



**Olendo t/a Olendo, Orare & Samba Company Advocates v Kenindia Assurance Company Limited  
(Miscellaneous Application E016 of 2022) [2025] KEELRC 1002 (KLR) (31 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1002 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
MISCELLANEOUS APPLICATION E016 OF 2022**

**JK GAKERI, J  
MARCH 31, 2025**

**BETWEEN**

**RAYMOND OLENDO T/A OLENDO, ORARE & SAMBA COMPANY  
ADVOCATES ..... APPLICANT**

**AND**

**KENINDIA ASSURANCE COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the respondent's reference application dated 15<sup>th</sup> May, 2023 and filed on 15<sup>th</sup> May, 2023 seeking Orders that:
  1. The decision of the Taxing Officer dated 26<sup>th</sup> April, 2023 in respect of Advocate bill of costs dated 26<sup>th</sup> January, 2022 be set aside.
  2. The Advocates bill of costs dated 20<sup>th</sup> January, 2022 be remitted to another Taxing Officer and be taxed a fresh and/or the court be pleased to tax a fresh the items objected to.
  3. The costs of this application be provided for.
2. The Chamber Summons application is based on the grounds set out on its face and the Supporting Affidavit of Josephine Onyambu who deposes that the firm of Olendo Orare & Samba LLB filed an Advocate-Client Bill of Costs against the applicant for professional fees incurred in Kisumu ELRC No. 10 of 2019 and the same was determined *vide* ruling delivered on 26<sup>th</sup> April, 2023 precipitating the instant application.
3. That a Notice of Objection dated 18<sup>th</sup> October, 2022 was filed before the Taxing Officer.
4. That the Taxing Officer did not provide reasons for her decision.



5. That retainer was also disputed as the respondent firm was not instructed by the applicant in Butali SRM CC No. 89 of 2014 having instructed J.B Shilenje and Co. Advocates and the two firm are not related.
6. That the Taxing Officer thus committed an error of law and fact since the retainer was objected to as the issue ought to have been determined by the Judge before the Bill of Costs is taxed as per the *Advocates (Remuneration) Order, 2009*, but the Taxing Officer erred in principle by allowing getting up fees under item 2 of the Bill of costs yet the matter had not been certified by the court as proper for consideration of the getting up fee and the Bill of Costs was not drawn to scale and the amounts claimed are unreasonable and unjustifiable and ought not to have been awarded.

### **Respondent's case**

7. By a Replying Affidavit sworn by Mr. Raymond Olendo Advocate on 3<sup>rd</sup> November, 2023 the affiant deposes that his firm Ogejo Olendo & Co. Advocates was duly instructed by the applicant to take up the matter in a tripartite agreement having been in the panel of advocates defending the applicant's interests as per email dated 11<sup>th</sup> December, 2018.
8. The affiant deposes that the Respondent instructed the respondent to defend the insured in Butali PMCC No. 89 of 2014 (Ezekiel Musimbi Lunbonga v West Kenya Sugar Co. Ltd and successfully did so securing a dismissal serve the respondent an award of Kshs.150,000.00 and costs and when the plaintiff appealed the respondent law firm defended the respondent company (West Kenya Sugar Co.) in Appeal No. 10 of 2019 and the appeal was dismissed.
9. That initially, the trial case was under Omwenga & Co. Advocates and a notice of Change of Advocates was filed and no objection was raised.
10. That a tripartite meeting held on 18<sup>th</sup> August, 2014 agreed that the respondent would defend all suits and legal interests where the applicant is the insurer and would pay legal fees and decretal sum payable will regular updates.
11. That in relation to Butali PMCC No. 89 of 2014, the Applicant vide letter dated 11<sup>th</sup> May, 2016 acknowledged receipt of the respondent's letter dated 30<sup>th</sup> July, 2015 and sought further update and later received instructions on how to deal with WIBA matters.
12. Paragraph 17 of the Replying Affidavit sets out the evidence relied upon to show that the respondent firm had the applicant's instructions to deal with the matter in question.
13. The affiant further deposes that whenever Judgment was entered, the applicant's general instructions was to avoid execution proceedings by filing a holding appeal and seeking stay of execution to buy time and had instructions to take up appeals to save on costs of hiring another advocate and prevent adverse orders being made in cases of delayed response.
14. That the applicant had settled decretal awards and costs through the respondent firm and had availed the investigation report in Butali PMCC No. 89 of 2014 to facilitate the defence and part of the policy between the insured and the applicant.
15. The affiant deposes that even if the applicant declined to pay the fees, counsel had liberty to seek the insured's instructions to file a declaration suit against the applicant and the Taxing Officer had jurisdiction to determine the issue of retainer and the Taxing Master exercised her discretionary powers judiciously and no error of principle was proved or substantiated.



16. Finally, the affiant deposes that the Taxing Master erred by taxing Item I at Kshs.25000 by invoking the wrong provision of the Advocates Remuneration Order in lieu of paragraph 1(b) of the 6<sup>th</sup> Schedule.

### **Applicant's submissions**

17. Counsel for the appellant addressed no specific issues but addressed the issue of retainer in the context of the instant application to contend that the applicant did not withdraw instructions from Omwenga & Co. Advocates and placed reliance on the sentiments of the Court in *Ohaga V Akiba Bank [2008] IEA* on the burden of proof of retainership, to argue that there was no retainership between the parties before the court.
18. Reliance was also made on Rule 13A of the Advocates Remuneration Order, 2009 on the powers of the Taxing Officer to urge that the applicant opposed the filing of the Bill of Costs.
19. Reliance was also placed on the sentiments of the Court in *Mugambi & Co. Advocates V John Okal Ogwayo & Another [2013] eKLR* and *Erickson Mogusu t/a N.E. Mogusu & Associates V Mash East Africa Ltd [2017] eKLR* on the resolution of a dispute on Bill of Costs.
20. Counsel urges that the term “court” in Section 2 of the *Advocates Act* does not refer to the Deputy Registrar, to submit that the Taxing Master acted incorrectly as she had no jurisdiction to tax the Bill of Costs.
21. Counsel submitted that Getting up fees was not awardable by virtue of Paragraph 3 of the 6<sup>th</sup> Schedule to the Advocates Remuneration Order, 2014 as there was no hearing of the appeal.
23. Reliance was made on the sentiments of the court in *Dickson Maina Kibira V David Ngari Makunya [2017] eKLR* on getting up fees.
24. Counsel further submitted that disbursements are awardable subject to prove as held in *Ngatia & Associates V Interactive Gaming & Lotteries Ltd [2017] eKLR* and some of the amount claimed were futuristic and speculative such as Item 13 on account of paragraph 69(3) of the Advocates Remuneration Order.

### **Respondent's submissions**

25. On jurisdiction of the Taxing Officer to tax the Bill of Costs, counsel for the respondent placed reliance on the sentiments of the court of Appeal in *Wilfred N. Konosi & Co. Advocates V Flamco Ltd [2017] eKLR* where the court was unambiguous that the Taxing Officer has jurisdiction to determine the issue of jurisdiction, a decision affirmed in *Simon Kitatel Kachapin & 2 Others V Joel P Arumanyang & Another [2021] KECA 36 (KLR)*.
26. Counsel submitted that based on the tripartite agreement between the applicant, insured and the respondent, there was an agreement that the respondent would safeguard the applicant's interests in suits, the absence of a written agreement notwithstanding.
27. That the instruction on WIBA matters and payment of decretal awards and costs through the respondent was sufficient testimony of a relationship.
28. Reliance was placed on Nairobi High Court Misc. Application No. E769 of 2021 *Mwaniki Gachuba t/a Mwaniki Gachuba Advocates V Gyto Security Co. Ltd* to urge that instructions to an advocate need not be explicit or in writing. They can be implied from conduct of the parties and in any case the instructions in the instant case were unequivocal.



29. Sentiments of the court in *Mereka & Co. Advocates V Zakhem Construction (Kenya) [2014]*, *Ohaga V Akiba Bank Ltd (Supra)* and *Uhuru Highway Development Ltd V Central Bank of Kenya & 4 Others [2003]* Eklr, among others were cited to urge that retainer can be gleaned from conduct of the parties and a single letter from an advocate to the client was sufficient, to urge that the law firm, had instructions.
30. Counsel submitted that under subrogation, the respondent was obligated to settle the claim under the policy and the insured is entitled to be reimbursed any costs that it incurred arising from the claim.
31. The court was unable to discern the import of this argument.
32. On Taxation, counsel urged that the Taxing Master ought to have relied on paragraph 1(b) of the 6<sup>th</sup> Schedule to urge that the awardable cost would be Kshs.150,000.00 of 75,000.00
33. That item 14 was the actual travelling expenses incurred, the Bill was served, item 9, drafting of Affidavit of Service 3 folios Kshs.720 and items 12 and 13 were attendances before the Taxing Master and the applicant suffered no prejudice by inserting the figure.
34. On costs of taxation, counsel submitted that the applicant had not demonstrated what constitutes one-sixth of the taxed off of the Bill and cited the sentiments of the High Court in *Esposito Franco V Amason Kingi Jeffah & 2 Others [2014] KEHC 3176 (KLR)* on the meaning of paragraph 77(1) and (2) of the Advocates Remuneration Order.
35. Counsel urged that the applicant had not demonstrated why the decision of the Taxing Master should be interfered with.
36. The singular issue for determination is whether the applicant's reference dated 15<sup>th</sup> May, 2023 is merited.
37. The advocates of the parties have adopted opposing positions on the attendant issues of jurisdiction of the Taxing Master to tax the Bill of Costs dated 20<sup>th</sup> January, 2022 and the actual taxation.
38. While the applicant maintains that the Taxing Master committed errors of principle and there is need for interference by this court, the respondent's advocate contended that since the Taxing Master had jurisdiction to determine all the issues before her, and taxed the same accordingly but for minor errors made against the respondent, the amount taxed ought to be upheld.
39. The most contentious issue is whether the Taxing Master had jurisdiction to tax the Bill of costs before her. Again the advocates have adopted contrasting positions citing different judicial authorities to embellish their respective cases.
40. Whereas the applicant relied on two decisions of the High Court namely; *Mugambi & Co Advocates V John Okal Ogwayo & Another (Waweru J)* and *Erickson Mogusu t/a N. E. Mogusu & Associate V Mash East Africa Ltd (E. N. Maina J)*, to urge that disputes on retainership ought to be determined by a court and the Taxing Officer had no jurisdiction to determine the same, the respondent cited 2 decisions of the Court of Appeal namely *Wilfred N. Konosi t/a Konosi & Co. Advocates V Flamco (Supra)* and *Kitalel Kachapin & 2 Others V Joel Arumonyang & Another (Supra)* which establish beyond peradventure that a Taxing Officer has jurisdiction to determine whether there existed an Advocate/Client relationship between the parties.
41. In the former case, the Court of Appeal expressed itself as follows:

The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an Advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer



by law. It is derived from the Advocates Act and the Advocates Remuneration Order. The Taxing Officer sits as a Judicial Officer. His or her task is to determine the legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in *Taparn V Roitei* [1968] that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case...

42. As a Judicial Officer sitting to a tax a bill of costs between an advocate and his/her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of Advocate/client relationship is raised.
43. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of costs must be determined at once. The Taxing Officer has jurisdiction to determine that question. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction.” (Emphasis ours).
44. Rule 13A, on powers of taxing:

For purposes of any proceeding before him, the Taxing Officer shall have power and authority to summon and examine witnesses to administer oaths to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.
45. The foregoing provision and propositions of law lay it bare that the Taxing Officer has jurisdiction to hear and determine disputes as to whether an Advocate/client relationship existed between the parties before him/her.
46. It behooved the Taxing Officer to determine this question as a Preliminary issue.
47. In the instant case the applicant herein filed submissions in opposition to the applicant’s Bill of Costs dated 20<sup>th</sup> January, 2022 and vociferously contended that there was no advocate/client relationship between the parties and the Taxing Officer had no jurisdiction to determine the Bill of Costs and cited the sentiments of *Waweru J. in Mugambi & Co. Advocates V John Okal Ogwayo & Another (Supra)*.
48. Counsel for the respondent addressed the taxation of the Bill itself on a without prejudice basis, having primarily submitted that the taxing officer had no jurisdiction to hear and determine the Bill of Costs dated 20<sup>th</sup> July, 2022.
49. The applicant’s counsel submitted that there was an Advocate/client relationship between the applicant and the respondent.
50. Puzzlingly, the learned Taxing Officer neither addressed nor determined the question whether there was an Advocate/Client relationship between the law firm of Raymond Odendo t/a Olendo Orare & Samba Advocates and Kenindia Assurance Co. Ltd.
51. Predictably, on 8<sup>th</sup> May, 2023, the applicant’s counsel herein filed a Notice of Objection dated 5<sup>th</sup> May, 2023 under paragraph 11(2) of the Advocates Remuneration Order, 2014.
52. Counsel objected to the issue of retainer on items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 and sought reasons for the decision.
53. It is unclear to the court whether the Taxing Officer availed the reasons sought as there is no copy on record. The instant reference application was filed 7 days later although the file was not placed before the Judge until 3<sup>rd</sup> July, 2023.



54. Under Rule 11 of the Advocates Remuneration Order;
- (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.
55. Clearly, Rule 11(2) of the Advocates Remuneration Order is couched in mandatory terms. However, there is judicial authority for the proposition that the taxing officer need not provide reasons if they were already part of the ruling. See *Ahmed Nasir V. National Bank of Kenya* [2006] EA Bernard Gichohi Njira *V* Kanini Njira Kathendu & Another [2015] eKLR.
56. In the instant case, the taxing officer did not provide reasons for all the items in the Ruling and there was need to furnish the same to the Objector in compliance with Rule 11(2) of the Advocates Remuneration Order.
57. The principles governing interference with the exercise of discretion by a taxing master or officer are well settled.
58. In *Donholm Rahisi Stores (firm) V E.A. Portland Cement Ltd* [2005] eKLR Waweru J. held:
- Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order.
- The court will not be drawn into the arena of taxation except by way of reference from a decision on taxation) made under rule 11 of the Advocates Remuneration Order”.
58. Ringera J. expressed similar sentiments in *Machira & Company Advocates V Magugu* [2002] 2EA 248.
59. In *Republic V Ministry of Agriculture & 2 Others Ex Parte Muchiri W. Njuguna & Others* [2006] eKLR Ojwang J (as he then was) held:
- 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 effect awarded was manifestly excessive as to justify an interference, that it was based on an error of principle. Of course, it would be an error of principle to taken into account irrelevant factors or omit to consider relevant factors...
- The taxation of costs is not a mathematic 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 somewhat too high or too low. It will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...”
60. Similarly, in *Kipkorir, Tito & Kiara Advocates V Deposit Protection Fund Board* [2005] eKLR, the Court of Appeal held:
- The learned judge like the taxing officer was exercising judicial discretion when he allowed the reference. This Court cannot interfere with the exercise of that discretion unless it is



shown that the learned judge acted on the wrong principles of law. The appeal to this Court from the decision of a judge on reference from a taxing officer is a kin to a second appeal and should be governed by Section 72 (1) of the *Civil Procedure Act*. In our view, such an appeal can only be allowed on any of the three grounds specified in section 72 (1) of the *Civil Procedure Act*, that is to say, if the decision is contrary to law or some usage having the force of law; or the decision has failed to determine some issue(s) of law or usage having the force of law or where there is a substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits.

It is apparent from the grounds on which the learned judge allowed the reference that the learned judge was satisfied that the taxing officer had committed grave errors of principle in assessing the costs”.

61. The court is guided by these sentiments.
62. In the instant application, and as adverted to elsewhere in this ruling, the taxing officer neither considered nor determine the foundational question raised by the respondent and contested by the applicant, whether there was an Advocate/client relationship between the parties which implicated her jurisdiction to proceed with the matter.
63. As the Court of Appeal held in *Wilfred N Konosi t/a Konosi Konosi & Co. Advocates V Flamco Ltd (Supra)*, this was a core issue and ought to have been determined as a preliminary issue at once but was not.
64. In the court’s view, this was a fundamental omission by the taxing officer which qualifies to be an error of principle and vitiated the assessment.
65. Similarly, the various items assessed are also contested some by both counsels and finally, for most of the items, no reason(s) was given for the assessment.
66. For the foregoing reasons, it is the finding of the court that the taxing master erred in principle which justifies re-assessment of Bill of costs.
67. In the upshot, the Orders that commend themselves are that:
  - a. The Applicant’s Chamber Summons dated 15<sup>th</sup> May, 2023 is merited and is allowed.
  - b. The Ruling of the taxing officer dated 26<sup>th</sup> April, 2023 be and is hereby set aside.
  - c. The Bill of costs dated 20<sup>th</sup> January, 2022 be and is hereby remitted for assessment by a taxing officer other than Beryl M. A. Omollo.
68. In the circumstances, parties shall bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 31<sup>ST</sup> DAY OF MARCH, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions



of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

