



**Agricultural Development Corporation & another v JJ. Chesaro & Company
Advocate (Environment and Land Miscellaneous (Reference) Application
E003 of 2023) [2024] KEELC 4886 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4886 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS
(REFERENCE) APPLICATION E003 OF 2023**

EK MAKORI, J

JUNE 20, 2024

**IN THE MATTER OF REFERENCE FROM THE RULING OF THE TAXING
MASTER OF THE ENVIRONMENT & LAND COURT AT MALINDI**

BETWEEN

AGRICULTURAL DEVELOPMENT CORPORATION 1ST APPLICANT

LANDS LIMITED 2ND APPLICANT

AND

JJ. CHESARO & COMPANY ADVOCATE RESPONDENT

*(Being an application against the decision of the Deputy Registrar Hon. Ivy Wasike dated
9th August 2023 in Malindi Environment and Land Misc. Application No.12 of 2023)*

RULING

1. This reference, dated 21st August 2023, challenges the ruling in taxation in Malindi Environment and Land Court Misc. Application No.12 of 2023 (Hon. Ivy Wasike DR.). The reference is between the Client on the one hand and the Advocate on the other hand and is brought seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. The applicant requests that the decision by the taxing master delivered on the 9th of August 2023 and all consequential orders arising therefrom be set aside or varied. They advocate for a fresh taxation of the bill by this Court and, in the alternative, the same be remitted back to the taxing master for fresh taxation.



- d. A stay of execution be granted pending the hearing and determination of the current reference, as well as the Certificate of Costs dated 11th August 2023 for Kshs. 13,226,441.60/—be stayed pending the determination of the present reference.
 - e. Kshs. 3,647,987/- be deducted from the re-taxed bill as part of the payment of instruction fees.
2. Rodgers Karumpu, the applicant's Corporation Secretary, swore an affidavit dated 21st August 2023; there are reasons, as disclosed in the reference and the written submissions by the applicant, to the effect that the matter subject to the taxation proceeded as a formal proof before the trial judge (Odeny J. (Dr.)). Judgment was delivered on 2nd March 2022, as at that time Kshs. 3,647,987/- had been paid partially to the respondent advocate as legal fees.
 3. Upon filing the Advocate–Client Bill of Costs, the taxing master taxed it at Kshs. 13,226,441.60/— for the respondent. The applicant believes this figure was manifestly excessive, and the taxing master did not consider the objections raised by the applicant and the legal principles of taxation in arriving at that figure.
 4. The applicant avers that under item No. 1, the taxing master improperly applied the provisions of Part 1b of Schedule 6 of the Advocates Remuneration Order while applying Kshs. 33,000,000/-, being Special Damages as determined by the judge, and the figure should have added up to Kshs. 1,552,950/-
 5. The applicant firmly believes that during the taxation, the Court was convinced to strike out the replying affidavit dated 19th October 2023, which had been filed by the respondent herein without the leave of the Court. The applicant believes that with the striking out of the replying affidavit and the annexed documents, the bill remained without necessary supporting documents, hence offending Order 21 Rule 9A of the Civil Procedure Rules. According to the applicant, the bill was taxed without supporting documents and, therefore, without basis. The applicant's conviction in this matter is firm, and they believe this is an error committed by the taxing master, which this Court should address in this reference. The decision in *Nyamogo & Nyamogo Advocates v Pan Africa Insurance Company Limited* and another [2016] eKLR is cited.
 6. The applicant submits that the taxing master went into speculation by adopting 3000 acres as the basis for determining the instruction fees. There was no valuation for this purpose, and based on the judge's findings, the correct figure to reckon for the item under the instruction fees was the special damages of Kshs. 33,000,000/-. In so doing, the taxing master fell unto an error in principle in taxation, which needs to be rectified as held in *Premch and Raichand Limited & another v Quarry Services of East Africa Limited* and another [1972] E. A 162, *First American Bank of Kenya v Shah and others* [2002] EA 64 and *Joreth limited v Muturi Kigano and Associates* [2002] 1EA 92.
 7. The applicant strongly contends that had the taxing master considered the correct fees for instruction, the amount would have been Kshs. 1,552,950/-. This is supported by the case of *Masore Nyangau & Co Advocates v Kensalt Limited* [2019] eKLR, where Munyao J. awarded Kshs 1,007,000/- in a matter whose subject value was Kshs. 63,000,000/-.
 8. The applicant further contends that in the alternative, the taxing master could have applied the formula provided under Part A Schedule 6 and for matters categorized under other matters where the value of the subject matter could not be determined from the pleadings and which provide Kshs. 45,000/— if undefended and Kshs. 75,000/—if defended; hence, Kshs. 45,000/—should have been applied in this matter.
 9. Under item No. 146, the getting up fees should have been 517,650/-, based on the correct instruction fees.



10. The applicant contends that 16%VAT should have been reckoned at Kshs 341,401/- when calculated using the appropriate figure of Kshs. 2,131,900/-
11. The applicant asserts that under item No. 35, Kshs 10,000/—was awarded without specific proof as no receipt was attached for the alleged substituted service.
12. It is the applicant’s averment that the taxing master did not factor Kshs 3,647,987/-, which had already been paid as interim legal fees together with Kshs 25,000,000/- paid in a related matter - Malindi ELC No. 16 of 2010 – Raphael Mlewa and others v Agricultural Finance Corporation to the respondent, a matter that had a similar cause of action and parties and that those figures ought to be reckoned in the final re-taxed bill by this Court.
13. The applicant asserts that this Court, with its inherent jurisdiction, has the power to alter the figure arrived at by the taxing master, citing Section 51(2) of the *Advocates Act* and the decisions in Lubulellah and Co. Associates v N.K Brothers Limited [2014] eKLR.
14. The applicant states that ample authorities support the contention that this Court has the discretion to offset and re-tax the bill of cost as taxed by the taxing master afresh. (see Kamunyor & Co. Advocates v Development Bank of Kenya Limited [2015] eKLR and Musyoka & Wambua Advocates v Rustam Hira Advocates [2006] eKLR).
15. The respondent cites the circumstances under which this Court can interfere with the decision of a taxing master in taxation as established in Catherine Njeri Angote v Lucy Wangari Ngugi & another [2021] eKLR, to include that the decision was based on an error of principles in taxation or that the fees were manifestly excessive to justify an interference, that it was based on an error of principles. That the taxing master considered irrelevant factors or omitted to consider relevant factors in taxation in accordance with the Advocates Remuneration Order, hence arriving at a wrong decision. For example, that failure to reckon the nature and importance of the subject matter or cause, the value of the subject matter involved, the interest of the parties, the general conduct of the proceedings, and any other directions provided by the trial judge. If an error is detected, the same is remitted back to the taxing master for re-taxation. It is the discretion of the taxing master to increase or decrease the instruction fees, and the amount of increase or decrease is the discretion of the taxing master. (See CMC Aviation Limited v Kenya Airways Limited (Crus Air Limited) [1978] eKLR).
16. The respondent avers that the bundle of documents produced and dated 15th June 2023 indicated the value of the subject matter and that the land was 3000 acres. These, along with the Valuation Report, the pleadings, and the judge's findings, were sufficient for the taxing master to arrive at the figure she did.
17. The respondent further asserts that the taxing master was within the law in the exercise of judicial discretion by considering all factors in the matter corresponding to the nature and importance of the subject matter, the general conduct of the proceedings, directions by the trial judge and all other relevant factors hence the respondent believes that the taxing master did not err in principle in taxing the bill and arriving at the figure she did. In this regard, the respondent cites the case of Otieno Rajat & Co. Advocate v Kenya Ports Authority [2001] eKLR.
18. The respondent believes that the taxing master correctly applied the Advocates Remuneration Order 2014 as the appropriate taxation based on 2017 when the matter was filed. Therefore, there is no error apparent in the taxation.
19. Regarding the amount paid earlier, the respondent states that this was considered and is shown as having been deducted from the overall bill. The other matter related to this one, ELC 16 of 2010 –



Raphael Mlewa and others v Agricultural Finance Corporation, cannot be factored here because the cause of action was different.

20. The respondent believes that the taxing master should have awarded more in the taxation had she factored in the Valuation Report, which disclosed that the subject matter was valued at Kshs 2,549,400,000/—In that regard, the respondent submits that the bill of costs as taxed should be upheld or that it should be adjusted and taxed upwards based on the said Valuation Report.
21. From the materials and submissions placed before me, the issues that I frame for the determination of this Court are whether this Court has jurisdiction to hear or re-tax the bill of costs and whether the taxing master used the appropriate Advocates Remuneration Order when taxing the bill that is being challenged in this reference. Whether the taxing master misapplied the legal principles in taxing the bill of costs and whether the advocate proved a case against the client to be entitled to Kshs. 13,226,441.60/-
22. From the submissions by both sides, there is no contention that this Court has jurisdiction to hear and determine the reference with leeway to re-tax the same or remit it back for re-taxation if it is established by this Court that the taxing master was way off the mark in the appreciation of the principles in taxation or that the figure as taxed was manifestly excessive or significantly low as to amount to a miscarriage of justice. In Vincent Kibiwott Rono v Abraham Kiprotich Chebet & another [2022] eKLR, Nyakundi J. discussing the jurisdiction of this Court upon being moved, through a reference stated:

“What is before the court is a reference of the decision delivered on 17th January 2022. A reading of the decision shows that it is a ruling on the taxation of the bill of costs dated 5th August 2021. The trial magistrate was exercising his jurisdiction as a magistrate and not a taxing officer. Rule 10 of the advocate’s remuneration order provides;

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.

The court in Bernard Gichobi Njira v Kanini Njira Kathendu & another [2015] eKLR held; A magistrate is allowed and/or mandated by law to assess or tax costs payable in a given case. The words or terminology used whether “assess” or “tax” is immaterial in my view. The bottom line is to determine the total amount of costs payable. The fact that a magistrate has taxed or used the terminology “taxation” to assess or determine costs payable is not fatal if the bill presented before the court is in compliance with the requirements of Schedule VII of the Advocates Remuneration Order. To make a different finding in my view would be unconstitutional in view of Article 159 (2) (d) of *the Constitution*.

It is therefore evident that the trial magistrate fulfilled the purpose that was determination of the total amount of costs payable. The next bone of contention is the process a party disputing the assessment should follow. I note that there are no provisions for challenging assessments made by magistrate’s courts therefore, in the interests of justice, the high court which has jurisdiction to tax bills of costs can intervene.



23. The said judicial authority enunciating on the jurisdiction of this Court to hear reference filed before this Court from the decision of a taxing master goes in tandem with the provisions of Rule 11 of the Advocates Remuneration Order, which provides:

11. Objection to decision on taxation and appeal to Court of Appeal

- (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.
24. Therefore, this Court has jurisdiction to entertain the current reference as filed.
25. It will be noted from the start that the taxing master initially dismissed and expunged an amended bill of costs with bundles for having been filed out of time. This issue was not taken up on this reference by the respondent, but there is a suggestion that the Valuation Report should be used if the matter is remitted for re-taxation. Perhaps if I talk about the expunged amended bill for taxation and the annexed bundles, it will be in passing. It cannot be used as the basis to strike out this reference as proposed by the applicant that the taxing master had nothing to look to in the taxation, having expunged the amended bill of costs. In my view, the initial bill subsisted. Therefore, it cannot be a basis to oust the jurisdiction of this Court.
26. The primary suit in the taxation was filed in 2017. Consequently, the appropriate Advocates Remuneration Order for taxation was the Advocates Remuneration Order of 2014. The parties did not contest this issue. The taxing master did not err on this point.
27. On instruction fees, which is contested, the ruling by the taxing master stated that the item was charged at Kshs 25,000,000/—, which the respondent objected to, and that both parties agreed that the Special Damages as awarded by the judge were Kshs 33,000,000/-. The taxing master applied paragraph 1b of the 6th Schedule of the Advocates Remuneration Order, 2014, which gave a basic fee of Kshs. 695,000/-
28. The taxing master proceeded to increase the figure to Kshs. 6,000,000/- she cited the decisions in *Premchand Raichand Limited v Quarry Service of East Africa Limited & another* [1972] EA 162 and *Republic v Minister for Agriculture and 2 others Ex parte Samuel Muchiri W'Njuguna & 6 others* [2006] eKLR in arriving at her decision and exercise of her discretion to increase the figure to 6,000,000/-.
29. From her ruling, she considered that the matter involved over 3000 acres of prime land. 516 defendants had been sued, and there were allegations that a police officer was killed while guarding this property.



She concluded that the matter was of immense importance to the parties as it had a substantial economic impact on them. On the complexity of the brief, she said that despite there being no certificate to that effect, a perusal of the file showed that the issues raised were quite contentious; she did not consider that the matter raised novel issues. On-time expensed, the taxing master argued that counsel must have placed sufficient time in preparation for trial based on the documents filed and the witnesses lined for the main hearing. On the value of the subject matter, the taxing master considered that the property was over 3000 acres of prime land. This was the contestation in this reference. The other items – getting up fees and VAT were affected by the figure adopted by the taxing master as instruction fees.

30. I am primarily called upon to interfere with the taxing master’s discretion, remarkably increasing the instruction fees as unguided and arrived at without appropriate legal principles. I have perused the records in the taxation and parent files. Parties quoted and cited decisions on what this Court needs to consider before offsetting the judicial discretion exercised by a taxing master. *Ojwang J. in Republic v Minister for Agriculture and 2 others Ex parte Samuel Muchiri W’Njuguna & 6 others [2006] eKLR* had this to say on the exercise of discretion by a taxing master:

“From the foregoing analysis it is clear that I am not of the opinion that the taxing officer was properly guided when she conducted the taxation which has been challenged in the two applications – and certainly not, with regard to the item on advocate’s instruction fees. Her exercise of discretion was, in my view, and with much respect, done perfunctorily and as a mere formality. It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs. Since the sum awarded as instruction fees herein, namely Kshs.20,000,000/=, was not shown to have been guided by the relevant principles, nor was it transparently accounted for, it appeared, in my assessment, as a mystical figure which cannot be allowed to stand. Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.”

31. The final orders by the judge in the primary suit were as follows:
- a. An order of permanent injunction is hereby issued restraining the Defendants, their servants, and agents from interfering, trespassing, selling, wasting, or interfering with the



Plaintiff's quiet enjoyment and use of their parcel of land known as LR Nos. 513,510, 490, 495,489,483,482,488,455,456, 550,475,480,427,461,469,472,460,454,479,458,114,440,540, M53, M54, M58, M38, M29, and 392 at Malindi township Kilifi County.

- b. The Defendants to pay Special Damages of Kshs.33,442,282/-
 - c. The Defendants are to give vacant possession of the suit parcels of land within 60 days, failing which the Plaintiffs are at liberty to evict the Defendants or cause them to be evicted from the suit land in strict adherence to the law.
 - d. The OCS Malindi Police Station to provide security in effecting the Court's Orders
 - e. The Defendant is to pay the costs of the suit.
32. Based on the explanation by the taxing master in her ruling, I do not think that a figure of Kshs 6,000,000,000/- was excessive and capricious to award as instruction fees considering the final orders by the judge, which had a figure of Kshs. 33,442,282/- as Special Damages and other orders that had no specific value but yet crucial to the overall outcome and benefit of the plaintiff in the primary suit, like eviction orders within 60 days of the delivery of judgment, permanent injunction, and police supervision to effect the orders.
33. I had also considered that before Malindi ELC No. 41 of 2017, Agricultural Development Corporation v Mlewa Mkare (the primary suit) had been filed, there was yet an earlier matter the defendants (in the primary suit had filed that is, ELC 16 of 2010 – Raphael Mlewa and others v Agricultural Finance Corporation, for adverse possession, which they lost and have been staying illegally on the suit property, leading to the filing of the primary suit (the subject of this reference) to have eviction orders, permanent injunction, and Special Damages occasioned to the applicant due to wanton waste of the land by the defendants in the primary suit. Therefore, the orders sought in the suit were significant to the applicants to settle a long, protracted trial in our Court System.
34. I have also considered that the land in issue was over 3000 acres; the Valuation Report filed late pegged the value of the land at 2,549,400,000/- perhaps this could have assisted could have assisted the taxing master in realizing the correct figure in instruction fees. It was struck out and, therefore, not relevant in this reference.
35. The increase in the instruction fees sounds germane, based on the material placed before the taxing master on a matter that has been in our Court System for a long time, the number of defendants involved, the attendant documents and evidence the respondent had to deal with in readiness for trial, and the final reliefs granted by the Court.
36. The monies allegedly paid earlier—Kshs25,000,000/—in ELC 16 of 2010—Raphael Mlewa and others v Agricultural Finance—involved a fully resolved matter, and this Court cannot tell the arrangements parties had made over it. The ruling by the taxing master considered and deducted earlier paid legal fees from the final bill. I see nothing to reconsider.
37. Regarding Kshs. 10,000/—for advertisement, I also need not interfere with this figure; the taxing master must have calculated that the amount was expensed and appropriately awarded the same.
38. The Reference is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 20TH DAY OF JUNE 2024.

E. K. MAKORI

JUDGE



In the Presence of:

Ms. Ndungu, for the Applicant

Ms. Chesaro, for the Respondent

Happy: Court Assistant

