



**Mwarabu & another v Kariuki t/a BG Kariuki & Company Advocates
(Environment and Land Miscellaneous (Reference) Application
E025 of 2024) [2025] KEELC 4047 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 4047 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS
(REFERENCE) APPLICATION E025 OF 2024**

CK YANO, J

JANUARY 30, 2025

BETWEEN

ANDRIAN KAUMI MWARABU 1ST APPLICANT

MWARABU KIRIMI NICHOLAS 2ND APPLICANT

AND

**BARABAS GATHEKA KARIUKI T/A BG KARIUKI & COMPANY
ADVOCATES RESPONDENT**

RULING

1. For determination, is the chamber summons application dated 18th June, 2024 in which the Applicants are seeking for orders:-
 1. That the Honourable court be pleased to set aside the Advocates/clients bill of costs taxed on 09/02/2024 amounting to Kshs. 329,137/= as advocate instruction fees in favour of the respondent against the applicants in Meru ELC Misc Application No. E012 of 2022.
 2. That the Honourable court be pleased to set aside Kshs. 304,137/= awarded to the respondent against the applicants in Meru ELC. Application No. E012 of 2022.
 3. That upon granting prayers No. 1 and 2 hereinabove, the Honourable court be pleased to exercise its discretion and tax the said bill of costs dated 26/04/2022 and/or order that the said advocates/client bill of costs be remitted back for re-taxation by another taxing officer.
 4. That the Honourable court be pleased to make such other or better orders as it may deem just and fit to meet the ends of justice.
 5. That costs of this application be assessed and be provided for.



2. The application is premised on the grounds on its face and supported by the affidavit of Andrian Kaumi Mwarabu, the 1st Applicant, sworn on 18th June, 2024.
3. The Applicants aver that on 16/02/2026, they instructed the firm of M/s B. G. Kariuki & Co. Advocates to file a suit against one pastor Dennis Mwenda. That pursuant to the said instructions, the said firm of advocates informed the applicants to pay a deposit of Kshs. 40,000/= to enable them prepare the necessary pleadings and file them in court. That the applicants paid the said sum of Kshs. 40,000/= to the said firm of advocates and were issued with a receipt which is annexed and marked "AKM1". That the said advocates then drew the pleadings and filed the plaint in Meru ELC case No. 98 of 2016 on 14/07/2016.
4. That the Applicants aver that after the defendant was served with summons to enter appearance, he filed a statement of defence through the firm of M/s Gichunge Muthuri & Co. Advocates. That the case proceeded for hearing and it was dismissed with costs. That the defendant's advocates then filed party and party costs which was subsequently taxed by the court on 22/7/2021. The Applicant's annexed copies of the plaint, verifying affidavit, authority to act, statement of defence, judgement, party and party bill of costs and the court ruling marked "AKM 2 (a)", "AKM 2 (b)", "AKM 3A", "AKM 4 (a)" and "AKM 4(b)" respectively.
5. The applicants contend that even though they paid the amount of money the respondent had requested them to pay after he filed the suit, the applicants were surprised when the respondent served them with Notice of Taxation together with Advocate/Client bill of costs dated 26/04/2022 which did not indicate and/or subtract the amount paid to him. That nevertheless, the applicants decided to instruct their current advocates (M/s Nyamu Nyaga & Co. Advocates) to oppose the said bill of costs, and they filed objections to the said Advocate/client bill and also annexed receipts for payment made to the respondent. Copies of Notice of taxation together with the said Advocate /client bill of costs, objection and receipts are annexed and marked "AKM5", AKM6A", AKM6(a) to AKM6(k) respectively.
6. The applicants averred that subsequently, the taxing officer taxed the said Advocates/client bill of costs and by a ruling delivered on 09/02/2024 taxed the respondent's bill of costs at Kshs 304, 137/= . Copies of the submissions and ruling are annexed and marked "AKM7(a), AKM 7(b) and AKM 8" respectively.
7. The applicants averred that being dissatisfied with the said ruling, they instructed their advocates to file a notice of objection to taxation dated 26/04/2024 annexed and marked "AMK9" as provided for under Rule 11(1) of the Advocates (Remuneration) Order. That the taxing officer who taxed the respondent's Advocate/client bill of costs was transferred to Isiolo Law Courts, and it was not until 06/06/2024 that the current Deputy Registrar who is also the taxing officer for the court made an order/directions that if the applicants were dissatisfied with the reasons given in the ruling, their recourse is filing a reference before the judge. The order/directions is annexed and marked "AKM 10".
8. The applicants argued that in view of the fact that no reasons were specifically made by the taxing officer in the ruling dated 09/02/2024 in respect of their objection to taxation, and in view of the order made on 06/06/2024, the taxing officer failed to consider the objections raised in respect to items 1, 2 and 3 of the respondent's Advocate/client bill of costs and failed to take into account all the payments made by the applicants to the respondent as legal fees in Meru ELC Case No. 98 of 2016, save for the initial payment of Kshs. 40,000/= which was acknowledged. The applicants further argued that the taxing officer failed to consider that there was no express agreement between them and the respondent that the payment made was not to be considered as part of fees paid to the respondent for court fees, attendance, consultation, disbursement and/or any amount paid towards legal representation or service.



9. The Applicants further averred that the taxing officer failed to take into account a total of Kshs. 168,000/- as part of the fees paid by the Applicants to the respondent when she taxed the Advocate/client bill of costs. That the taxing officer failed to take into account that the respondent filed Advocate/Client bill of costs in Meru ELC Misc. Application No. E012 of 2022 in complete disregard of the mandatory provisions of Rule 69(1) (a) to (e), (2) & (3) of the Advocates (Remuneration) Order which seriously prejudiced the Applicants in that the Advocate/client bill of costs did not provide inter alia, the dates, items, services rendered and amount charged by the respondent, the amount taxed off and disbursements. That the said bill of costs did not reflect the amount paid to the respondent by the applicants which ought to have been deducted accordingly from the amount payable (if any) to the respondent.
10. The applicants averred that the taxed amount was excessive particularly taking into account that defendant's party and party costs which the taxing officer relied upon to tax the respondent's Advocate/Client bill of costs were taxed based on the party and party bill of costs drawn by the defendant's advocates in Meru ELC No. 98 of 2016, and therefore the respondent had a duty to draw his own advocate/client bill of costs clearly reflecting what is provided in Rule 69 of the Advocates (Remuneration) Order and also factor in the amount paid to him by the applicants. That the taxing officer could not entirely rely on the defendant's taxed costs in Meru ELC No. 98 of 2016 in taxing the Advocate/Client on Advocates instruction fees and where applicable, advocates court attendances in respect of the respondent's attendances in court.
11. The Applicants averred that the taxing officer failed to consider and/or find that the respondent had to file his own bill of costs particularly taking into account the services rendered by the respondent in Meru ELC No. 98 of 2016 as they were not necessarily the same as those rendered by the Defendant's Advocates in the said case. That the taxing officer ought not to have relied on Kshs 219,425/= being the total amount of costs awarded to the defendant in Meru ELC No. 98 of 2016 in determining the advocates instructions fees because the said amount were inclusive of advocates instruction fees, services rendered, attendances, drawings, perusals and disbursements on party and party costs on the part of the defendant and is advocates in Meru ELC No. 98 of 2016 which (save for the attendances where applicable), could not be the same with the services rendered by the respondent to the applicants in the said case. That the amount of Kshs 329,137/= awarded to the respondent as advocates instruction fees is against the Advocates (Remuneration) Order 2014, particularly taking into account the nature of services rendered by the respondent in Meru ELC No. 98 of 2016 which he did not disclose in Meru ELC Misc. Application No. E012 of 2022. That the amount of Kshs. 304,137/= awarded as cost to the respondent was excessive, particularly taking into account that advocate instruction fees payable in Meru ELC No. 98 of 2016 was Kshs. 120,000/= and not Kshs. 329,137/=
12. The applicants further averred that the taxing officer accepted via submission that only Kshs. 25,000/ was paid by the applicants as advocates instruction fees whereas there was overwhelming evidence presented to the court by the applicants in form of receipts annexed to the respondent's objection to the Advocates/Client bill of costs in Meru ELC No. 98 of 2016 filed in court on 21/03/2023 showing that payments were done pursuant to the services rendered by the respondent, and that the receipts presented to court showed that the amount paid to the respondent totalled to Kshs. 168,000/= which the taxing officer never took into account when she taxed the Advocate/client bill of costs. That additionally, the taxing officer failed to make a finding that even if all the receipts exhibited by the applicants were all for attendance fees as alleged by the respondents, and which the applicants dispute the taxing officer ought to have considered and made a finding that they formed part of fees paid to the respondent and such payments ought to have been taken into account as part of the advocate instruction fees, attendance fees, disbursement and/or consultation fees in view of the fact that the



- respondent had not drawn his bill of costs as provided under Rule 69 of the Advocates (Remuneration) Order which would have provided inter alia, the services rendered by the respondent to the applicants and the amount charged. That the taxing officer relied on submission by the respondent in determining the amount paid by the applicants to the respondent without perusing all the receipts availed by the applicants which clearly showed the purpose for which payments were made for. That whether the payments received by the respondent as court fees, consultation fees, advocates fees, the same were paid by the applicants to the respondent and they all went to payments as requested by the respondent and such payment ought to have been taken into account by the taxing officer in determining the respondent/client bill of costs against the applicants.
13. The applicants reiterated that the taxing officer did not determine the respondent's failure to draw his independent bill of costs as provided under Rule 69 of the Advocates (Remuneration) Order and failed to take into account the amount paid by the applicants as requested by the respondent and ought to have been taken into account and deducted accordingly from the amount payable to the respondent. The applicants argued that it is only just and fair that this reference be allowed, adding that if the same is not allowed, they stand to suffer irreparable loss. That no prejudice will be occasioned to the respondent if this reference is allowed as they failed to comply with the provisions of the Advocates (Remuneration) Order in preparation of their Advocates/client bill of costs dated 26/04/2022.
 14. The reference is opposed by the respondent through a Replying affidavit dated 25.09.2024 by Susan Mbumbuya advocate and administrator of the firm of B. G. Kariuki & Co. Advocates. The deponent averred that the applicants herein instructed the firm of B. G. Kariuki & Co. Advocates to represent them in two matters being Tigania succession Miscellaneous Application No. 2 of 2016 and Meru ELC No. 98 of 2016. That the respondent's retainer in the two matters has never been objected to or opposed by the applicants' either before the Honourable Taxing master during taxation or before this court. That the party and party bill of costs in Meru ELC No. 98 of 2016 was taxed on 22nd July, 2021 and a Certificate of Taxation thereof issued by the court on 21st September, 2021. That the Honourable court's ruling of 22nd July, 2021 has not been set aside, reviewed, altered and or challenged at all.
 15. It is contended by the respondent that section 51(2) of the Advocates Act provides that the certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby and the court may make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed as is in this case. That the advocate/client costs are governed by part B of schedule 6 of the Advocates (Remuneration) (amendment) Order, 2014 which sets out the parameters to be considered by the taxing officer in determining the costs payable to the Advocates for professional legal services rendered to a client. That schedule 6A and B of the Advocates (Remuneration) Order, 2014 which is stipulated in mandatory terms specifies that determination of the Advocate/client bill under part B is dependent upon determination of the party and party costs under part A. That the Advocate/client bill dated 26th April, 2022 was filed upon determination of the party and party costs for ELC 98 of 2016 taxed at Kshs 219,425/=. That from the reading of part A and B of schedule 6, clearly the process of taxing an advocate fees is by applying fees prescribed in schedule 6(A) being the party and party costs awarded in the primary suit ELC No. 98 of 2016 assessed at Kshs. 219,425/= and then increasing by 50% making a total sum of Kshs 329,137.50. That the Language in schedule 6(B) is unequivocal and is simply applying the fees prescribed in A and increasing it by 50%.
 16. It is contended by the respondent that the applicants' allegation to have paid the respondent a total sum of Kshs 168,000/= is disputed. That 21 copies of the receipts issued by the respondent, only 3 of them totalling to Kshs. 25,000/= were paid in respect to Advocate instruction fees in ELC No. 98 of 2016 while the rest of the receipts are Advocate's consultation fees, attendance fees and filing



pleadings in Tigania Succession Misc. Application No. 2 of 2016. The dates and amounts of the said receipts have been stated. It is averred that the receipts dated 04/01/2016 of Kshs. 5000/=, receipt dated 25/04/2016 of Kshs. 10,000/= and Receipt dated 16/05/2016 of Kshs. 40,000/= were not payments made in respect to ELC Case No. 98 of 2016 but Tigania succession Misc. Application No. 2 of 2016, and therefore a total of Kshs. 55,000/= should be deducted from the total amount alleged to have been paid by the Applicants of Kshs. 168,000/=. It is averred that the applicants have paid a total of Kshs. 113,000/= to the Respondent in respect to ELC No. 98 of 2016 out of which Kshs. 25,000/= was Advocates instructions fees and the rest was Advocates attendance fees and drafting/filing pleadings. That part B of schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014 expressly state that the 50% increment to the party & party costs should further include all proper attendances and all necessary correspondences. The respondent averred that it is in the interest of justice that this application be dismissed with costs.

17. Vide a further supporting affidavit 11th October, 2024, the applicants reiterated inter alia that there was no written retainer/agreement between them and the respondent in regard to manner of payment of instruction fees in respect of Meru ELC No. 98 of 2016 and Tigania PMC Succession Misc. Application No. 2 of 2016 and therefore payments of the advocates instruction fees was subject to the Advocates (Remuneration) Amendment) Order, 2014. That in view of the fact that Meru ELC No. 98 of 2016 was filed in the Environment and Land Court, the applicable schedule for taxation of the party and party costs and Advocates/client's bill of cost is schedule 6 part A and B respectively of the Advocates (Remuneration) (Amendment) Order, 2014.
18. The applicants stated that whereas they did not file an objection in respect of party and party costs and costs taxed for the defendant in Meru ELC No. 98 of 2016 when it comes to assessment of Advocate – client costs under part B of schedule 6, the Taxing officer should subject the disputed items to evaluation and for judicial determination according to the circumstances of each case. That it is trite that once the instruction fees in party and party certificate of costs is disputed, it must be ascertained and the certificate cannot be applied hook, line and sinker in the assessment of instruction fees under schedule 6 part B. The Applicants averred that setting aside, reviewing, altering and/or challenging the court's ruling of 22/07/2021 in regard to party and party costs for the defendant does not arise because what was before the taxing officer for determination was the respondent's bill of costs dated 26/04/2022 which is now the subject of the reference herein. That even if schedule 6 part A and B of the Advocates (Remuneration) (Amendment) Order, 2014 are stipulated in mandatory terms, it is not per se binding when it comes to assessment of advocates instruction fees.
19. The reference was canvassed by way of written submissions and only the applicants filed their submissions dated 12th October, 2024 through the firm of Nyamu Nyaga & Co. Advocates in which they reiterated the brief facts of the subject matter herein, and relied on Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR), and which I have read and there is no need to regurgitate them. The respondent's counsel relied on the replying affidavit filed herein.

Analysis and determination:

20. The contested bill of costs relate to the Advocate/client bill of costs dated 26th April, 2022 in which the respondent was awarded Kshs. 304, 637/= vide the ruling dated 9th February, 2024. In the said ruling, the taxing officer found that the applicable provision of the law is the Advocates (Remuneration) Order, schedule VI B. The learned Deputy Registrar found that the party and party costs in ELC 98 of 2016 was on 22.7.2021 taxed at Kshs. 219,425/=, and therefore going by the decisions of superior courts and the law, that amount was to be enhanced by 50% which came to Kshs. 329,137/=



21. The issues for determination are whether the taxing officer erred in the taxation of the respondents said bill of costs dated 26/04/2022 and whether the same should be set aside or not. The applicable principles are that a court cannot interfere with the taxing officer's decision on taxation unless it is shown that the decision was based on error of principles or the fee awarded was manifestly excessive as to justify interference.
22. As rightly submitted by the applicants, the issue herein relates to how instruction fees of an advocate in an advocate/client bill of costs should be assessed/taxed where the party and party relating to the same matter have been assessed and a certificate of costs issued. The question is whether the taxing officer has room to exercise judicial discretion in the assessment of costs depending on the circumstances of each case.
23. Schedule VI of the Advocates (Remuneration) Order provides for assessment or taxation of instruction fees due to an advocate on account of proceedings before the High Court (or in this case ELC).
24. In her ruling dated 9th February, 2024 the taxing officer held that "according to decided case, when party and party costs have been taxed, the advocate is entitled as a right, to party and party costs plus half of the same". The taxing officer relied on Civil Appeal No. 48 of 2014, Central Bank of Kenya v Makhecha & Co. Advocates [2019] eKLR where the court observed that "it seems it is quite clear that where the party and party costs have been taxed and agreed, then unless there be an agreement as to fees between the client and advocate, the advocate is entitled, as right by dint of schedule VI B of the Remuneration Order, to the party and party costs plus half of the same. (That) it is a matter of arithmetic, requiring no exercise of discretion on the part of the taxing officer."
25. In the case of Kenya Ports Authority v Otieno Ragot and Company Advocates (Supra), the Supreme Court, upon analysing the provisions of the Advocates Remuneration Order which relates to the Remuneration of advocates, and specifically assessment/taxation of instruction fees under schedule VIB of the Advocates Remuneration Order which relates to Advocate and client costs held inter-alia that it was not persuaded that the taxing officer is simply required to increase the instruction fees determined/ascertained in part A by one-half of 50%. The Supreme Court stated that this is because Rule 16 of the Advocates Remuneration Order should be read together with section 2 of the Advocates Act which interprets the word "costs". The Supreme court held that: -

"Bearing the above in mind, we find that the proper interpretation of schedule VI Part B is that in assessing fees thereunder including instruction fees, a taxing officer is required to exercise his/her discretion guided by the prescribed scale of fees in part A. To our minds, ... that does not mean ... that a Taxing officer is simply to apply the mathematical formula to the instruction fees ascertained in the taxed party – party costs. Failure to evaluate a disputed item under taxation and determine it judiciously is contrary to the clear provisions of the Advocates Remuneration Order. Besides, a Taxing officer being a Judicial officer exercising a Judicial mandate cannot be said to be performing such mandate mechanically or merely as a formality..."
26. Being guided by the above decision by the Supreme Court, and based on the fact that the Taxing officer merely stated that the respondent herein was entitled as a right, to the party and party costs plus 50% of the same, it follows that the impugned ruling was erroneous. It is my finding that the Taxing officer misapprehended the principles applicable in taxation of Advocate/client bill of costs and her ruling must be set aside.
27. Consequently, I find merit in the chamber summons dated June 18, 2024 and the same is allowed. The Advocate/client Bill of costs dated April 26, 2022 is remitted for re-taxation by another taxing officer.



28. Costs of the application are awarded to the applicants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 30TH DAY OF
JANUARY, 2025 VIDE MICROSOFT TEAMS IN THE PRESENCE/ABSENCE OF;**

Court Assistant – Laban

No appearance for the Applicants.

No appearance for the Respondents.

HON. C. YANO

ELC, JUDGE

