



**Nairobi City County v Masaba t/a Munikah & Co Advocates
(Commercial Miscellaneous Application E011 of 2019)
[2025] KEHC 12288 (KLR) (Commercial and Tax) (29 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E011 OF 2019**

H NAMISI, J

AUGUST 29, 2025

BETWEEN

NAIROBI CITY COUNTY APPLICANT

AND

SAMSON MASABA T/A MUNIKAH & CO ADVOCATES RESPONDENT

RULING

1. Before the Court is the Applicant's Chamber Summons dated 16 February 2024, brought under Section 11 of the Advocates Remuneration Order. The Applicant seeks principally to set aside a Ruling delivered on 1 August 2012 by Hon. A. K. Ndungu and the resultant Certificate of Taxation dated 7 August 2012.
2. On 20 August 2002, the Respondent was instructed by the Applicant's predecessor, the City Council of Nairobi, to institute recovery proceedings for contribution in lieu of rates against the Commissioner of Lands. This led to the filing of Nairobi RMCC No. 2 of 2003. The suit was settled on 27 July 2006 by consent. Subsequently, the Respondent filed an Advocate-Client Bill of Costs dated 13 October 2006 for legal services rendered in the main suit. The Bill was taxed, and a Certificate of Taxation issued on 16 January 2007 in the sum of Kshs 60,712,373/=.
3. On 19 July 2007, after the settlement of the main suit, the Attorney General, acting for the Defendant therein, successfully applied to amend the Defence to introduce a substantial Counterclaim for Kshs 13,299,105.74 against the Applicant. In response thereto, the Applicant issued fresh instructions to the Respondent, vide letter dated 7 August 2007, to defend it against the Counterclaim. The Respondent successfully defended the same, and the Counterclaim was ultimately dismissed with costs.



4. The Respondent then filed a second Advocate-Client Bill of Costs dated 25 May 2011, which was taxed on 1 August 2012 and Certificate of Taxation issued on 7 August 2012 for Kshs 498,757,315.28. It is this Certificate of Taxation that precipitated the current application.
5. The Application is premised on 2 grounds:
 - i. That the learned Taxing Officer erred in law and misdirected himself in principle in awarding a second Certificate of Taxation in respect of the same matter, RMCC No. 2 of 2003;
 - ii. That the learned Taxing Officer erred in law and misdirected himself in principle by failing to consider that the first Certificate of Taxation dated 16 January 2007 was issued in Misc Application No. 884 of 2006 for Kshs 60,712,373/= in favor of the Respondent for representing the Applicant in the same matter, RMCC NO. 2 of 2003.
6. The Respondent contends that the Counterclaim does not constitute a separate suit for which a distinct Bill of Costs can be raised. It is argued that the filing of the second Bill was irregular and an attempt to unjustly enrich the Respondent at the expense of public funds. In support of this position, the Applicant relies on the Court of Appeal decision in William Koross (legal representative of Elija C.A. Koross) v Hezekiah Kiptoo Komen and 4 Others [2015] eKLR, where the Court stated that a counterclaim does not give rise to a separate, stand-alone judgement and cannot be a pleading independent of a defence.
7. The Respondent has opposed the Application through a Replying Affidavit sworn on 8 March 2024. The Respondent avers that the second Bill of Costs was justified as it arose from a separate and distinct set of instructions to defend a Counterclaim that was filed long after the initial claim had been settled.
8. The Respondent argues that a Counterclaim, for all intents and purposes, is an independent suit against the plaintiff. It is submitted that instructions to defend the Counterclaim were separate and distinct from the initial instructions to prosecute the main claim, especially since they were issued over a year after the main claim had been settled. The Respondent contends that an Advocate is entitled to charge separate instruction fees for prosecuting a claim and defending a counterclaim. The Respondent cited several authorities including Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 others [2014] eKLR and Tom Rading Kuyoh v Joshua Nyiera (sued as Chairman of Fera Association); Nairobi City County Government (Interested Party) [2021] eKLR, where the Court affirmed that a counterclaim or cross petition is a distinct suit that warrants separate instruction fees.

Analysis & Determination

9. Having considered the Application, the Affidavits and rival submissions, the following issues commend themselves for determination by this Court:
 - i. Whether the learned Taxing Officer erred in principle by taxing the second Bill of Costs dated 25 May 2011;
 - ii. Whether the Applicant has met the threshold for this Court to interfere with the Taxing Officer's decision;
 - iii. Who shall bear the costs of this Application.
10. The central question upon which this entire Application turns is the legal status of a counterclaim in the context of the Advocate's remuneration. While a claim and a counterclaim are procedurally combined in one action for convenience, the law has long recognised them as distinct cause of action. A Counterclaim is, in effect, a cross-action.



11. The Applicant's reliance on the William Koross case (supra) is, in my view, misplaced in the context of taxation. That decision correctly articulated the procedural reality that a suit and its counterclaim result in a single final judgement. However, it did not address the question of an Advocate's entitlement to fees for the distinct work done in prosecuting one and defending the other.
12. The authorities cited by the Respondent are more directly on point. In *Kenyariri & Associates Advocates* (supra), Hon. Angote J was unequivocal when he stated thus:

“ A Counter-claim contains assertions that a defendant could have made by starting a lawsuit if the Plaintiff had not already begun an action. It is governed by almost the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant files in response to the Plaintiff's claim. A Counter claim is therefore in all respects a suit by the Defendant.

The Applicant is therefore entitled to instruction fees on the Counter claim. The taxing officer erred in not awarding the Applicant instruction fees on the Counter claim.”
13. More recently, in the *Tom Rading Kuyoh* case (supra), Hon. Eboso, J reinforced this principle, stating that a cross petition is similar to a counterclaim and that they are distinct and separate suits. The learned Judge reasoned thus:

“The bill of costs under taxation related to both the primary suit which was a petition by Tom Rading Kuyoh and the subsequent cross-petition by Joshua Nyiera. It is apparent that the taxing officer treated the petition and the cross-petition as one suit. That, in my view, was wrong. A cross-petition is similar to a counter-claim. Although a petition and a cross-petition would ordinarily share the same cause number, they are distinct and separate suits. Instructions to defend a petition cannot for purposes of taxation be construed to be the same as instructions to lodge and prosecute a cross-petition. An advocate instructed to defend a petition and simultaneously lodge and prosecute a cross-petition receive two sets of instructions relating to two separate suits; the petition and the cross-petition.
14. Applying these principles to the present case, the conclusion is inescapable. The Respondent's initial instructions pertained to the recovery of rates. That matter concluded with a settlement in 2006, and the fees for the work done were duly taxed on 2007. The Counterclaim, raising a new and substantial claim of over Kshs 13 billion, was a fresh legal battle. The Applicant acknowledged this by issuing new and specific instructions to the Respondent to act in its defence. This was not a continuation of the old mandate, but the commencement of a new one. The work involved in analysing, responding to, and ultimately defeating a claim of such magnitude is separate, distinct, and substantial. The Respondent was, therefore, fully entitled to file a separate Bill of Costs for this distinct work.
15. It is well settled principle that this Court will not interfere with the discretion of a Taxing Officer on quantum, unless the decision is based on an error of principle, or the fee awarded is so manifestly excessive or low as to justify an interference that it was based on an error of principle. This was the holding in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR and reiterated in numerous subsequent decisions.
16. The Applicant has failed to demonstrate any error of principle that would warrant this Court's interference. The allegation that the Respondent is seeking to be paid twice for the same work is factually incorrect and not borne out of the record. The first Bill of Cost was for prosecuting the main suit; the second was for defending the counterclaim. These were two distinct sets of instructions and



two distinct scopes of work. The allegation of a scheme to defraud public funds is a serious one and ought not to be made lightly. On the evidence before me, it is unsubstantiated.

17. In the premise, I find that the Chamber Summons dated 16 February 2021 is devoid of merit. The same is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 29 DAY OF AUGUST 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Applicant: Ms. Kosgei

Respondent: Mr. Khatete h/b Kanjama, SC

Court Assistant: Lucy Mwangi

