing Master should consider when taxing costs.
15. I have accordingly considered the reference, the Applicant's written and oral submissions and the law. The issues for determination are: whether the learned Taxing Master properly taxed the Applicant's Party and Party Bill of Costs; and, consequently, if the answer is in the negative, what orders I should make.
16. Of paramount importance is to note that the Taxing Master was well aware of the guiding principles that she was required to adhere to while taxing the bill. She rightfully relied on the case of *Premchand Raichand Ltd vs. Quarry Services of East Africa Ltd (No. 3)* [1972] EA 162 where this Court set out certain principles on taxing costs as:
 - a. Costs should not be allowed to rise to such a level as to limit access to the courts as to the wealthy only.
 - b. Successful litigant has to be fairly reimbursed for the costs he has to incur.
 - c. The general level of remuneration of advocates must be such as to attract recruits to the profession.
 - d. So far as practicable there should be consistency in the awards made.
17. The Third Schedule of this *Court's Rules, 2022* deals with taxation of costs. Regulations 9 to 12 thereof guide the Taxing Master on how to award costs on instruction fees and other items such as of drawing documents and disbursements. They provide as follows:
 9.
 - (1) The fee to be allowed for instruction to make, support or oppose any application shall be such sum as the taxing officer shall consider reasonable but shall not be less than one thousand shillings.
 2. The fees to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.
 3. The sum allowed under sub-paragraph (2) shall include all works necessary and properly done in connection with the appeal and not otherwise chargeable, including attendances, correspondence, perusals, and consulting authorities.
 4. Other costs shall, subject to the provisions of paragraphs 10, 11 and 12, be awarded in accordance with the scale set out below or, in respect of any matter for which no provision is made in those scales, in accordance with the scales applicable in the High Court.
 10. The fee for drawing a document shall include the preparation of all copies for the use of the party drawing it and for filing and service when only one other party or one advocate for other parties has to be served; where there are additional parties, fees may be charged for making the necessary additional copies.
 - 11.



1. On taxation the taxing officer shall allow such costs, charges and disbursements as shall appear to him to have been reasonably incurred for the attainment of justice but no costs shall be allowed which appear to the taxing officer to have been incurred through overpayment, extravagance, over caution, negligence or mistake or payment of special charges or expenses to witnesses or other persons or by other unusual expenses.
 2. In taxing the costs of any civil appeal, the taxing officer shall disallow the costs of any matter improperly included in the record of appeal or in any supplementary record of appeal.
12. If, after a bill of costs has been taxed, the taxing officer considers that, having regard to all the circumstances, the total of the bill before signing the certificate of taxation is excessive, he may make such a deduction from the total as will in his opinion render the sum reasonable.
18. Starting with the cost taxed under the instruction fees, this is how the Taxing Master delivered herself:

“Instruction fees

The Appellant in the bill of costs sought instructions fees to file the appeal together with all legal steps and actions necessary to advance the appellant’s interests at Kshs.5,000,000.

Schedule 3, paragraph (2) provides as follows:

‘The fees to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.

Being guided by the said rule and rule 9(3) which states as follow:

‘The sum allowed under sub-paragraph (2) shall include all works necessary and properly done in connection with the appeal and not otherwise chargeable, including attendances, correspondence, perusals, and consulting authorities.’

I am guided by decision in *Premchand Raichand Ltd vs. Quarry Services of East Africa Ltd (No.3)* [1972] EA 162 where this Court set out certain principles to be taken into account. These were as follows:

- a. Costs should not be allowed to rise to such a level as to limit access to the courts as to the wealthy only;
- b. Successful litigant has to be fairly reimbursed for the costs he has to incur;
- c. The general level of remuneration of advocates must be such as to attract recruits to the profession; and
- d. So far as practicable there should be consistency in the awards made.

Having given consideration to the above authority, and in exercise of my discretion, I do hereby award Kshs. 500,000 item 1. The balance is taxed off. Getting up fees is covered under the instruction fees as per section 9(3) of the Court of Appeal Rules and as such item 17 is taxed off.



19. As observed above, the Taxing Master warned herself as to the applicable law in taxing instruction fee. But did she apply it to the case at hand? It is trite that in assessing instruction fees, the value of the subject matter is one of the factors to be considered. In *Joreth Ltd vs. Kigano & Associates* (2002) 1EA 92, the Court of Appeal held that:
- “the value of the subject matter of a suit for the purposes of a taxation of a bill of cost ought to be determined from the pleadings, judgment or settlement. That value should then be used to determine the instruction fee. However, the taxing officer is entitled to consider other factors such as complexity, time spent and responsibility”
20. In *Masore Nyang'au & Co. Advocates vs. Kensalt Limited* [2019] eKLR, this Court held that the value of the subject matter can be ascertained from documents other than the pleadings.
21. The reference to the valuation report as an aid to assessment of instruction fees was critical in this matter. However, from the excerpt of the ruling of the learned Taxing Master above, it is clear that she did not mention the valuation report, nor did she give a justification for disregarding it altogether. The High Court in *First American Bank of Kenya Ltd vs. Gulab P. Shah & 2 others* [2002] eKLR, held that the Taxing Master is vested with discretion to increase or decrease instruction fees and in exercising such discretion, he/she must act judicially by taking into account relevant factors stipulated in the Advocates Remuneration Order including, the importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances. Further, it was observed that the court will only interfere with the discretion of the Taxing Master in certain circumstances, such as where the amount awarded is either too low or too high as to occasion an injustice or where the Taxing Master errs in principle.
22. From the cited case law, it is true to say that the taxing of a bill of costs is not purely an arithmetic exercise, and that the taxing officer must consider the following in assessing instruction fees:
- a. Value of the subject matter;
 - b. complexity of the matter;
 - c. time and effort involved;
 - d. nature and importance of the matter to the parties;
 - e. risk and responsibility shouldered by the advocate
 - f. skill and expertise demonstrated; and
 - g. public interest and novelty.
23. It is also noteworthy that instruction fee is distinct from other costs, and is meant to compensate for the general conduct of the suit; it is not considered as a granular activity. Party-to-party costs are intended to reasonably indemnify the successful party, and not to reimburse an advocate-client fees. Overcharging is discouraged, and such costs must align with the Third Schedule of the *Court of Appeal Rules, 2022*.
24. In the instant case, the task involved voluminous documents, pleadings, proceedings and submissions. The matter related to 119 parcels of land. The appellant was tasked with defending 119 individual properties and at the beginning, with multiple respondents. Having regard to the activities and processes that culminated to the instruction fees sought, and taking into account the subject matter, its value, nature, importance and difficulty, the interest of the parties, the general conduct of the proceedings, the fund or person to bear the costs, parties to be served, duration of the appeal and all



other relevant circumstances, my view is that a lot of industry went into the entire appeal. Unless proved to be a mechanical or routine task, which I think was not, the award of Kshs.500,000 as instruction fees appear to me to be disproportionately low. It is a paltry cost compared to the work and industry involved.

25. As regards the other items that were taxed off, I specifically take issue with the disbursements. The Taxing Master was clearly in error in holding that there were no documents to support the disbursements, yet, clearly and as submitted by Mr. Kinyanjui, pages 58 to 68 of the Applicant's List and Bundle of Documents comprise supporting documents to disbursements.
26. In the case of *Bank of Uganda vs. Banco Arabe Espanol* (1999) EA 45 (SCU), the Supreme Court of Uganda reiterated the grounds for interference with the Taxing Master's taxed costs as: where the amount taxed is manifestly excessive or low, or where the taxing officer acted on a wrong principle.
27. In *Kenya Airports Authority vs. Otieno Ragot and Company Advocates* (Petition E011 of 2023) [2024] KESC 44 (KLR) (2 August 2024) (Judgment), the Supreme Court stated that the instruction fees on a party to party bill of costs is guided by the value in pleadings but that the taxing officer retains the discretion in awarding such costs, but that the taxing Officer is required to do so judiciously and not whimsically. What this implies is that the Taxing Officer must give reasons for arriving at the costs he/she does. He/she must specify candidly how he/she arrives his/her discretion. It is not enough to say that 'I exercise my discretion and tax the costs at this and that amount', bearing in mind that the exercise of discretion is guided by principles, the elements of which must be conscientiously conceived.
28. Further in *Republic vs. Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others* [2006] eKLR, the High Court held as follows:

“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 facts”
29. For all the foregoing, I reach the inescapable conclusion that Taxing Master did err in principle and in law in not taking into account the totality of the nature of the matter, the valuation report of the subject matter and the industry involved, consequent to which the cost she awarded under the instruction fees was inordinately too low. In the same vein, she failed to take into account the fact that there were documents to support the disbursements claimed. Accordingly, I find that the Applicant's reference is meritorious and I allow it as follows:
 - a. The ruling of the Taxing Master, Hon E. M. Mwamuye dated 20th March 2025 on taxation of the Applicant's Party and Party Bill of Costs dated 13th July 2022 be and is hereby set aside.
 - b. The Applicant's Party and Party Bill of Costs dated 13th July 2022 be and is hereby referred for re-taxation by another Taxing Master other than Hon. E.M. Mwamuye.
 - c. Taking into account that this Court in Mombasa has only one Deputy Registrar, I direct that the Hon. Registrar of this Court do appoint another Deputy Registrar who shall re-tax the bill of costs.
 - d. Accordingly, the Hon. Registrar of this Court be served with this ruling or an extracted order arising from this ruling for reference.



- e. Further, taking into account that this is a second bite of the cherry, the re-taxation be done on a priority basis.
- f. Costs to the Applicant.

30. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 2025.

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

