TOPIC: RE-THINKING THE JURISDICTION OF THE TAXING OFFICER IN KENYA'S JUDICIARY

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ABSTRACT

The nature of taxation of costs proceedings in Kenya has evolved from simple, non-laborious bills of costs to complex, laborious and extremely contentious proceedings. Many legal, procedural and substantive issues arise before, during and after taxation proceedings. It appears there is no clarity in the whole process so that it is not easy to determine what issues should be handled by a taxing officer and which ones should be handled by a judge. The jurisprudence on the jurisdiction and powers of a taxing master is equally evolving. For instance, initially, taxing masters had no jurisdiction to determine jurisdictional questions in taxation proceedings but since 2017 when the Court of Appeal delivered its judgment in *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited* (2017) eKLR, taxing masters now have jurisdiction to determine jurisdictional questions. Consequently, it is now time to rethink the jurisdiction and powers of a taxing master in Kenya’s judiciary. It is important that taxing masters have sufficient powers to deal with all issues connected to taxation proceedings before them. This paper examines the jurisprudence before and after the *Wilfred Konosi* case and also explores the opportunities presented by that jurisprudence, in light of constitutional dictates of expeditious, efficient and effective delivery of justice, while drawing lessons from some common wealth jurisdictions. It then makes recommendations on the way forward.
1. INTRODUCTION

Costs are a significant aspect of modern day litigation and are intrinsically intertwined with the fundamental principle of access to justice. The process of taxation of costs plays a significant role in ensuring that this fundamental principle is available to all irrespective of class or creed.

For every case filed in the judiciary, there is a potential taxation matter that will arise at the end of the case, unless a court declines to award costs to any of the parties. Agreements as to costs are there but they are by far fewer than those that go to taxation. In addition to this, there are taxation proceedings filed in courts arising from non-contentious business, like conveyancing and general business not transacted in court. Taxation proceedings are most of the times, extremely contentious. This is a signal that taxation is no longer taken as a mere mathematical exercise of just giving an estimate of what a taxing officer considers as reasonable and fair costs. Increasingly, many interlocutory issues are arising in the course of taxation proceedings and the manner in which the issues are being handled has brought into sharp focus the question of jurisdiction and powers of a taxing officer. Put another way, what can a taxing officer do or not do in taxation proceedings and what should a taxing officer be doing going forward? The answer to this question is very important because taxation proceedings, just like any other court proceedings must be determined expeditiously and in the most cost and time effective manner. Taxation related matters contribute to the courts’ workload and backlog and the Judiciary has been focusing on ways of reducing the backlog and managing the workload through the Sustaining Judiciary Transformation Framework.

For a long time, a taxing officer’s role was to tax bills only and any other issues arising before or after taxation was to be dealt with by the court. In 2017, there was a shift in jurisprudence when the Court of Appeal in *Wilfred N. Konosi t/a Konosi & Co. Advocates*
v Flamco Limited,\(^1\) faced with a question as to whether a taxing officer has jurisdiction to determine the question of existence of an advocate-client relationship held 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 in taxation as a Judicial Officer.

The purpose of this paper is to analyse the jurisprudential effect of this Court of Appeal decision and the opportunities it presents in making a taxing officer’s office a proper judicial office clothed with sufficient jurisdiction and powers to deal with matters arising before, during and after taxation. The paper will also draw some lessons from comparative jurisdictions and propose a way forward.

### 2. THE JURISDICTION OF A TAXING OFFICER

Under Rule 10 of the Advocates (Remuneration) Order (ARO), a Registrar or a Deputy Registrar of the High Court is a taxing officer for purposes of taxation of bills under the ARO. In Kenyan Judiciary’s establishment, a Registrar or a Deputy Registrar is a judicial officer within the meaning of Article 161(1) & 3 of the Constitution.\(^2\)

A taxing officer exercises judicial power in the determination of quantum of costs. The position is expressed in numerous cases, among them, KANU National Elections Board & 2 others v Salah Yakub Farah,\(^3\) KTK Advocates v Baringo County Government\(^4\) the court held that ‘the determination of such quantum is determined by the taxing officer and is an exercise of judicial power guided by the applicable principles.’ Indeed, under Rule 13A of the ARO, a taxing officer has power and authority to summon and examine witnesses, to

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\(^1\) [2017] eKLR
\(^2\) Constitution of Kenya, Article 161.
\(^3\) [2018] eKLR.
\(^4\) [2017] eKLR.
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 or her.\(^5\) The Rule provides as follows concerning the powers of a taxing officer:

‘for the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, administer oaths, to direct the production of books, papers 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.’

In Akide & Co. Advocates v Kenindia Assurance Company Ltd,\(^6\) the court, following the decision in Abincha & Co. Advocates v Trident Insurance Co. Ltd,\(^7\) held that ‘determination of any matter in dispute before him’ means that the taxing officer has power only to deal with matters in connection with taxation of the bill of costs before him. Determining what ‘matters are in connection with taxation of a bill of costs’ is not an easy task as will be demonstrated shortly in various court decisions.

In contentious matters and other proceedings, a taxing officer exercises special jurisdiction of the court in taxing bills of costs.\(^8\) The jurisdiction is described as ‘special’ because under Section 2 of the Advocates Act, a ‘court’ is defined to mean the High Court and under Rule 49 of the ARO, a court is defined as means the High Court or any judge thereof or a resident Magistrate Court or any magistrate sitting as a member of a resident Magistrate Court and a taxing officer is not a court within the meaning of the two provisions. Consequently, anything that is ordinarily done by a ‘court’ cannot be done by a taxing officer, for example, determining questions of retainer, interlocutory applications such as joinder of parties, limitation of action, review and stay of execution. This is the position expressed by many courts before and after the Court of Appeal decision in Wilfred Konosi case was delivered in 2017. For instance, in

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\(^5\) ARO, Rule 13A.
\(^6\) [2018] eKLR
\(^7\) [2013] eKLR
\(^8\) Nyamogo & Nyamogo Advocates v Pan Africa Insurance Company Limited & another [2016] eKLR.
Hezekiel Oira T/A H. Oira Advocate v Kenya Broadcasting Corporation,⁹ Mwadumbo & Company Advocates v Joseph Maina Kimani,¹⁰ Khan & Katitu Advocate –vs- Central Electrical International Ltd,¹¹ and Mugambi & Co. Advocates –vs- John Okal Ogwayo & another¹² the courts were all in agreement that the issue of retainer is a question of fact and an issue that does not go into the general powers of a taxing officer in taxation, and must therefore be resolved by the court.

In Khan & Katitu case, the Court held that;

“But in my view that power and discretion must relate to the core business of the taxing officer and that is, to tax the bill of costs before him. The issue whether or not an advocate had instructions to act in the matter is outside this core business of taxing the bill of costs and should have no bearing on the taxation it is an issue that must be decided by the court itself at the appropriate time. Having said that, however, a situation may arise such as the present one, were the advocate’s instructions are only partly disputed. Here it is contended by the Client that the Advocate had instructions only to deal with correspondence and not to act in the suit itself. It is therefore necessary that the extent of the advocate’s instructions be first established as it will have a bearing on whether or not, or to what extent the taxing officer should allow the instruction fee claimed in the bill of costs. That issue should be resolved by the court itself first before the taxation proceeds”

In Mugambi case, where the Court held inter alia that:

“That jurisdiction of a taxing officer is provided for in the Advocates (Remuneration) order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of Court. See paragraphs 2, 10 and 13 of the remuneration order.”

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⁹ [2015] eKLR.
¹⁰ [2018] eKLR
¹¹ [2005] eKLR
¹² [2013] eKLR
In the *Wilfred Konosi* case, the Court of Appeal overturned the position expressed by the courts below when it held as follows,

‘As a Judicial Officer sitting to tax a bill of costs between an advocate and his or 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. 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.’

This Court of Appeal decision is in line with Rule 13A of the ARO, that a taxing officer has powers to determine all issues in dispute before them. Only then can the taxing officers efficiently and effectively contribute to quality, efficient and expeditious delivery of justice as demanded by Article 169 of the Constitution of Kenya. It is unfortunate that some courts are still proceeding on the view that taxing officers have no jurisdiction to determine issues of retainer, which was the issue before the Court of Appeal in the *Wilfred Konosi* case in 2017. For instance, *Mwadumbo & Company Advocates v Joseph Maina Kimani* (decided in 2018). However, other courts have moved the jurisprudence in Wilfred Konosi case further by holding that there is nothing wrong with a taxing officer handling some issues and only seeking the court’s opinion under Rule 12 of the ARO. Such a decision is in *Morris Guchura Njage t/a Morris Njage & Company v Liza Catherine Wangari Mwangi*, *Mukono Ondieki & Company Advocates v Unclaimed Financial Assets Authority* where the courts held that a taxing officer has jurisdiction to determine jurisdictional questions in taxation proceedings.

Three years before the Wilfred Konosi decision by the Court of Appeal, Justice Tuiyott dealt with the jurisdiction of a taxing officer to determine preliminary issues before taxation in *Ratemo Oira & Company Advocates v Kenya Steel Fabricators Limited*. In this case, an advocate filed his bill against his client. The client opposed the bill alleging that he had paid the fees in full, was not issued with a demand for fees and that the advocate did not issue him with the 30 days notice required before filing his bill of costs. The taxing officer agreed with the client and struck out the bill of costs. The advocate filed a reference arguing that the taxing officer’s duty and scope of

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14 [2018] eKLR.
15 [2019] eKLR.
16 [2014] eKLR.
the Deputy Registrar in a taxation is simply to tax the Bill of Costs before him/her and no more and that once an objection is taken to the procedure and manner in which the Deputy Registrar is moved then it must surrender the hearing of that objection to the High Court. The court held as follows;

“I hold that the issue as to whether the fees has been paid in full, just like the procedural questions of notice taken up in the motion, were matters that fell squarely within the purvey of the Taxing Officer’s function in taxation. I feel somewhat fortified because the language of paragraph 12 of The Advocates Remuneration Order contemplates that some disputes may arise in the cause of the Taxation of a Bill. The paragraph provides:

(1) With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court.

(2) The procedure for such reference shall following that of a case stated but shall be to a judge in chambers.

The language does not command the Taxing Officer to refer any or all disputes arising out of the taxation to the High Court. The Deputy Registrar in my view may choose to deal with certain disputes. The Deputy Registrar, this Court thinks, acted appropriately.”

Therefore, there is an opportunity to rethink the jurisdiction of taxing officers in Kenya.

3. OTHERS POWERS OF A TAXING OFFICER UNDER THE ADVOCATES REMUNERATION ORDER

In addition to the power to the taxing officer to tax bills of costs and 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

17 Id, paragraph 13.
for the determination of any matter in dispute before him provided for under Rule 13A of the ARO, a taxing officer has other of powers under the ARO.

i.  **Default of an advocate to attend taxation after notice**

Where an advocate, having been duly notified, fails to appear for taxation without reasonable excuse, or in any way delays or impedes the taxation, or puts any other party to any unnecessary or improper expense relative to such taxation, Rule 14 of the ARO gives power to a taxing officer to order forfeiture of the fees to which the advocate would otherwise be entitled to for drawing his bill of costs and attending the taxation and payment by that advocate for any unnecessary or improper expense to which he has put any party. In addition, the taxing officer may proceed with the taxation ex parte.

The taxing officer has no power to deal with any other party (or parties) to taxation proceedings who fails to attend without a reason, delays or impedes the taxation process or puts another party in unnecessary or improper expense. It is important to have a rule that applies to all parties to taxation proceedings because it is not always that an advocate is involved in such matters. In Australia, a taxing officer has power to direct the party or the practitioner to pay the costs caused by the neglect or delay and the expenses of that other party or adjust those costs by way of deduction or set-off or delay the allowance of the costs that the party is entitled to receive until the payment or tender of the costs that party is liable to pay, and that order is enforceable as an order for costs made by a judge or court, under Rule 857(2) of Supreme Court Rules, 2000 (Australia Supreme Court Rules).

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18 ARO, Rule 14.
19 Id.
20 Australia, Supreme Court Rules, 2000, Rule 857(2).
ii. **Extension of time**

Under Rule 16 of the ARO, a taxing officer has power to extend time for filing a bill for taxation after the initial one calendar month’s notice by the party liable to pay costs to the party to the party entitled to tax a bill.\(^{21}\)

iii. **Conduct of taxation proceedings**

Under Rule 75 of the ARO, the taxing officer has power to proceed to taxation ex parte in default of appearance of either or both parties or their advocates, and to limit or extend the time for any proceeding before him, and for proper cause to adjourn the hearing of any taxation from time to time.\(^{22}\) A taxing officer does not appear to have power to impose sanctions for non-compliance with orders made in exercise of these powers, for instance, setting aside ex parte proceedings or failure to comply with set timelines or adjournments. In Hong kong, a taxing officer has power to impose costs, including thrown away costs, to preserve the integrity of the court under Rule 26 of the Rules of the High Court, Chapter 4, Order 62 ( Hong Kong High Court Rules).\(^{23}\)

iv. **Disallowing costs of taxation**

Under Rule 77 of the ARO, where more than a sixth of the total amount claimed in a bill of costs is disallowed on taxation, the taxing officer has power to disallow the party presenting the bill the costs of taxation, and such an order is final.\(^{24}\) The importance of this rule is to encourage parties to charge reasonable fees as much as possible and to avoid exaggerated bills that are very rampant in courts.

v. **Issuing certificate of taxation**

There is no express power to a taxing officer to issue a certificate of taxation upon conclusion of taxation proceedings but a reading of Section 51(2) of the Advocates Act reveals that such a certificate is to be issued by a taxing officer and is final, unless it is otherwise set

\(^{21}\) ARO, Rule 65.
\(^{22}\) Id., Rule 75.
\(^{23}\) Hong Kong, Rules of the High Court, Chapter 4, Order 62 Rule 26.
\(^{24}\) ARO, Rule 77.
aside or otherwise set aside by the court. In England, Australia and Hong Kong, a taxing officer has express power to issue a certificate of taxation at the conclusion of proceedings. For good order and clarity, there is need to expressly provide for the power to issue a certificate of taxation under Kenyan law.

**vi. Recording of consents on agreements on amounts of costs**

Under Rule 57 of the ARO, a taxing officer has power to accept agreements on amounts of costs pursuant to a joint request in writing by the parties or to reject the consent whether the taxing officer thinks the amounts are exorbitant in which event the taxing officer directs that the matter proceeds to taxation.

**4. JURISDICTION OF A DEPUTY REGISTRAR VIZ-A-VIZ JURISDICTION OF A TAXING OFFICER**

In many quarters particularly in practice, there has been no distinction between the office of a Deputy Registrar on the one hand and that of a taxing officer on the other hand. The two offices have been taken as one. The confusion arises due to application of Civil Procedure Act and Rules to taxation proceedings taken under the Advocates Act. Courts have clarified that the two offices are separate and distinct and that Civil Procedure Act and Rules do not apply to proceedings under the Advocates Act. In *Sotik Tea Company v Nyamweya Osoro & Nyamweya Advocate*, *Nyamogo & Nyamogo Advocates v Pan Africa Insurance Company Limited & another*, *Hezekiel Oira T/A H. Oira Advocate v Kenya Broadcasting Corporation*, the courts were unanimous that the jurisdiction of a Deputy Registrar under the Advocates (Remuneration) Order is distinct and separate from jurisdiction of the Deputy Registrar under the Civil Procedure Act and therefore the procedure adopted in one cannot be substituted in the other. In *Sotik Tea case*, the court said a taxing officer had no

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25 Advocates Act, Section 51(2).
26 England & Wales, The Rules of the Supreme Court (Amendment) 1986, Order 62 Rule 22(1); Australia, Supreme Court Rules, Rule 866; Hong Kong, High Court Rules, Rule 17A.
27 ARO, Rule 57.
28 [2017] eKLR.
29 [2016] eKLR.
jurisdiction to entertain an application for joinder of a party to taxation proceedings. In Nyamogo & Nyamogo case, the court held that an applicant cannot invoke appeal procedures provided for under the Civil Procedure Rules for purposes of challenging decisions of taxing officers. The position expressed by the courts in these and many other, decisions, is the law as regards this issue. Consequently, the Civil Procedure Act and Civil Procedure Rules cannot be invoked to cover for any scenario that has not been provided for under the Advocates Act and the ARO in taxation proceedings before a taxing officer.

This is the reason why courts have held that a taxing officer only has power to tax bills and not to entertain any other applications especially those brought under the Civil Procedure Act and Rules. There is need to rethink this position for the reason that unlike times gone by where a taxing officer was just giving an estimate figure of costs payable based on the bill as presented and only give reasons when they are requested for under Rule 11 of the ARO, litigation on taxation proceedings has now become more contentious, laborious and vicious requiring taxing officers to take time to apply their judicial minds and give reasoned rulings. Infact, under the Judiciary’s performance management system, rulings on taxations are taken as any other ruling of a court. Legal issues, akin to those that arise in civil proceedings, arise in taxation proceedings e.g joinder of parties, applications to extend time, review and stay of execution or even proceedings, are increasingly arising in taxation proceedings. The ARO did not envisage these scenarios and that is why parties fall back to Civil Procedure Act and Rules to try and fill up the gaps in procedural and substantive law. The confusion mostly affects both the taxing officer and the litigants. There is therefore need to make clear legal provisions to enable everyone to discern the difference between the two offices and be able to use the law effectively to address their legal issues.

5. OPPORTUNITIES FOR RE-DEFINING THE JURISDICTION OF TAXING OFFICERS

The nature of taxation proceedings has evolved over time since 1962 when the ARO was enacted. Notably, there has been no amendment to Rule 10 which appoints registrars and deputy registrars as taxing officers. The office of the deputy registrar has evolved with time in Kenya’s judiciary and deputy registrars are now recognized judicial officers. It is time their powers as judicial officers are harmonized with their role as taxing officers. Rule 13A of the ARO which provides for powers of a taxing officer was inserted in 1967 and there has been no amendment since then. The opportunities now presenting include the following.
i. **Determination of jurisdictional and procedural & substantive issues**

Since 2017 when the Court of Appeal decided the *Wilfred Konosi* case, a taxing officer now has jurisdiction to determine questions touching on their own jurisdiction. Following the court’s decision in *Ratemo Oira* case, there is really nothing stopping taxing officers from determining any other issue arising in the course of taxation proceedings including preliminary issues arising before taxation and those arising during taxation as well as after taxation such as applications for review, correction of arithmetic errors and even stay of execution pending filing of a reference. Gradually, the courts are accepting that a taxing officer should have more powers than just determining quantum.

In some commonwealth jurisdictions, taxing officers have jurisdiction to determine more issues than just those that touch on their jurisdiction. Below are some examples with some lessons that Kenya can borrow, in addition to the powers to determine jurisdictional and preliminary issues.

i. **Alterations, cancellation or setting aside of a certificate of taxation**

Section 51(2) of the Advocates Act which provides that a taxing officer cannot set aside or alter a certificate of taxation. It provides as follows,

> 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, an order that judgment be entered for the sum certified to be due with costs.\(^{31}\)

In *Ndungu Githuka and Company Advocates v Geoffrey Moriaso Ole Mailoy*,\(^{32}\) the court held that section 51(2) of the Advocates Act is to the effect that only the “court” can alter the amount in the certificate or enter judgment upon it and that the Taxing Officer’s mandate

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\(^{31}\) Advocates Act, Section 51(2).

\(^{32}\) [2019] eKLR.
ends after taxation and signing of the certificate of costs. In practice, instances have arisen where arithmetic errors have been discovered after a certificate of taxation has issued. A party has to apply to the judge for correction and what a judge does is just to remit the certificate back to the taxing officer for correction of the error. This procedure wastes a lot of valuable judicial time and also parties’ time and money. However, having noted that taxation proceedings are judicial proceedings taken by judicial officers, one cannot understand how the decision maker cannot review their own decision or make corrections on the figures they themselves have come up with.

In England and Wales, a taxing officer has power to amend, cancel, correct any clerical mistake or errors and set aside a certificate of taxation issued by him or her under Rule 22 of Order 62 of the Rules of the Supreme Court of England and Wales (Supreme Court of England & Wales Rules). In Hong Kong, a taxing officer may set aside a final certificate of taxation for good reasons and on such terms as he thinks fit.

ii. Where a party is liable to paid and to pay costs (set-off)

There are instances, especially in party & party costs, where the party entitled to be paid is also liable to pay the other party costs. ARO has no provision providing guidelines on how a Court or even a taxing officer should proceed in settling the issue. In the England, taxing officers have power to tax the costs which that party is liable to pay and set off the amount allowed against the amount he is entitled to be paid and direct payment of the balance or delay the issue of the certificate for the costs the party is entitled to be paid until he has paid or tendered the amount he is liable to pay. A taxing officer in Australia has similar powers as a taxing officer in England in dealing with set-off cases.

33 Id., paragraph 12.
34 England & Wales, The Rules of the Supreme Court, Rule 22.
35 Hong Kong, The Rules of the High Court (n23), Rule 16.
36 Id., Rule 23.
37 Australia Supreme Court Rules, Rule 857(1).
iii. **Review**

Taxing officers in Kenya have no powers to review their own decisions. In England and Wales, a taxing officer has power to review any decision they make during taxation proceedings upon application by any party to those proceedings. The power of a taxing officer to review enables the taxing officers in England and Wales to receive further evidence and exercise all powers they have in an original taxation including awarding costs in those proceedings. In Australia, a taxing officer has power to review their decision on taxation before he signs the certificate of taxation. In Hong Kong, a taxing officer also has power to review their decision, take further evidence and may exercise all the powers which he might exercise on an original taxation in respect of that item, including the power to award costs of and incidental to the proceedings before him.

The opportunity for taxing officers to review their own decisions saves time spent on appeals/reference thereby expediting delivery of justice.

iv. **Alternative dispute resolution**

Alternative dispute resolution mechanisms must be promoted as required by Article 159 2(c) of the Constitution of Kenya and Kenyan Judiciary has provided Court Annexed Mediation (CAM) as one of those methods of alternative dispute resolution. The CAM offers an opportunity to the parties to achieve their own resolution within a period of a maximum seventy days and the results thereof are final upon adoption by the court. Unlike normal taxation proceedings requiring the tax master to hear parties and make a decision which

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38 Id., Rule 33.
39 Id., Rule 34.
40 Supreme Court Rules 2000, Rule 867. Rule 866 of these Rules provides that a certificate is not to be signed until after the expiration of 48 hours after the taxation is completed, to allow time for objections and applications for review under Rule 867.
41 The Rules of the High Court, Chapter 4, Order 62 Rules 33 & 34.
42 Gazette Notice no 5214, Practice Directions on Mediation.
43 Id., Rule 1.
takes much longer time especially where the proceedings are contentious, CAM offers the best opportunity for expedited resolution. Taxation officers should therefore be facilitated to refer matters to CAM.

In Australia, a confidential conference, akin to CAM, is available for parties in taxation proceedings and is provided for in the law. Once parties achieve a resolution, the taxing officer proceeds to issue a certificate of taxation pursuant to the parties’ agreement.

Another alternative mode of taxation is provisional taxation. This method is common in some common wealth jurisdictions. For instance, in Hong Kong, a taxing officer has power to tax a bill without hearing any of the parties and make an order nisi for the amount he or she allows in respect of the bill plus costs of the proceedings and unless a party entitled to be heard applies for a hearing within fourteen days of service with the order, the order becomes absolute and a certificate of taxation issues. A similar procedure is followed in Australia and England. This procedure removes the necessity of a full hearing and has potential to reduce time taken in resolving taxation disputes thereby increasing expediency in delivery of justice.

6. CONCLUSIONS

Advocates Act and the ARO as they are, are inadequate in addressing all the issues that now arise in taxation proceedings considering evolution in the nature of taxation proceedings.

Clothing the taxing officer’s role with sufficient jurisdictional powers will make the process of taxation of costs neater, clearly, more transparent and efficient. Referring to the judges every other question not involving determination of quantum of costs that arises in the course of taxation proceedings is a waste of precious judicial time and an impediment to expeditious delivery of justice. Granting taxing

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44 Australia, Federal Court Rules 2011, Rule 40.22.
45 Id.
46 Hong Kong High Court Rules (n23) Rule 21B.
47 Australia, Federal Court Rules 2011, Rule 40.23.
48 Supreme Court of England and Wales Rules (n26), Rule 31.
officers jurisdiction to determine the issues in a judicial manner saves time so that once a reference or appeal is preferred, the appellate court will deal with all the issues holistically.

Other commonwealth jurisdictions have expanded the jurisdiction and powers of a taxing officer in various ways including entrenching alternative dispute resolution in the law to expedite delivery of justice.

7. RECOMMENDATIONS

This paper recommends that the Advocates Act and the ARO be amended to expand the jurisdiction and powers of taxing officer in light of the Wilfred Konosi and Ratemo Oira judgements. The opportunities explored in this paper encompassing lessons from other jurisdictions should be adopted as appropriate to increase expediency in delivery of justice in taxation proceedings. Express provisions providing for clear jurisdiction and powers of taxing masters, including, to determine jurisdiction, substantive and procedural issues before during, and after taxation proceedings, provisional taxation, powers of review, dealing with set-offs, alternative dispute resolution, cancellation, power to issue a certificate of taxation which is as effective as an order of the court and alteration and setting aside of certificates of taxation, are required in addition to the powers already provided for under the ARO. Superior courts should follow the Wilfred Konosi case jurisprudence and continuously and consistently develop the jurisprudence in the interests of efficient, effective and expeditious delivery of justice. To avoid confusion with the procedures and processes under the Civil Procedure Act and Rules, a clear, separate and distinct procedure for determination of bills of costs should be provided for under the ARO.