

KENYA / JUDGMENT

Dewdrop Enterprises Ltd v Muthami & another [2026] KEHC 13650 (KLR)

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COURT

High Court

BEFORE

RE Aburili

CASE / FILE NUMBER

Petition 399 of 2018

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Dewdrop Enterprises Ltd v Muthami & another (Petition 399 of 2018) [2026] KEHC 13650 (KLR) (Constitutional and Human Rights) (18 September 2026) (Ruling) Neutral citation:

[2026] KEHC 13650 (KLR) Republic of Kenya In the High Court at Nairobi (Milimani Law Courts) Constitutional and Human Rights Petition 399 of 2018 RE Aburili, J September 18, 2026 Between Dewdrop Enterprises Limited Petitioner and William Muthee Muthami 1 st Respondent The Chief Magistrate's Court, Milimani Commercial Courts 2 nd Respondent

Ruling

1. This ruling determines the Reference dated 23rd October 2025 filed by the Applicant vide a Chamber Summons under a Certificate of Urgency. It is brought pursuant to the provisions of Sections 5, 11, 50, 50A & 77 of the Advocates (Remuneration) Order, Rule 3 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Sections 4, 6 & 7 of the Fair Administrative Action Act and Articles 40, 47, 48, 50, 165 & 258 of the Constitution and all other enabling provisions of the law. It seeks the following Orders: - a. That this Honourable Court be and is hereby pleased to allow the reference. b. That this Honourable Court be and is hereby pleased to set aside the Ruling dated 14/10/25 and the Certificate of Costs dated 14/10/25 by the Hon. Deputy Registrar taxing the Party and Party Bill of Costs dated 30/3/22 at Kshs. 186,100/=. c. That this Honourable Court be and is hereby pleased to remit the Party and Party Bill of Costs dated 30/3/22 back to the Taxing Officer for taxation. d. That costs of this application be provided for. 2. The Applicant seeks to set aside the Ruling and Certificate of Costs dated 14 th October 2025, which taxed the Party and Party Bill of Costs at Kshs. 186,100/=:, and to remit the Bill back for reassessment. 3. The underlying petition was dismissed on 28 th March 2019 with costs to the 1 st Respondent. Pursuant thereto, the Taxing Officer taxed the Party and Party Bill of Costs at Kshs. 186,100/= on 14 th October 2025. The Applicant lodged a Notice of Objection on 15 th October 2025, received reasons on 22 nd October 2025, and subsequently

instituted the present reference. The Applicant contends that the Taxing Officer committed an error of principle by misapplying the Advocates Remuneration Order (ARO), awarding manifestly excessive fees, and failing to disallow unsupported items. Conversely, the 1st Respondent opposes the application, terming it frivolous, incompetent, and an abuse of the court process. 4. The Application is premised on the grounds on its face and further supported by the sworn affidavit of Edward Thiong'o Macharia the Managing Director of the Petitioner company, sworn on the even date of the Application. 5. In the Applicant's Supporting Affidavit, the deponent Edward Thiong'o Wachira apart from setting out the historical aspect of the Application, deposes that the Taxing Officer erred in principle by misapplying the Advocates (Remuneration) Order scale, resulting in manifestly excessive fee awards for specific items. He states that the Taxing Master failed to disallow certain items entirely. 6. Further, he contends that the Taxing Officer failed to respect, protect, promote and fulfil the Petitioner's constitutional rights under Articles 40, 47, 48, and 50 of the Constitution . He prays that the Application to be allowed in the interest of justice. 7. In response to the Application, the 1st Respondent filed a Replying Affidavit sworn on 12th May 2026 in which he deposes that the Application is incompetent, frivolous and an abuse of the court process because it improperly asks the court to sit on its own appeal, wasting precious judicial time and delaying his right to enjoy the fruits of a lawfully obtained judgment. 8. Citing the principle that costs follow the event and the principle of finality in litigation, he argues that the Applicant lost the suit and must comply with the judgment rather than use frivolous applications to delay execution. 9. The 1st Respondent states that the Applicant's supporting affidavit fails to clearly explain why the assessed costs are excessive or how the taxing master erred under the Advocates Remuneration Order, noting that the court operates on facts and law rather than opinion. 10. He contends that the Taxing Master correctly exercised discretion and provided valid reasons for the decision dated 14th October 2025, which the Applicant has not validly objected to. 11. Emphasizing that the Application is a late afterthought meant to rescue a dismissed petition, the 1st Respondent asserts that the Application raises no justifiable grounds for setting aside the ruling or certificate of costs. He asserts that the application is unmeritorious and should be dismissed with costs, as granting it would unjustly prejudice him and further burden an already stretched judicial system. 12. The Reference was canvassed by way of written submissions. The Applicant's Submissions 13. The Applicant's written submissions are dated 14th October 2025 in which it is submitted, regarding the instruction fees that, the Taxing Officer improperly awarded Kshs. 120,000/= instead of the statutory minimum scale fee of Kshs. 45,000/= prescribed under Section 1(j) of Schedule 6 to the ARO for opposed constitutional and prerogative matters. The Applicant emphasizes that there was no court order issued under Section 50A of the ARO to justify taxing on a higher scale, nor did the 1st Respondent formally apply for such an order with an opportunity for the Applicant to be heard, as required by Articles 20(1) and 21(1) of the Constitution and Sections 4(3) and 4(4) of the Fair Administrative Action Act . 14. To support the argument that judicial review and public law claims occupy a distinct class separate from private law commercial claims, and that taxation discretion must be transparently guided by rational, regular criteria rather than

arbitrary ‘mystical figures’, the Applicant relies on the case of *Republic v Minister for Agriculture; W’Njuguna & 8 others (Ex parte)* [2006] KEHC 3504 (KLR). 15. The Director for the Applicant highlights that under Section 5 of the ARO, an additional special fee for business of exceptional importance is only receivable by an advocate from their own client, not from an opposing party. 16. Regarding the taxation of individual items including Items 1, 5, 8, 9, 12, 13, 16, 22, 23, 25, 27, 28, 29, 31, 43, 44, 51, 52, 53, 54, and 55, the Applicant submitted that these items lacked supporting evidence, violating Section 4 of the Fair Administrative Action Act . It is submitted that although the Applicant formally requested written reasons for the decision on these impugned items pursuant to Section 11(2) of the ARO and the Fair Administrative Action Act , the Taxing Officer neglected this duty. 17. On the necessity of a court comprehensively addressing pleaded issues to uphold the right to a fair hearing, the Applicant relies on the Supreme Court of Kenya decision in *Jovet (Kenya) Limited v Bavaria NV* [2025] KESC 27 (KLR). The Applicant submits that the Taxing Officer’s actions threaten its constitutional rights to property, fair administrative action and a fair hearing and prays that the court allows the Application. The Respondent’s Submissions 18. The Respondent’s submissions are dated 12 th May 2026. The 1 st Respondent contends that the Application is fundamentally misconceived, incompetent and is an abuse of the court process because it improperly invites the Court to sit on appeal over its own decision and interfere with the Taxing Master’s discretion without proving any error in principle. 19. On the issue of competence and the proper invocation of Paragraph 11 of the Advocates Remuneration Order, the 1 st Respondent argues that merely listing items and alleging that amounts are excessive does not prove an error in principle. 20. It is the 1 st Respondent’s submission that courts will not interfere with a Taxing Master’s discretion unless an error in principle or a manifestly excessive award is demonstrated. That this principle was underscored in *First American Bank of Kenya v Shah and Others (Civil Suit 2255 of 2000)* [2002] KEHC 1277, where the court held that interference is unwarranted absent an error of principle or an award so excessive as to imply one. Similarly, the Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board (Misc. Cause 888 of 2003)* and *Joreth Limited v Kigano & Associates (Civil Appeal 66 of 1999)* [2002] KECA 153 affirmed that taxation involves judicial discretion, and a judge on reference should remit the matter for reassessment only upon finding a clear error in principle. 21. Regarding alleged constitutional violations, the 1 st Respondent submits that citing Articles 40, 47, 48, and 50 of the Constitution without demonstrating precise violations, specific infringed rights, or a direct nexus to the taxation proceedings is legally unsustainable. That under the established rule in *Anarita Karimi Njeru v Republic*, a party seeking constitutional redress must set out the particulars of the complaint and the manner of infringement with a reasonable degree of precision. 22. On whether an error of principle has been established, the 1 st Respondent maintains that the Applicant failed to present evidence proving fraud, illegality, or procedural impropriety, merely labelling the Certificate of Costs as fraudulent. It is his submission that general allegations of fraud require strict proof as established in *R.G. Patel v Lalji Makanji* [1957] EA 314. Furthermore, invoking the doctrine of finality in litigation, the 1 st Respondent argues that the Application constitutes an improper collateral attack, noting

that the Supreme Court in *Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited* and the court in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others* cautioned against the endless reopening of concluded disputes. 23. Finally, addressing the question of whether the Application is an abuse of the court process and whether the Respondents are entitled to the fruits of their judgment, the 1st Respondent asserts that the Notice of Motion is designed purely to delay execution. Citing *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* (Civil Appeal 25 of 2002) and *Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others* (Misc. Civil Application 685 of 2017), the 1st Respondent emphasizes that courts must guard against the misuse of judicial time through frivolous applications. 24. Citing *Machira t/a Machira & Co. Advocates v East African Standard (No. 2)*, the 1st Respondent concludes that a successful litigant is entitled to enjoy the fruits of a lawful judgment unless good cause is shown to deny that right.

Analysis and Determination

25. From the foregoing, the issue for determination is whether the Taxing Officer committed any error of principle warranting this Court's interference with the taxation of the Bill of Costs. 26. The grounds for the Reference Application are that the Taxing Officer erred in principle by awarding manifestly excessive fees, misapplying the Advocates (Remuneration) Order (ARO), entirely failing to disallow specific contested items and violating the petitioner's constitutional rights under Articles 40, 47, 48, and 50 of the Constitution of Kenya. 27. It is a settled principle of law that taxation is a discretionary exercise and not a rigid mathematical formula and that Courts will not interfere with the Taxing Officer's discretion unless an error of principle is shown, or the award is manifestly excessive or so low as to amount to injustice. In *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* [1972] EA, the Court stated: - "The taxation of costs is not a mathematical 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." 28. Similarly, in *First American Bank of Kenya v Shah & Others* [2002] EA, the Court 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 fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle." 29. The Supreme Court in *Fredrick Otieno Outa v Jared Otieno Odoto & 3 Others* SC Petition No. 6 of 2014; [2023] KESC 75 (KLR) reaffirmed: "A certificate of taxation will be set aside, and a single Judge can only interfere with the taxing officer's decision on taxation if: (a) there is an error of principle committed by the taxing officer; (b) the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy (and conversely, if the award is so manifestly deficient as to amount to an injustice to one party); (c) the court is satisfied that the successful litigant is entitled to fair reimbursement for the

costs he has incurred; and (d) the award proposed is, so far as practicable, consistent with previous awards in similar cases.” 30. In summary, the principles are that: - a. There is an error of principle committed by the taxing officer; b. The fee awarded is manifestly excessive or so low as to amount to an injustice; c. The reasons given are inadequate or fail to consider relevant factors; or d. The Taxing Officer disregards guiding principles or awards fees so disproportionate as to cause injustice. 31. Applying the above decisions and principles espoused therein to the present Reference, on Item 1 (instruction fees), the Applicant argues that the Taxing Officer improperly awarded Kshs. 120,000/= instead of the statutory minimum of Kshs. 45,000/= under Schedule 6 of the ARO, without a court order under Section 50A authorizing a higher scale. 32. Schedule 6 (A) (1) of the 2014 ARO provides as follows: - “ Constitutional Petition and Prerogative Orders To present or oppose an Application for a Constitutional Petition and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and the importance of the petition or the application, the complexity of the matter and the difficulty or novelty of the questions raised, the amount or value of the subject matter, the time expended by the advocate – i. Where the matter is not complex or opposed, such sum as may be reasonable but not less than Kshs. 45,000/=. ii. Where the matter is opposed and found to satisfy the criteria set out above, such sums as may be reasonable but not less than Kshs. 100,000/=” 33. A review of the record reveals that the Taxing Officer in enhancing the fee to Kshs. 120,000/=:, she pronounced that the basis for departing from the minimum scale is that the suit was important to the parties. I however, find that this contradicts her earlier finding where she stated as follows: - The court records indicate that though the matter was defended, the issues at hand were neither novel nor complex....” 34. This finding does not link or resonate with the principles in underscored in Prof. Tom Ojienda & Associates v Nairobi City County (Nairobi HC Const. Petition No. 6 of 2020), where the Court held that the failure to provide clear reasons or to apply established taxation principles constitutes an error of principle. The discretion to go above the set minimums must be exercised judiciously setting out the reasons for the same. 35. The Taxing Master’s findings are inconsistent because if the matter was neither novel nor complex, then the justification for departing from the minimum scale of Kshs. 100,000 for opposed matters is not justified. Importance of a matter alone, without complexity or novelty, does not justify enhancement. 36. The inconsistency amounts to an error of principle, for the reason that, the enhancement was not anchored in the statutory criteria given and is therefore unjustified. 37. Regarding the other impugned items, the Applicant submitted that several items lacked evidentiary support and that despite requesting written reasons under Paragraph 11 of the ARO, the Taxing Officer failed to provide adequate justification. 38. I note that the Applicant wrote to Court seeking for reasons for the taxation and the taxing master stated that the reasons were in the Ruling for taxation. In the impugned Ruling, the Taxing Master stated as follows, regarding some items: “Items 24, 41, 47 and 50 are all taxed off completely for want of proof. However, regarding the other items as allowed, the taxing officer stated that the 2014 ARO applies with respect to all items since the petition was filed in 2018 and that in her view, the items therein are drawn to scale and or are reasonable hence taxed as drawn save

for instructions fees and the items that she disallowed. 39. It is not sufficient to state that the items are drawn to scale or are reasonable. The specific items must be justified in the ruling. The impugned ruling does not explain the rationale for allowing the specific items in the Bill of Costs. 40. In view of the above findings, the Respondent's assertion that the Application is frivolous and an abuse of process cannot override the duty to ensure that the discretion in taxation of Bills of Costs is exercised judiciously, and supported. 41. I am satisfied that the Taxing Officer erred in principle by providing inconsistent reasons for awarding the item on instructions fees and for failure to provide reasons for allowing the other challenged items in the Bill of Costs. This error substantially affected the quantum of costs awarded. 42. Accordingly, I allow the Reference dated 23 rd October, 2025 and make the following orders: a. The Ruling on the party and party Bill of costs and Certificate of Costs dated 14th October 2025 are hereby set aside in respect of Item 1 (instruction fees) and the specifically challenged items in the Bill of Costs dated 30 th march, 2022. b. The Party and Party Bill of Costs dated 30 th March 2022 is remitted back to the Taxing Officer for reassessment in accordance with the established principles set out in this ruling, and providing reasons for allowing or disallowing the items in the Bill of Costs dated 30 th March, 2022. c. Each party shall bear their own costs of this Application, the error being attributable to the taxing process. 43. Mention before the Deputy Registrar on 8 th October, 2026 for directions on reassessment of the party and party Bill of Costs dated 30 th March, 2022. 44. It is so ordered. DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18 TH DAY OF SEPTEMBER, 2026 R.E ABURILI JUDGE

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