



**Muri Mwaniki & Wamati Advocates v Museum View Office Suits Limited (Environment and Land Miscellaneous Application 28 of 2018) [2024] KEELC 6327 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6327 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 28 OF 2018  
A NYUKURI, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**MURI MWANIKI & WAMATI ADVOCATES ..... ADVOCATE**

**AND**

**MUSEUM VIEW OFFICE SUITS LIMITED ..... CLIENT**

**RULING**

**Introduction**

1. Before court for determination are two applications; the chamber summons dated 9<sup>th</sup> March 2021 filed by the advocate/applicant and the chamber summons application dated 18<sup>th</sup> May 2021 filed by the client/respondent.

**Application dated 9<sup>th</sup> March 2021**

2. The chamber summons dated 9<sup>th</sup> March 2021 was filed by the advocate/applicant seeking the following orders;
  - a. This Honourable Court be pleased to set aside the decision of the Deputy Registrar Hon. Bartoo Taxing Officer's decision delivered on 3<sup>rd</sup> July 2019 (hereinafter "Ruling") and the resultant certificate of taxation if any be set aside to the extent that it related to the reasoning and determination pertaining to taxation of the following items in the advocate/client Bill of Costs dated 17<sup>th</sup> July 2018;
    - a. Item (1) and (2);
    - b. Item 27, 28, 29, 30, 31 and 32.
  - b. This Honourable Court be pleased to tax the items of the bill of costs dated 17<sup>th</sup> July 2018 set out in 1 (a) and (b) above;



- c. In the alternative to prayer 2 above, this Honourable Court do remit the items of the bill of costs dated 17<sup>th</sup> July 2018 set out in 1 (a) and (b) above to another Taxing Officer for taxation with direction on the taxation.
- d. The advocate/applicant be awarded costs of this application.
3. The application is premised on the grounds on its face and the supporting affidavit sworn by Martin G. Mwaniki on 9<sup>th</sup> March 2021. The applicant's case is that the taxing officer failed to properly exercise her discretion thereby arriving at an inordinately low amount of Kshs. 3,000,000/- in respect of instruction fees instead of awarding Kshs. 4,438,750/- for item 1.
4. The applicant further faulted the decision of the taxing officer for failing to award a sum of Kshs. 2,219,375/- in respect of item number 2 arguing that she failed to properly exercise her discretion in that regard. The decision of the taxing officer to tax off items numbers 27, 28, 29, 30, 31 and 32 alleged to be for disbursement was challenged on the basis that the same were not contested and that the taxing officer did not direct production of any documents in regard to those items as provided for under paragraph 13A of the Advocates Remuneration Order. The applicant also contended that the taxing officer failed to take into account paragraph 69 of the Advocates Remuneration Order to the extent that there is no obligation on the applicant to supply documents in support of the Bill of Costs save where directed by the Taxing Officer under paragraph 13A of the Advocates Remuneration Order. He attached a copy of the Advocate/Client Bill of Costs; Notice of Objection and request for reasons of the decision; the email from the court dated 24<sup>th</sup> February 2021; and the taxation ruling.
5. The application was opposed. John Wambugu a director of the client/defendant filed a replying affidavit dated 18<sup>th</sup> May 2021 opposing the application. He deposed that the application was based on greed to enable the advocate get more funds from the client than what was agreed upon. He stated that the client engaged the advocate to encumber the client's fixed assets to the bank in consideration of funds amounting to Kshs. 570,000,000/-.
6. It was his case that the advocate is misadvised in contending that there were two sets of instructions when the instructions were for him to register an encumbrance. He stated that the advocate and client agreed that the sum of Kshs. 2,500,000/- would be the full and final amount chargeable as professional fees regarding the instructions given to the advocate. He stated that therefore the client paid the advocate a sum of Kshs. 2,954,085/- pursuant to their agreement, upon completion of the transaction.
7. He stated that the above figure was inclusive of value Added Tax, which he paid in two instalments of Kshs. 270,000/- and Kshs. 300,000/-. He therefore took the view that the taxing officer erred by failing to take into account the sum of Kshs. 2,384,085/- already paid to the advocate. He maintained that the advocate acknowledged receipt of the above from the client hence he is estopped from claiming more in view of the fact that they had agreed on the amount to be paid.
8. Regarding items 27 to 32, he stated that it is trite that such items be strictly proved. He averred that it was not correct that those items were not contested and that he invites strict proof of the alleged disbursements. His position was that it is cardinal principle of law that he who alleges must prove and that the application before court was an abuse of the court process and ought to be dismissed.
9. In a rejoinder, the advocates swore a further affidavit dated 8<sup>th</sup> October 2021. He reiterated that the client had instructed the advocate to act on their behalf on two separate and distinct transactions, namely, the first transaction was in respect of purchase/transfer of Land Reference No. 16115 for Kshs. 570,000,000/-. That the advocates were instructed by Jamii Bora Bank vide their letter dated 15<sup>th</sup>



January 2015, wherein there was no mention of a charge in the instruction letter. That the advocates finalized the transfer transaction, forwarded the relevant documents and raised a fee note dated 13<sup>th</sup> March 2014 which was settled by the client.

10. He stated that on 27<sup>th</sup> March 2014, the advocate received instructions for the second transaction to among others, prepare and perfect a charge over LR. No. 12715/402 in favour of Jamii Bora Bank for facilitates of Kshs. 570,000,000/-. That the advocate finalized this second transaction and subsequently forwarded the charge to the bank and raised their fee note which remains unpaid todate. He stated that the client upon being asked to settle fees for the second transaction wrote to the advocate making allegations in the supporting affidavit herein, and the advocate responded accordingly, clarifying that these were separate transactions.
11. The advocate maintained that save that there was error in the sum awarded, the taxing officer was right in finding that the advocate was instructed twice, whereof payment for the first transaction had been made and he was therefore entitled to taxation for the second transaction. The advocate demand there being an agreement for payment of Kshs. 2,500,000/- stating that if there were such agreement, the same would be contrary to Section 45 (1) of the Advocates Remuneration Order requiring an agreement to be in line with the relevant Schedule of the Advocates Remuneration Order; and in writing and signed by the client or his or her agent. He also stated that in the second transaction, the client paid the sum of Kshs. 570,000/- paid in two instalments of Kshs. 300,000/- and Kshs. 270,000/- to cover stamp duty.
12. He insisted that the taxing officer was right in not taking into account the sum of Kshs. 2,384,085/- in the taxation of the bill of costs as the same was in respect of fees for the first transaction.
13. Regarding items 27 to 32, the advocate averred that the same are disbursements ordinarily incidental to the perfection of a charge and under paragraph 69 of the Advocates Remuneration Order there is no provision obligating the advocate to supply documents regarding the same and that if documents were required the taxing officer ought to have invoked paragraph 13A of the Advocates Remuneration Order and directed that the same be provided. He attached the instruction letter dated 15<sup>th</sup> January 2014; letter dated 13<sup>th</sup> March 2014; instructions letter dated 27<sup>th</sup> March 2014; letter dated 23<sup>rd</sup> May 2014; fee note dated 9<sup>th</sup> February 2018; letter dated 16<sup>th</sup> February 2018; letter dated 20<sup>th</sup> February 2018; and copy of charge dated 11<sup>th</sup> April 2014.

#### **Chamber summons dated 18<sup>th</sup> May 2021**

14. The chamber summons dated 18<sup>th</sup> May 2021 filed by the client/respondent sought the following orders;
  - a. The time limited for filing a reference under paragraph 11(2) of the Advocates (Remuneration) Order be and is hereby enlarged.
  - b. That this application be deemed to have been duly filed within such enlarged time.
  - c. That in the alternative to prayer (2) above the Honourable Court be pleased to grant the applicant leave to file a fresh reference within such enlarged time.
  - d. That the decision of the taxing officer delivered on 3<sup>rd</sup> July 2019 as far as the same relates to taxation of the Bill of Costs dated 17<sup>th</sup> February 2018 be and is hereby set aside.
  - e. That the Honourable Court be pleased to refer the matter back to the taxing officer for re-taxation of the Bill of Costs aforesaid and with proper directions thereof.



- f. That the costs of the application be borne by the respondent.
15. The application was anchored on the grounds on its face as well as the supporting affidavit sworn by John K. Wambugu, a director of Museum View Office Suites Ltd, the client/applicant. The applicant's case is that the taxing officer erred in principle in arriving at a decision that was contrary to the applicable law. Further, that the advocate admitted having been paid by the client and was estopped from asking for further fees. They further asserted that the taxing officer failed to take into account fees already paid to the advocate and failed to deduct the same from the final taxed award and that she failed to consider relevant factors like parties' interests, and subsisting oral agreements of the parties and that it is only fair and equitable that the taxed bill of costs be set aside.
  16. The application was opposed. Martin K. Mwaniki, an Advocate of the High Court of Kenya practising as such in the form of Muri Mwaniki, the advocate/respondent herein swore a replying affidavit dated 21<sup>st</sup> October 2021 in response to the application. The advocate's case is that the client/applicant had instructed the advocate/respondent to act on their behalf on two separate and distinct transactions. Further, that the advocate received instructions for the first transaction vide a letter dated 15<sup>th</sup> January 2014, for transfer of L.R. No. 16115, which letter did not mention a charge. That the advocate acted on the instructions above and the fee note was duly settled by the client.
  17. The advocate further stated that vide a letter dated 27<sup>th</sup> March 2014, he received instructions for the second transaction to prepare and perfect a charge over LR. No. 12715/402 in favour of Jamii Bora Bank for a facility of Kshs. 570,000,000/-. That the advocate finalized the transaction, forwarded the charge to the bank and raised a fee note dated 9<sup>th</sup> February 2018 which remains unsettled to date. The advocate conceded that he does not dispute payments made in respect to the 1<sup>st</sup> transaction relating to the transfer.
  18. It was the advocate's position that the allegation by the client that the parties entered into an oral agreement for payment of Kshs. 2,500,000/- for the two transactions is misleading as instructions in respect of the same were given at different times and attracted different fees. According to the advocate, Section 45 (1) of the *Advocates Act* provides that for there to be an agreement on advocate's fees, the same must be in line with the fees provided in the Remuneration Order, and that it ought to be in writing and signed by the client, which was not the case herein.
  19. The advocate also stated that the taxing officer was right in not taking into account the sums paid earlier by the client being Kshs. 2,384,085/-. He insisted that there was no meeting of mind between the parties in respect of fees payable for the change. The advocate's view was that the doctrine of estoppel does not apply in this case as the advocate did not conduct himself in a manner to mislead the client that the work done was free of charge, save for payment of stamp duty. Further, that acceptance of monies paid by the client does not amount to admission of an agreement.
  20. The issue of extension of time was settled by consent on 23<sup>rd</sup> June 2021 whereof the client was granted leave to file reference out of time.
  21. Both applications were disposed by way of written submissions. On record are the advocates submissions filed on 8<sup>th</sup> October 2021 and the client's submissions filed on 21<sup>st</sup> January 2022.

### **Advocate's submissions**

22. Counsel for the advocate submitted that the Bill of Costs emanates from services rendered by the advocate to the client in the perfection of a legal charge of Kshs. 570,000,000/- over LR. No. 16115,



which the advocate received instructions through a letter dated 27<sup>th</sup> March 2014, which instructions were executed to completion.

23. Regarding item Number 1, counsel submitted that the first scale of Schedule 1 of the Advocates Remuneration Order 2009 is the applicable order as the one of 2014 came into effect on 1<sup>st</sup> April 2014 after instructions herein had already been issued. Counsel argued that the advocate acted for both the client (borrower) and the bank and was therefore guided by paragraph 33 of the Advocates Remuneration Order. Counsel argued that where an advocate acts for both mortgagor and mortgagee, he shall charge the mortgagee's advocate's charges and one-half of those which would be allowed to the mortgagor advocate. Counsel therefore argued that as the subject matter was Kshs. 570,000,000/- in accordance to first scale (2) (a) Schedule (1) of the Advocates Remuneration Order 2009, the advocate was entitled to a total of Kshs. 4,438,750/- and not the sum awarded by the taxing officer.
24. On item number 2, counsel relied on paragraph 33 of the Advocates Remuneration Order and argued that the sum chargeable to the mortgagee/bank, he is entitled to one half of the fees that would be allowed for a mortgagor's advocate. Therefore that since item 1 was Kshs. 4,438,750/- he is entitled to half thereof which is Kshs. 2,219,375/-.
25. Besides, counsel argued that under paragraph 31 of the Advocates Remuneration Order, 2009, costs of the mortgage ought to be paid by the borrower and that therefore the advocate was entitled to Item Number 2.
26. Regarding Items 27, 28, 29, 30, 31 and 32, counsel submitted that the taxing officer erred in law and misdirected herself in the exercise of her discretion when she failed to allow the same as she had power under paragraph 13A of the Advocates Remuneration Order to direct production of any supporting documentation necessary for determination of the matter before her. Counsel argued that in failing to call for supporting documents, the taxing officer fell into error of law. Reliance was placed on the case of *Mumias Sugar Company Limited v. Tom Ojienda & Associates Advocates* [2021] eKLR for the proposition that a party filing a bill of costs is not required to accompany the bill with supporting documents, which position is confirmed by Paragraph 13A of the Advocates Remuneration Order where the taxing officer has power to summon and examine witnesses and direct production of books, papers and documents as may be necessary for the determination of any matter in dispute. Further that paragraph 74 of the Advocates Remuneration Order provides that receipts and vouchers shall be produced if required by the taxing officer.
27. Counsel argued that paragraph 16 of the Advocates Remuneration Order empowers the taxing officer to allow such costs, charges and expenses as authorized in the Advocates Remuneration Order as appear to have been necessary and proper for defending the rights of the party as long as they have not been incurred or increased through over-caution, negligence, mistake or otherwise on any unusual terms. In that regard, counsel argued that Items 27 and 32 were expenses properly incurred on instructions from the client and charged strictly to scale as they are items that relate to matters incidental to the perfection of a charge. Further that there was no obligation to provide documents and that the same were not contested hence they ought to have been allowed.
28. Regarding the alleged agreement between the client and the advocate counsel argued that there was no such agreement. They relied on Section 45 of the Advocates Act and maintained that agreements between advocates and clients must be in writing and signed by the client. To buttress this point, reliance was placed on the case of *Invesco Assurance Company Ltd v. J. G. Kariuki t/a Gachiri Kariuki & Co. Advocates* [2013] eKLR.
29. In addition, the court was also referred to Section 46 of the Advocates Act and paragraph 3 of the Advocates Remuneration Order for the argument that an agreement between a client and advocate



will only be valid if the fees therein is not less than the fees prescribed in the Remuneration Order. Counsel argued that the alleged sum of Kshs. 2,500,000/- could not be fees in regard to a charge of Kshs. 570,000,000/- as that would amount to undercutting. Counsel submitted that the sum paid earlier by the client was in regard to another transaction regarding purchase of L.R No. 16115 for Kshs. 570,000,000/- whose fees as wholly settled but the current bill was for a second transaction (different instructions) which were in regard to creating a charge over LR. No. 16115 to secure Kshs. 570,000,000/-. It was therefore counsel's position that the doctrine of estoppel was inapplicable.

### **Client's submissions**

30. Counsel for the client submitted that the client consistently denied ever issuing two sets of instructions to the advocate and maintained that there was a single set of instructions which were executed and payments made. Counsel argued that the client was a stranger to the purported instructions contained in the letter dated 27<sup>th</sup> March 2014 and submitted that the client has never owned such parcel and no work was undertaken by the advocate in furtherance of the said instructions. They maintained that the client owns LR. No. 16115 and it is on that parcel that the instructions were discharged.
31. Counsel for the client cited Section 107 of the Evidence Act and argued that the burden to prove that there were two sets of instructions lay on the advocate, who failed to discharge that burden. It was submitted that the agreed fees was Kshs. 35,000,000/- which was paid in full and duly acknowledged. Counsel argued that where an advocate acts without instructions he cannot be paid fees. The court was referred to the decision in the case of Ohaga & Akiba Bank [2008] 1EA for the proposition that the advocate bears the burden to prove retainer.
32. It was therefore submitted for the client that the taxing officer erred in awarding a sum of Kshs. 3,000,000/- while there was no proof of instructions for the advocate to render the said services as the letter relied upon is for a different parcel and cannot be the basis for awarding costs. Counsel argued that the taxing officer in awarding the aforesaid sum for Item 1 for sale, purchase and security, failed to acknowledge that the same had already been settled and acknowledged by the advocate, and the advocate had no proof that he had instructions to perfect the charge separate from the instructions of 15<sup>th</sup> January 2014.
33. Reliance was placed on the cases of Premchard Raichard Limited & Another v. Quarry Services of East Africa Limited & Another [1972] EA 162 and Njogu & Company Advocates v. National Bank of Kenya Limited [2016] eKLR on principles to guide this court in determining whether to interfere with the taxing officer's decision. Counsel maintained that the client had demonstrated that there was an agreement of Kshs. 2,500,000/- which was settled in full and therefore there was no justification for the taxing officer to award fees twice.
34. Counsel submitted that the 2<sup>nd</sup> scale of the 1<sup>st</sup> Schedule of the Advocates Remuneration Order 2009 provided that where the value of the subject matter exceeded Kshs. 500,000,000/- the applicable fees is to be agreed upon by the parties subject to a minimum of Kshs. 3,000,000/- and that therefore the advocates argument that he is entitled to Kshs. 4,438,750/- is erroneous.
35. Regarding Item 2, counsel supported the findings of the taxing officer and argued that there was nothing whatsoever in the instructions to show that the advocate acted for both the financier and the chargor for him to claim an additional one half. Further counsel argued that the instruction letter of 15<sup>th</sup> January 2014 required the advocate to deduce title by conducting a search to determine ownership and that it would be unlawful for the advocate to be awarded fees for Item 2 as he was already paid. Regarding Item 3, counsel contended that the instructions thereof were in the letter dated 15<sup>th</sup>



January 2014 whose fees was settled and if awarded the advocate would have been paid twice for single instructions.

36. Counsel also argued that Items 4 – 21 ought not be granted because counsel was appearing in person. Regarding Items 27 to 32, counsel argued that the taxing officer was right in taxing off the same as no documents were produced by the advocate to prove the same. Counsel argued that the advocate provided documents to support his bill of costs and omitted documents for the aforesaid items and hence cannot fault the taxing officer.

### **Analysis and determination**

37. The court has carefully considered the two applications herein, the responses thereto as well as the parties' rival submissions. I must point out at this stage that the issues raised in the client's application dated 18<sup>th</sup> May 2021 and the submissions filed by the client on 21<sup>st</sup> January 2022 are at variance as the client states in the affidavit sworn by his director John K. Wambugu on 18<sup>th</sup> May 2021, that the advocate was instructed to prepare a charge on behalf of the client and a third party – Jamii Bora Bank, but the client in its submissions contest the retainer denying instructing the advocate to prepare the charge. The client further argues that the agreed fees between the client and the advocate was not Kshs. 2,500,000/- but Kshs. 35,000,000/- which was paid, a matter not raised in his replying and supporting affidavits. As submissions are mere persuasions, and not necessarily the basis of issues in dispute, which issues only arise from the pleadings, this court will restrict itself to the issues as raised in the two applications.

38. Therefore, it is the considered view of this court that from the two applications, the issues arising for determination are as follows;

- a. Whether the taxing officer failed to exercise her discretion judiciously in her decision regarding Item Numbers 1, 2, and 27 to 32.
- b. Whether there was an agreement between the advocate and the client.
- c. Whether there was only one set of instructions from the client to the advocate.

39. It is trite that taxation of bills of costs is an exercise of discretion by the taxation officer, and therefore this discretion must be exercised judiciously. For this court to interfere with the taxing officer's exercise of discretion, it must be demonstrated that the decision was clearly wrong due to a misdirection by failure to take into consideration relevant matters or taking into consideration irrelevant matters or awarding a manifestly excessive or too low a figure to justify the conclusion that the same was based on an error of principle. Therefore it is not enough for an applicant to argue that the court should upset the decision of the taxing officer merely on the basis that the award is low or high, because interference with the taxing officer's discretion is not a matter to be taken lightly.

40. In the case of *First American Bank of Kenya v. Shah & Others* [2002] 1 EA 64, the 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 factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. ....if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to



remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved.

41. Regarding instruction fees, the same can be deduced from the value of the subject matter if the subject matter can be ascertained. However, where the subject matter cannot be ascertained, the taxing officer exercises his or her discretion by taking into account relevant matters including the care and labour required by an advocate; the volume of documents to be perused; the nature and importance of the matter; the interest of the parties; complexity of the matter and the general conduct of the proceedings.

42. In the case of *Joreth Limited v. Kyano & Associates* [2002] 1 EA 92, the court stated as follows;

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

43. In this matter, the advocate states that there were two sets of instructions; the first set contained in the letter of instructions dated 15<sup>th</sup> January 2014 and the second set of instructions contained in the letter of instructions dated 27<sup>th</sup> March 2014. The advocates attached the two letters to his affidavit and it is clear that the first letter above specifically required him to conduct a search to ascertain ownership of LR. No. 16115; conduct search to ascertain directorship of the client and transfer Parcel LR. No. 16115 to the client. Both the client and advocate confirm that these instructions were duly executed by the advocate. The advocate raised a fee not in respect of these instructions dated 13<sup>th</sup> March 2014; which fee included inter alia legal fees for transfer; disbursements; rent and land rates; valuation; stamp duty on transfer and registration of transfer making a total of Kshs. 37,384,085/ which sum was duly settled by the client.

44. The letter of instruction dated 27<sup>th</sup> March 2014 was for conducting search for the land, conducting search for the client's directorship drawing up the charge document and preparing the borrowers extract of minutes and board resolutions to borrow. The advocates letter dated 23<sup>rd</sup> May 2014 confirms that the advocate proceeded to execute the instructions and even forwarded all the documents attendant thereto including the original grant for the property (LR. No. 16115), original certificate of registration of a mortgage created by the charger dated 21<sup>st</sup> May 2014 and clearance certificate for land rates and resolution and minutes of the borrower approving the borrowing. They subsequently sent a fee note dated 9<sup>th</sup> February 2018 to the client being fees in respect to the second letter of instructions.

45. Although the client denies that there were two sets of instructions he is on record in his replying affidavit objecting to the bill of costs sworn on 13<sup>th</sup> August 2018 in paragraph 5 thereof confirming to have instructed the advocate to prepare a charge. The record also shows that the purchase of L.R. No. 16115 was secured by a loan facility from Jamii Bora Bank of Kshs. 570,000,000/-. The client therefore was able to purchase the property on the strength of the charge over the same property. While the first instructions in January was only for transfer of the property to the client, there were no instructions to charge the property and no fees were demanded for the charge. From the above, it is clear that the advocate received two sets of instructions from Jamii Bora Bank on behalf of the client, to transfer the property to the client and then register a charge thereon in consideration of a loan facility of Kshs.



570,000,000/- which was paid to the vendor. In the premises, I reject the clients contention that there were only a single set of instructions and find and hold that there were two sets of instructions, the first set being on 15<sup>th</sup> January 2014, which were executed and the advocate fully paid while the instructions of 27<sup>th</sup> March 2014 which were duly executed by the advocate were not paid for by the client.

46. On whether the taxing officer averred in awarding Kshs. 3,000,000/- for Item 1, it is clear that the instructions herein were issued on 27<sup>th</sup> March 2014 and therefore the applicable law is Advocates Remuneration Order of 2009 and more specifically the first scale of the first schedule thereof. Under the said provisions, it is clearly provided that the scale of fees on mortgages or charges affecting land registered in any registry, “in respect of an amount where the consideration or value is more than Kshs. 500,000,000/- such fee as may be agreed subject to a minimum of Kshs. 3,000,000/-. The notes there under are stated as follows;

Fees will be calculated on the consideration or value of the transaction using the percentage rate of the band within which the consideration lies. It shall not be cumulative.

47. In this case, while the taxing officer awarded a sum of Kshs. 3,000,000/- in regard to the subject matter value being 570,000,000/, the advocate proposes a cumulative calculation by subjecting the first Kshs. 2,500,000/- to 1.5% the next 2,500,000/- to 1.25%, the next 245,000,000/- to 1% and 0.6% on the balance of Kshs. 320,000,000/- to arrive at Kshs. 4,438,750/-. In my view, as the notes in scale 1 schedule provide that the calculation ought to be within the band where the consideration lied and not cumulative, it is clear that the advocates proposal and calculations are contrary to the manner of calculations provided in scale 1 of Schedule 1. Under that schedule and scale, for the value of the subject matter in the band between Kshs. 250,000,000/- the fees charged ought to be 0.6 % the minimum being Kshs. 2,500,000/-. And for a matter where the value is more than Kshs. 500,000,000/- then fees is what is agreed between the parties subject to a minimum of Kshs. 3,000,000/-.
48. Since the value herein was Kshs. 570,000,000/-, then the parties were at liberty to agree, subject to a minimum of Kshs. 3,000,000/-. As the taxing officer made an award of Kshs. 3,000,000/-, it is my view that she properly exercised her discretion basing on scale 1 of schedule 1 and the notes thereunder, and therefore there is no basis for this court to interfere with the said decision.
49. On Item No. 2, the advocate sought for Kshs. 2,219,375/- for deducing and investigating title perfecting the charge and completion of the entire transaction as advocates of the mortgagee/bank. In support of this claim, the advocate argued he had acted for both the mortgagor and mortgagee and therefore is entitled to one half of the fees allowed as mortgagor’s advocate under paragraph 33 of the Advocates Remuneration Order. He also argued that paragraph 31 of the Advocates Remuneration Order makes the client liable to pay the mortgagee’s legal fees for investigation of title, preparation and completion and registration of the security.
50. I have considered the provisions of paragraph 33 of the Advocates Remuneration Order; the same provides as follows;
- Where an advocate is concerned for both mortgagor and mortgagee, he shall charge the mortgagee’s advocates charges and one half of those which would be allowed to the mortgagor’s advocate.
51. It is not disputed that the advocate herein was concerned for both the mortgagor and mortgagee. Fees payable for mortgagor under schedule 1 scale 1 is one half of the scale in 2(a) of the said scale. As the mortgagee’s fees for the value of Kshs. 570,000,000/- is Kshs. 3,000,000/-, the mortgagor’s fee is one half thereof which is Kshs. 1,500,000/-. As the advocate herein having been concerned with both the



mortgagee and mortgagor, I find and hold that apart from the mortgagee's fees as was awarded by the taxing officer, he was also entitled to one half of Kshs. 1,500,000/- (mortgagor's fees) which is Kshs. 750,000/-. Therefore the taxing officer did not exercise her discretion properly in declining to award the advocate one half of the mortgagor's advocates fees. I also find that the awards under Items 1 and 2 are subject to VAT at 16%.

52. Regarding items 27, 28, 29, 30, 31 and 32, the taxing officer taxed off those items on the basis that being reimbursements, supporting documents were necessary. The said items were in respect of binding charges for the charge document; application for consent; stamp duty; stamping, registration of charge and registration disbursement. It is not disputed by the client that the charge document was prepared and bound, or that a consent for the charge was obtained or that stamp duty was paid or the fact that the charge was registered. In the client's own replying affidavit sworn on 13<sup>th</sup> August 2018 objecting to the bill, John Kiumi Wambugu the client's director confirmed that he paid a sum of Kshs. 570,000/- for stamp duty on the charge instrument. That position is confirmed by the advocate. Therefore the client's change of narration in the replying affidavit that the Kshs. 570,000/- paid was for VAT on Kshs. 2,500,000/- is rejected in any case VAT on legal fees as at March 2014, was 16% and Kshs. 570,000/- is not 16% of Kshs. 2,500,000/- as alleged or at all. It is therefore my view that the items 27, 28, 29, 30 and 31 are legitimate expenses on a charge registration which ought to have been allowed by the taxing officer, as a charge instrument would need binding, the relevant consent, registration and payment of stamp duty, I also find that the taxing officer was wrong in discounting stamp duty which is an expenditure and not part of instruction fees, from the instruction fees. In the premises therefore, items 27, 28, 29, 30 and 31 are allowed. Item 32 is a repetition of the claim in item 31 and is therefore taxed off.
53. On the question as to whether there was an agreement between the client and the advocate, regarding the instructions to register the charge, no evidence of such agreement was presented by the client and the payments of Kshs. 2, 384,085/- was in regard to different instructions. Although the advocate represented himself, he applied the skill of an advocate in the representation and is therefore in my view entitled to items contested on that ground by the client. In the premises, I find and hold that there was no agreement between the client and the advocate whatsoever.
54. The upshot is that the client's application dated 18<sup>th</sup> May 2021 is dismissed. On the other hand, the advocates application dated 9<sup>th</sup> March 2021 is allowed and his reference succeeds. Having upheld Kshs. 3,000,000/-, for item 1, allowed Kshs. 750,000/- for item number 2, and allowed items 27, 28, 29, 30 and 31 as drawn, and taking into account VAT, and prior payment of Kshs. 570,000/- for stamp duty, I hereby set aside the taxing officer's ruling dated 3<sup>rd</sup> July 2019 and substitute the same by taxing the advocates bill of costs dated 17<sup>th</sup> July 2018 at Kshs. 4,386,051/-.
55. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Lundi for applicant

No appearance for respondent

Court assistant – Abdisalam

