



REPUBLIC OF KENYA



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Carzan Flowers Kenya Limited v Mago & 18 others (Environment and Land Civil Miscellaneous Application E9 of 2022) [2022] KEELC 14861 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E9 OF 2022
LA OMOLLO, J
NOVEMBER 17, 2022**

BETWEEN

CARZAN FLOWERS KENYA LIMITED APPLICANT

AND

JOSEPH KIBE MAGO 1ST RESPONDENT
VERONICA MORAA 2ND RESPONDENT
GLENN ARAKA 3RD RESPONDENT
DAVID NAMISI 4TH RESPONDENT
EDWARD OGUTU 5TH RESPONDENT
JOHN KIBEU SIFUNA 6TH RESPONDENT
JORAM OYOO 7TH RESPONDENT
BEATRICE MORUMBWA 8TH RESPONDENT
BONIFACE OMBOK 9TH RESPONDENT
DAVID NGANGA WANJAMA 10TH RESPONDENT
SIMON MBUGUA NGURE 11TH RESPONDENT
DISMAS NYAKUNDI 12TH RESPONDENT
ABDU KAHORE 13TH RESPONDENT
MARGARET WAITHERA 14TH RESPONDENT
ERIC MOCHAMA 15TH RESPONDENT
JOHN MACHARIA 16TH RESPONDENT
CHARLES SIFUNA 17TH RESPONDENT



MUCHIRI KIMANI 18TH RESPONDENT

DIRECTOR GENERAL NEMA 19TH RESPONDENT

RULING

1. This ruling is in respect of the Applicant's Chamber Summons application dated April 21, 2022 which is expressed to be brought under Rule 11 of the *Advocates (Remuneration) Order, 1962*, Rule 39(1)(a) of the *National Environmental Tribunal Procedure Rules, 2003*, Section 130(2) and 130(4)(d) of the *Environmental Management and Co-ordination Act* 1999, Section 3A of the *Civil Procedure Act*, Cap 21, Article 159 (2)(d) of the *Constitution*.
2. The application is brought under certificate of urgency and seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. That the Honorable court be pleased to set aside the Taxing Master's decision delivered on March 25, 2022.
 - iv. That the honorable court be pleased to decide the question as to whether the Applicant, vide its conduct of resisting the 1st to 18th Respondent's Appeal in Nairobi Tribunal Appeal No 190 of 2016, acted frivolously, vexatiously, or unreasonably.
 - v. That depending on this Honorable Court's finding on prayer 4 above, this honorable court be pleased to reassess the fees due under item No 1 and 2 in respect of the 1st to 18th Respondents' bill of costs and make a finding of the same.
 - vi. That the costs of this application be borne by the 1st to 18th Respondents.
3. The application is based on the grounds on its face and supported by the affidavit sworn by one Situma Collins Sami.

Factual Background.

4. The application first came up for hearing on April 27, 2022 when the court directed the Respondents to file their responses to the application.
5. The application came up again for hearing on May 12, 2022 and the parties agreed to canvass it by way of written submissions. The court granted prayer 2 of the application and gave a mention date for the June 28, 2022.
6. On the June 28, 2022, the parties confirmed that they had filed their submissions and the matter was reserved for ruling.

The Applicant's Contention.

7. The Applicant contends that the genesis of this matter is that the 1st to 18th Respondents made an Appeal on August 19, 2016 to the National Environmental Tribunal vide Nairobi Tribunal Appeal No 190 of 2016 against the decision of the 19th Respondent approving an Environmental Impact Assessment (EIA) License to the Applicant, following an application by the Applicant under reference number NEMA/NKR/PR/5/2/3027 for a proposed commercial flower farming on LR



No's Muchorwi Settlement Scheme/687 & 688 in Muchorwi village, Molo Sub-County, Nakuru County.

8. The Applicant further contends that during the pendency of Appeal and at the urging of the National Environmental Tribunal members, the matter was settled and a consent dated May 7, 2019 was entered into. The said consent was adopted by the court and an order dated May 14, 2019 issued.
9. The Applicant also contends that the consent dated May 7, 2019 addressed the question of costs of the Appeal to the effect that the costs of the Appeal would be applied for and dealt with under the provisions of Rule 39 of the National Environmental Tribunal Procedure Rules, 2003.
10. The Applicant contends that the 1st to 18th Respondents made an application to the National Environmental Tribunal vide a Notion of Motion application dated July 16, 2019 seeking to have costs awarded to it pursuant to Bills of Costs attached to the application which application was opposed by the applicant.
11. The Applicant also contends that the National Environmental Tribunal entertained pleadings and submissions from both parties on the application and delivered a ruling dated March 25, 2022 wherein it awarded costs of the Appeal to the Appellants as against the 1st and 2nd Respondents. The Appellants, who are the 1st to 18th Respondents herein, were awarded the sum of Kshs 4,163,890/= as against the 1st and 2nd Respondents (the Applicant and 19th Respondent herein) jointly and severally.
12. The Applicant further contends that being aggrieved with the decision of National Environmental Tribunal, the Applicant wrote an objection letter on March 28, 2022 to the tribunal notifying it of the Applicant's decision to object and request for reasons of its decision. This is as per the provisions of Rule 11 of the Advocates (Remuneration) Order, 1962 which requires the tribunal as the taxing master to within 14 days from the date of the letter dated March 28, 2022 to record and forward to the Applicant the reasons for its decision and which period came to an end on April 11, 2022 without the tribunal complying with the law.
13. It is the Applicant's contention that the Applicant's reference is made on the assumption that the ruling dated March 25, 2022 contained the reasons for the Tribunal's decision which is a position endorsed by the superior courts of Kenya.
14. The Applicant contends that its challenge against the ruling of the tribunal is based on the Tribunal's misapprehension of the law on the award of costs in proceedings before the it. The tribunal based its decision to award costs to the 1st to 18th Respondents based on the conclusion that the 1st to 18th Respondents were successful parties in the Appeal.
15. The Applicant also contends that the Tribunal's basis of granting costs which was informed by its perception of which party was successful by the terms of the consent, shows that the tribunal misapprehended the applicable law and relied on the erroneous principle of 'costs following the event' thus arriving at the wrong conclusion.
16. The Applicant further contends that the applicable law for the award of costs in the Tribunal is Rule 39(1)(a) of the National Environmental Tribunal Procedure Rules, 2003 which provides that the Tribunal shall not normally make an order awarding costs and expenses.
17. It is the Applicant's contention that the Tribunal is empowered to make an award on costs where necessary and where circumstances call for such and that the power is discretionary and does not make the granting of an order of costs a matter of right.



18. The Applicant contends that the relevant principle that the Tribunal should apply in determining the question of costs is whether the conduct of the party to make, pursue, or resist an Appeal was frivolous, vexatious, or in any way wholly unreasonable.
19. The Applicant further contends that the National Environmental Tribunal did not address its mind to the relevant legal principles as provided for under Rule 39(1)(a) of the National Environmental Tribunal Procedure Rules, 2003 and instead relied on the principle 'costs follow the event' which was not applicable in the circumstances thereby arriving at a flawed decision.
20. The Applicant also contends that even if the National Environmental Tribunal was to apply these principles, then it would not arrive at the conclusion of saddling the Applicant with the burden of costs since its conduct during the Appeal was neither frivolous, vexatious nor wholly unreasonable.
21. The Applicant further contends that its decision to oppose the Appeal was borne of the need to protect its interests as it had been issued with an EIA License by the 19th Respondent authorizing it to establish a proposed commercial flower farm on LR Nos Muchorwi Settlement Scheme/687 & 688 in Muchorwi Village, Molo Sub County, Nakuru county. The 1st to 18th Respondent's Appeal in Nairobi Tribunal Appeal No 190 of 2016, sought to cancel the said license which it was constrained to defend.
22. The Applicant also contends that based on the foregoing, it was impossible to conclude that the Applicant's decision to oppose the Appeal frivolous, vexatious or unreasonable to warrant an order of costs against the Applicant.
23. It is the Applicant's contention that the National Environmental Tribunal awarded Kshs 3,000,000/= under Item No. 1 for Instruction Fees and Kshs 1,000,000/= under Item No 2 for getting up fees which were inordinately high and unsupported by the pleadings of the 1st to 18th Respondents and the relevant schedule of the Advocates (Remuneration) Order, 1962.
24. The Applicant also contends that from the 1st to 18th Respondents Notice of Appeal, the prayers sought by the said Respondents were non-pecuniary in nature, and included a prayer for a site visit, revocation/variation of EIA Licenses and a prayer for an EIA study to be done.
25. In view of the foregoing, the plaintiffs have failed to establish adverse possession and are thus not entitled to the reliefs sought. I find no merit in the plaintiffs' case and I therefore dismiss it. No order on costs.
26. The Applicant also contends that the award of getting up fees of Kshs 1,000,000/= under item No 2 was unlawful and illegal as no such provision is made under Schedule 11 of the Advocates (Remuneration) Order which is the applicable law for taxation of a Bill of Costs in Tribunals.
27. The Applicant further contends that no prejudice will be suffered by the Respondents if the application is allowed and that it is in the interest of justice that the application be allowed.

The 1st To 18th Respondents Response.

28. In response to the application, the 1st to 18th Respondents filed their replying affidavit dated May 10, 2022 on May 12, 2022 sworn by one Davies Mulani counsel for the 1st to 18th Respondents.
29. He contends that in response to paragraphs 3 and 4 of the supporting affidavit, he stated that the 1st to 18th Respondents lodged their Appeal before the National Environment Tribunal and partly prosecuted their Appeal before they executed the consent dated May 7, 2019 which compromised the said proceedings.



30. He contends further that the consent was arrived at after lengthy and time-consuming meetings with negotiations spanning several months in the year 2018 and 2019. The meetings involved travel for counsel for the Appellants to Nakuru with some meetings lasting several days at the site of the impugned project in Molo Sub-County which lead to the consent on May 7, 2019.
31. He also contends that at the time the consent was recorded, the Appeal was ready for hearing as the parties had complied with pre-trial directions by filling several witness statements, an expert report and hearing notices.
32. It was his contention that the consent dated May 7, 2019 was adopted as the order of the National Environment Tribunal on May 14, 2019 and clauses 19 and 20 of the consent provided that the costs of the Appeal shall be applied for and dealt with under the provisions of Rule 39 of the Environment Management and Co-ordination Act and Rules and that the parties shall honor the costs as awarded by the tribunal.
33. He contends that the 19th Respondent voluntarily executed the consent dated May 7, 2019 and was accordingly ordered by the National Environment Tribunal to vary the conditions of the Environmental Impact Assessment license issued to the Applicant to reflect the form of the consent order as prescribed in clauses 16 and 17 of the consent between the parties.
34. He further contends that upon the adoption of the consent dated May 7, 2019 as an order of the tribunal, the 1st to 18th Respondents applied to the tribunal to have their Bill of Costs of Kshs 4,829,792.40 annexed to their Notice of Motion application dated July 16, 2019 assessed.
35. He also contends that the Applicant herein opposed the 1st to 18th Notice of Motion application by filing a Replying Affidavit dated August 23, 2019 where they filed their own bill of costs of Kshs 6,242,294.80 annexed to their Replying Affidavit to be assessed by the Tribunal which was significantly higher than the 1st to 18th Respondents.
36. It is his contention that the National Environment Tribunal considered the 1st to 18th Respondents Notice of Motion application dated July 16, 2019 and the Applicant's response dated August 23, 2019 and their respective Bill of Costs and made a Ruling dated March 25, 2022 and the order issued on the same date.
37. He also contends that the parties herein having voluntarily executed the consent dated May 7, 2019 and bound themselves to the Orders of the National Environment Tribunal and in particular Clauses 19 and 20 of the Consent Order which addressed the issue of costs, the instant application fails to satisfy the requirements of opposing the costs and setting aside a consent order and/or judgement as awarded by the Tribunal as was stated in the case of *Samuel Mbugua Ikumbu Vs Barclays Bank of Kenya Limited [2015] eKLR*.
38. He contends further that the instant application is a disguised attempt at rewriting and/or varying or setting aside the terms of clauses 19 and 20 of the Consent Order on one hand while failing to precisely plead the grounds of setting aside a consent judgement or order namely that the consent was obtained by fraud or by an agreement contrary to the policy of the Tribunal or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable this Honorable Court or the Tribunal to set aside the agreement.
39. It is his contention that the instant application should therefore fail and be dismissed on the grounds set out in paragraph 9 of his Replying Affidavit but in the event the court decides to determine the instant application on merit then the *Environmental Management and Co-ordination Act* of 1999 and accompanying Tribunal Rules of 2003 do not provide for the filing of a Reference as prescribed in



- Paragraph 11 of the Advocates Remuneration Order of 2009 which the Applicant is relying upon in the present application.
40. He contends that Paragraph 2 of the Advocates Remuneration Order of 2009 provides for the limitation of the application of the Advocates Remuneration Order.
 41. He further contends that Paragraph 10 of the Principal Order of 2009 defines Taxing Masters for the purposes of Taxation under the principal and Amendment Orders of 2009 and 2014 respectively.
 42. He also contends that the National Environment Tribunal is not a Taxing master within the meaning of Paragraph 10 of the Advocates Remuneration Order of 2009 and therefore its decision on costs within the meaning of Rule 39 of the National Environmental Tribunal Procedure Rules of 2003 cannot be challenged by way of a reference as provided for in paragraph 11 of the Advocates Remuneration Order of 2009.
 43. He further contends that the National Environment Tribunal Ruling of March 25, 2022 can only be challenged by way of Appeal to this court within the confines of Section 130 of the *Environmental Management and Co-ordination Act* of 1999 as it constitutes a decision and/or order of the Tribunal. He further contends that the instant application is a reference challenging a non-existent taxing master's decision making it fatally defective.
 44. It is his contention that the instant application is fatally defective and cannot be cured by way of amendment as the same has been brought under the wrong provisions of the law and cannot be construed as an Appeal within the meaning of Section 130 of the *Environmental Management and Co-ordination Act* of 1999 for the court to exercise its Appellate jurisdiction against the ruling and orders of the National Environment Tribunal delivered on March 25, 2022 and it should therefore be dismissed with costs to the 1st to 18th Respondents.

The 19th Respondent's Response.

45. The 19th Respondent filed a Reply Affidavit sworn on May 6, 2022 by one Mamo B Mamo it's Director General.
46. It is his contention that he is aware that the present application is instigated by the decision of the taxing master in the National Environment Tribunal Appeal 190 of 2016 dated March 25, 2022 where a party and party bill of costs drawn by the 1st to 18th Respondents was taxed at Kshs 4,163,890/= to be borne by the Applicant and the 19th Respondent.
47. He further contends that he had the benefit of reading and briefing by his advocate on record touching on the decision of the taxing master delivered on the March 25, 2022 which awarded costs of Kshs 4,163,890/= to be borne by the Applicant and the 19th Respondent.
48. It is his contention that his affidavit is sworn in support of the reference application dated April 22, 2022 where he takes great exception to the excessiveness and basis in quantum of the taxing officer's decision.
49. He also contends that the decision of the taxing master flies in the face of the tenets of Alternative Dispute Resolution since excessive costs have been awarded in a matter where parties deployed Alternative Dispute Resolution to settle the Appeal before the National Environment Tribunal.
50. He further contends that upon receipt of the decision, he wrote to the National Environment Tribunal requesting for reasons for the decision as required under paragraph 11 of the Advocates remuneration Order and received a response on April 11, 2022.



51. It is his contention that the decision of the taxing master faltered on assessment of instruction fees by disregarding the provisions of paragraph 4 of the 11th schedule of the Advocates Remuneration Order where 50% of instruction fees should be discounted on matters settled by consent of the parties.
52. He contended that the subject proceedings being the National Environment Tribunal No 190 of 2016 was settled by consent of the parties which is a fact that is acknowledged by the taxing officer in his ruling.
53. It is his contention that the taxing master did not ascertain or set the value of the subject matter from which taxation of instruction fees could proceed and thus made no basis on which it set the instruction fees of Kshs 3,000,000/=.
54. It was his further contention that the taxing officer having not set the value of the subject matter did not apply the 50% off on instruction fees as required by paragraph 4 of Schedule 11 as relates to matters determined by consent of parties such as the present case and therefore the instruction fee of Kshs 3,000,000/= does not reflect the 50% discount required by the scale.
55. It was his contention that the taxing master did not record the impossibility of setting the value of the subject matter and awarded 1,000,000/= towards 'getting up' fees whereas Schedule 11 does not provide for the same and that no reasons for this were given.
56. He contends that the award on attendances and disbursements were allowed without any reason and they should therefore be set aside.
57. He also contends that the applicable scale of the Remuneration Order is not contested as the Taxing Officer acknowledged that at paragraph 12 of his ruling as Schedule 11 of 2014 Advocates Remuneration Order.
58. He further contends that the Applicant herein is on the right course and desirous of having the said decisions reviewed by way of a reference to the judge.
59. It is his contention that the application is made timeously and without delay and further that the 19th Respondent is a State Agency that depends on funding from the exchequer and which funding only comes from budget forecasts and proposals and so the amount of Kshs 4,000,000/= is too much to be accommodated in any miscellaneous or other vote and further that the award is disputed for not being in consonance with the Advocates Scale on Fees.
60. He ends his deposition by stating that on April 20, 2022, he had filed a similar application for reference at Nairobi being Nairobi ELC Misc E066 of 2022 but the same was discontinued to allow this application to be heard.

Applicant's Supplementary Affidavit.

61. In response to the 1st to 18th Respondents Replying Affidavit, the Applicant through its advocate on record filed a Supplementary Affidavit sworn on May 27, 2022.
62. He contends that in response to paragraphs 3 to 10 of the Replying Affidavit, the proceeding before the tribunal were compromised by way of a consent and therefore the appropriate instruction fees ought to have been allowed by the Tribunal pursuant to Schedule 11 Paragraph 4 as read with Paragraph 8(b) of the Advocates (Remuneration) Order.
63. He further contends that under the said provisions, when a matter is disposed by consent, the applicable fee is reduced by 50% which provision was overlooked by the Tribunal as evident from its ruling dated March 25, 2022.



64. It is his contention that the deponent is convoluting issues by referring to the Applicant's Bill of Costs that were not taxed by the Tribunal and is not subject to the present reference and in any case, the Applicant was within its rights to apply for costs as stipulated in the consent dated May 7, 2019.
65. It is further his contention that the Applicant's Application is not concerned with upsetting the terms of the Consent Order but seeks to challenge the decision of the National Environment Tribunal as the Taxing Body on Costs as provided for under Rule 11 of the Advocates Remuneration Order.
66. It is his contention that in response to paragraphs 11 to 17 of the 1st to 18th Respondents Replying Affidavit which was to the effect that EMCA and the National Environment Tribunal rules do not provide for filing of a reference and that the Tribunal is not a Taxing Master within the meaning of Rule 10 of the Advocates Remuneration Order and that the Tribunal's ruling can only be challenged by way of an Appeal, that even though they are sound on face value, they are improbable and misleading when subjected to deep legal analysis.
67. It is his contention that as per paragraph 19 of their consent dated May 7, 2019 the costs were to be applied for under the provisions of Rule 39 of the Environment management and Co-Ordination Act and Rules and therefore its clear that the core function of a taxing officer is to determine the costs payable to an advocate or a prevailing party then the Tribunal is a Taxing Master.
68. It is his further contention that paragraph 2 of the Advocates Remuneration Order delineates the applicability of the Advocates Remuneration Order as it particularly provides that the Order applies to contentious proceedings before subordinate courts and tribunals established under the law.
69. It is also his contention that the National Environment Tribunal established under Section 125 of the *Environmental Management and Co-ordination Act*, 1999 is a subordinate court within the meaning of Article 169 of the *Constitution* of Kenya and therefore the Tribunal is a 'taxing master' or 'taxing body' and the Advocates Remuneration Order applies to proceedings before the Tribunal.
70. He further contends that in so far as the Advocates Remuneration Order applies to the National Environment Tribunal proceedings, Rule 11(1) of the Order stipulates that when dissatisfied with the decision of the Taxing Officer, the aggrieved party should within fourteen days of the decision give notice in writing to the taxing officer of the items of taxation to which they object.
71. It is his contention that in their case, they notified the Tribunal of their dissatisfaction with their ruling dated March 25, 2022 and waited for the Tribunal to supply them with the reasons for their decision and upon lapse of a considerable amount of time without reply, they presumed that the reasons for the decision were contained in the ruling dated March 25, 2022 and at that point filed the present Reference Application in line with Rule 11(2) of the Advocates Remuneration Order.
72. It is also his contention that in the circumstances, their reference is properly on record and is the proper means of seeking legal intervention for the taxing body's erroneous decision on costs delivered on March 25, 2022.
73. He ends his deposition by stating that the 1st to 18th Respondents assertion that the correct forum for lodging their objection to the decision of the taxing body which is the Tribunal in this matter via an appeal to this court is a misleading legal proposition that has no basis, considering their foregoing legal arguments and sought that their application be allowed.

Issues For Determination.

74. The Applicant filed its submissions on May 27, 2022 while the 1st to 18th Respondents filed their submissions on June 27, 2022.



75. The Applicant in its submissions identified the following issues for determination;
- a. Whether the reference is a valid application.
 - b. Whether order as to costs on March 25, 2022 by the NET should be set aside.
 - c. Whether the Applicant acted frivolously or vexatiously or that his conduct in opposing the appeal was wholly unreasonable; and
 - d. Whether there was an error in the Taxation.
76. On the first issue, the Applicant submits that the Advocates (Remuneration) (Amendment) Order 2014 is applicable to the proceedings before the National Environment Tribunal regarding costs and relied on Rule 2 of the aforementioned Advocates Remuneration Order.
77. The Applicant refers to Section 125 of the Environment Co-ordination and Management Act No 8 of 1999 and submits that the Advocates (Remuneration) (Amendment) Order 2014 applies to the Tribunal which is established under the aforementioned section and therefore the Tribunal is a subordinate court within the meaning of Article 169 of the Constitution of Kenya.
78. On whether the National Environment Tribunal should be considered a taxing officer, the Applicant relied on Rule 10 of the Advocates (Remuneration) (Amendment) Order 2014 which defines a taxing master to be limited to the Registrar, Deputy Registrar and an officer appointed by the Chief Justice in writing.
79. The Applicant went on to submit that courts have however taken judicial notice of the fact that the major function of a taxing officer is to determine costs payable and cited the decision in the cases of Benard Gichobi Njira Vs Kanini Njira Kathendu & Another [2015] eKLR and Supply Linkages Vs Hudson Mangeni [2020] eKLR.
80. The Applicant submits that a taxing master realizes the title from the basic function of taxation and that the National Environmental Tribunal has been awarded the same status as a Taxing Officer by Rule 39(3) of the National Environmental Tribunal Procedure Rules, 2003. The Applicant further submits that it therefore follows that when a party is aggrieved with a taxing master's decision then the party ought to follow the procedure for challenging a taxing master's decision which is provided under Rule 11 of the Advocates (Remuneration) (Amendment) Order, 2014.
81. The Applicant submits that it served the taxing master with a letter of Objection on March 28, 2022 which was not responded to and so they proceeded to file the reference after giving the Tribunal sufficient time to respond.
82. On the second issue, the Applicant submits that the order as to costs should be set aside as the National Environment Tribunal failed to apply the principles set down in Rule 39 of the National Environmental Tribunal Procedure Rules, 2003 and it therefore acted in excess of its limits set by law. The Applicant relies on the decisions in Sky Africa Holdings Limited Vs National Environment Management Authority (NEMA) [2021] eKLR and Samuel Kamau Macharia Vs Kenya Commercial Bank & 2 Others Civil Appl No 2 of 2011 in support of its arguments.
83. The Applicant also submits that when an authority lacks jurisdiction, then its decision is considered null and void. It relies on the decision in Joseph Muchiri & 2 Others Vs Sigma Seeds Limited & 2 Others [2021] eKLR.
84. On the third issue, the Applicant reiterates that the National Environment Tribunal issued its ruling on Costs on March 25, 2022 without regard to Rule 39(3) of the National Environmental Tribunal



Procedure Rules, 2003 and relies on the decision in *County Council of Nandi Vs Ezekiel Kibet Rutto & 6 Others [2013] eKLR*.

85. On the fourth issue the Applicant submits that the National Environment Tribunal erred in taxation of costs on both instruction fees and getting up fees as the value of the subject matter was not mentioned in the pleadings, consent and that the taxing master did not discuss the value in its ruling. The Applicant further submits that it is at loss as to how the taxing master arrived at the amount to charge for instruction fees.
86. The Applicant submits that where the value of the subject matter cannot be ascertained, the taxing master ought to apply the scale that is provided for under Schedule 11(9) of the Advocates (Remuneration)(Amendment) Order, 2014 and further Schedule 11 paragraph 4 of the Advocates (Remuneration)(Amendment) Order, 2014 indicates that once a matter has been resolved by consent, then the lower scale ought to apply which provision the taxing master did not apply.
87. On getting up fees the Applicant submitted that the Tribunal charged getting up fees of Kshs 1,000,000/= which it submits to be unlawful as no provision for the same is made under Schedule 11 of the Advocates (Remuneration) (Amendment) Order, 2014.
88. The Applicant concludes its submissions by seeking that its reference application be allowed.
89. The 1st to 18th Respondents in their submissions addressed the issues raised by the Applicant and added the following;
 - a. Whether this Honorable Court has the jurisdiction to hear and determination the instant application.
 - b. Depending on the answer on (b) above, whether this Honorable Court should set aside the Ruling and Orders of the NET made on March 25, 2022.
90. The 1st to 18th Respondents first submitted on the first issue identified by the Applicant on whether the Reference is valid. They relied on Paragraphs 2, 10 and 11 of the Principal Order of 2009 and submitted that the reference in this matter was filed out of time as it was filed thirty days after the ruling by the Tribunal was delivered.
91. They rely on the decision in *Robinson Onyango Malombo t/a OM Robinson & Co Advocates Vs County Government of Mombasa [2019]* and *KCB Bank Limited & another Vs Yeswa Antony Joseph [2022]* and submit that this reference is not valid as it was filed outside of the fourteen days without leave.
92. On the jurisdiction of this court, they submit that since the application is not valid for purposes of challenging the ruling and order of the Tribunal made on March 25, 2022, this court lacks the jurisdiction to hear and determine the same. The 1st to 18th Respondents rely on the decisions in *Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd [1969] EA 696*, *Madison Insurance Company Limited Vs David Wambua, Jackson Mulinge Maingi & Another (Interested Parties) [2021] eKLR*, *Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another [2015] eKLR* among other decisions and submit that instead of filing the present reference the Applicant ought to have filed an Appeal.
93. On whether this court should set aside the ruling and orders of the National Environment Tribunal, the 1st to 18th Respondents reiterate that there is no valid reference before the court as it was filed outside of the required fourteen days but if the court holds to the contrary then it should consider that the Applicant and the 19th Respondent have not demonstrated how the Tribunal wrongly exercised its jurisdiction.



94. They rely on the decision in *Peter Muturi Njuguna Vs Kenya Wildlife Service [2017] eKLR* and pray that the instant application be dismissed as it lacks merit.
95. After considering the Application, Supporting Affidavit, Replying Affidavits, the Supplementary Affidavit and the rival submissions of the parties herein, it is my view that the issues that arise for determination are as follows:
 - a. Whether the reference is properly before this court and/or whether this court has jurisdiction to entertain the reference.
 - b. Whether the court should set aside the National Environment Tribunal's Ruling delivered on March 25, 2022.
 - c. Whether there was an error in taxation.
 - d. Who should bear the costs of this application.

Analysis And Determination.

A. Whether the reference is properly before this court and/ or whether this court has jurisdiction to entertain the reference.

96. The Applicant in this matter filed the application dated April 22, 2022 challenging the decision of the National Environment Tribunal delivered on March 25, 2022 awarding the 1st to 18th Respondents costs of Kshs 4,163,890/= as against it and the 19th Respondent.
97. The background of the application is extensively set out by both the Applicant and the 1st to 18th Respondents. Briefly, it is that the 1st to 18th Respondents had Appealed to the National Environment Tribunal which proceedings were compromised by way of a consent entered into on May 7, 2019 and adopted by the court through the order issued on May 14, 2019.
98. The 1st to 18th Respondents argue that the *Environmental Management and Co-ordination Act* of 1999 and the National Environmental Tribunal Procedure Rules 2003 do not provide for the filing of a reference as set out under Paragraph 11 of the Advocates Remuneration Order.
99. Section 130(1) of the *Environmental Management and Co-ordination Act* provides as follows:
 - (1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, Appeal against such decision or order to the High Court.
100. It is possible to lose sight of the important question for determination in this matter by splitting hairs and raising issues of technicalities. My assessment of this question as presented by the 1st -18th Respondent is that they would have preferred that an Appeal is filed in this matter and not a reference.
101. In order to deal with the objection raised on jurisdiction and form by the 1-18th Respondents I need to answer three questions under this heading.
 - a. What is a Reference?
 - b. What is an Appeal?
 - c. Would the outcome of dealing with this dispute whether as a reference or Appeal be any different?



102. Even as I attempt to answer these three questions, I am reminded of my solemn duty as set out in Article 159 (2) (d) of the Constitution of Kenya, 2010- that justice shall be administered without undue regard to procedural technicalities.
103. The Black's Law Dictionary 11th Edition at pg 1533 defines reference thus;
- The act of sending or directing to another for information. Service, consideration, or decision; esp., the act of sending a case to a master or referee for information or decision.
104. The Black's Law Dictionary 11th Edition at pg 121 defines an Appeal thus;
- A proceeding undertaken to have a decision reconsidered by a higher authority; espe., the submission of a lower court's or agency's decision to a higher court for review and possible reversal.
105. My analysis is that both terms are in respect of proceedings in the superior courts seeking that the said courts have another look at a decision rendered by subordinate courts or tribunals. The outcome would either be that the decision is upheld, set aside or varied.
106. I am of the view that the difference in terminology is meant to distinguish the subject matter of a dispute that is filed before a Superior Court. In one, the subject matter is costs awarded and in another the subject matter relates to a decision other than costs. This distinction of terms, in my view, is immaterial and I doubt that it is meant to place a hurdle in a Superior Courts ability to render itself on a matter emanating from a Subordinate Court or Tribunal.
107. To further demonstrate the absurdity that a holding to the effect that this court cannot determine the dispute because it has been filed as a reference rather than as an Appeal would present is that after such holding, the Applicant herein would only have to change the cause title, maybe extend time within which to file the cause, file a different cause and seek the same orders. This would only delay justice rather than meet the ends of it.
108. In Benard Gichobi Njira Vs Kanini Njira Kathendu & Another [2015] eKLR the learned Judge had this to say on assessment and taxation of a bill;
- 'For me this is simply a question of semantics because 'taxation of costs' and 'assessment of costs' mean one and the same thing. The Black's Law Dictionary defines 'Taxation of Costs' as follows:
- The process of fixing the amount of litigation-related expenses that a prevailing party is entitled to be awarded.'
- On the other hand the same dictionary defines assessment of costs as follows:
- 'Determination of the rate or amount of something (costs in this instance) – imposition of something (costs) eg fines.'
- The Oxford English Dictionary defines 'taxation of costs' as follows:
- 'To examine and assess the costs of a case.'
- The same dictionary (Oxford) defines 'assessment' as follows:
- 'To evaluate or estimate the nature, value or quality to set the value of a tax, fine etc for a person at a specified level.'



The above definitions clearly for me mean one and the same thing and is simply a question of semantics and practice in our courts at different levels. In the High Courts determination of costs payable has always been referred to as taxation while at the lower court the determination of costs payable has been commonly referred to as 'assessment' but the two terminologies mean one and the same thing. Any of the terminologies can be used both by the High Courts and the courts below without any problem.

109. This decision is useful to the extent that it sets out the scope of duty of a taxing officer. There is no doubt that the National environmental Tribunal undertook duties of a taxing officer and was guided by provision of Schedule 11 of Advocates (Remuneration) (Amendment) Order, 2014. This is stated in its ruling.
110. A taxing officer realizes the title from the basic function of taxation. I am of the view that the National Environmental Tribunal has been accorded the status of a Taxing Officer by Rule 39(3) of the National Environmental Tribunal Procedure Rules, 2003.
111. It follows, therefore, that when a party is aggrieved with a taxing officer's decision then the party ought to follow the procedure for challenging a taxing officer's decision which is provided under Rule 11 of the Advocates (Remuneration) (Amendment) Order, 2014.
112. While Section 130(1) of the *Environmental Management and Co-ordination Act* 1999 provides for filing of an Appeal against the decision of the tribunal, the Advocates (Remuneration) (Amendment) Order, 2014 provides for filing of a reference against the decision of a taxing master. There seems to be a discord between these two statutes as to the procedure to be applied in approaching the High Court or Courts of equal status. Both statutes intended that an aggrieved party be given an opportunity to approach the High Court or Courts of Equal Status to have the decision of the Tribunal or Subordinate Courts acting as taxing officers re-considered.
113. It is therefore not correct to say that this court has no jurisdiction to hear a dispute in respect of costs awarded by the tribunal. The preferred term by the 1st – 18th respondent is 'an appeal' and not 'a reference' but that is a question of nomenclature and in itself does not take away the jurisdiction of the court.
114. It is important to state that there is need to harmonize the provisions of the *Environmental Management and Co-ordination Act* and the Advocates Remuneration Order. This is because Rule 2 of the Advocates Remuneration Order, 1962 (The Principal Order) in setting out its application, does not state that it applies to taxation of costs by the National Environment Tribunal while Schedule 11 of The Advocates (Remuneration) (Amendment) Order, 2014 provides for the costs of proceedings before tribunals other than those under Schedules 8 and 9 of the said order except where otherwise prescribed under the Act setting up the Tribunal.
115. Rule 2 of the Advocates Remuneration Order 1962 provides as follows:

(2) Application of Order

This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap 301) and in a Tribunal established under the *Rent Restriction Act* (Cap. 296).



116. This rule should be amended to reflect the provisions of Schedule 11 of the The Advocates (Remuneration) (Amendment) Order, 2014.
117. The National Environment Tribunal in determining costs to be paid relies on the provisions of the Advocates (Remuneration) (Amendment) Order, 2014. A party seeking to challenge costs awarded under the Advocates Remuneration Order can only do so by way of filing a reference as provided for under Rule 11 of the Advocates Remuneration Order, 1962.
118. The provisions of Section 130 of the *Environmental Management and Co-ordination Act* which gives this court jurisdiction to hear and determine Appeals which includes Appeals on the award of costs should be harmonized with the provisions of the Advocates (Remuneration) (Amendment) Order, 2014 to provide that parties may file a reference and/or Appeal to challenge the award of costs on an Appeal.
119. In my final analysis, I find that this court has jurisdiction to entertain a reference and/or an Appeal filed to challenge the decision of the National Environmental Tribunal in respect of taxation of costs.
120. The 1st-18th Respondent also state that the Applicant herein filed the reference without an order for enlargement of time and it is therefore not properly before this court.

Rule 11 of the Advocates (Remuneration) Order, 1962 bears a heading 'Objection to decision on taxation and Appeal to Court of Appeal' and provides as follows;

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

121. In *Abmed Nassir Vs National Bank of Kenya Ltd [2006] EA* the court held: -

'Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.'



122. Rule 11, therefore, allows a period of 28 days from filing an objection to receiving reasons for the ruling. Of the 28 days, a person filing a reference only has control over the first 14 days. The applicant submissions are to the effect that is followed the provisions of Advocates (Remuneration) (Amendment) Order, 2014 and when it occurred to it that the failure by the taxing officer to respond to the objection was probably because the ruling issued on March 25, 2022 had reasons given in it, it proceeded to file this reference.
123. Therefore, I do not agree that there was need to file an application to enlarge time as the Applicant herein filed their objection within 2 days of the ruling and waited for the taxing officer; the National Environment Tribunal to give its reasons but they- National Environment Tribunal- failed to do so as stipulated under Rule 11 (2) of the Advocates (Remuneration) (Amendment) Order, 2014. The next step was for the Applicant to file this reference. I find that there was no delay on the part of the Applicant and there was therefore no need by it to file an application under Rule 11(4) to enlarge time.
124. In conclusion, I am not persuaded that the dispute is not properly before this court. I have gone to great lengths to demystify the provisions of Rule 11 and schedule 11 of the Advocates (Remuneration) (Amendment) Order, 2014 and Section 130 of the *Environmental Management and Co-ordination Act* of 1999. I decline to proceed on a perceived technicality but rather on the merits of this dispute.
- B. Whether the court should set aside the National Environment Tribunal's Ruling delivered on March 25, 2022.
125. The Law relating to costs of proceedings before Tribunals is found in Schedule 11 of the Advocates (Remuneration) (Amendment) order 2014.
126. The consent order entered into on May 7, 2019 addressed the issue of costs and provided that the same would be applied for under the provisions of Rule 39 of the National Environmental Tribunal Procedure Rules 2003 which provides as follows:
- 39(1) The Tribunal shall not normally make an order awarding costs and expenses, but may, subject to paragraph (2), make such an order-
- a. Against a party, including a party which has withdrawn its appeal or reply, if it is of the opinion that the party has acted frivolously or vexatiously or that his conduct in making, pursuing or resisting an Appeal was wholly unreasonable;
- b. Against the Authority, where it considers that the decision against which the Appeal is brought wholly unreasonable; or
- c. As respects any costs or expenses incurred, or any allowances paid, as a result of a postponement or adjournment of a hearing at the request of a party.
- (2) No Order shall be made under paragraph (1) against a party without first giving that party an opportunity of making representations against the making of the order.
- (3) Any Costs required by an order under this rule to be taxed shall be assessed by the Tribunal.
127. My analysis of this consent order is that parties were not able to agree on costs and left it for whichever party that felt entitled to costs to make an application to have costs assessed and the merit or other wise of the said application to be decided by the tribunal under the provisions of Rule 39 of the National Environmental Tribunal Procedure Rules, 2003.



128. The Applicant contends that its challenge against the ruling of the tribunal is based on the Tribunal's misapprehension of the law on the award of costs in proceedings before it. The Applicant states that the Tribunal based its decision to award costs to the 1st to 18th Respondents on the idea that the 1st to 18th Respondents were successful parties in the Appeal and that 'costs follow the event' thus arriving at the wrong conclusion.
129. The law is that the Tribunal shall not ordinarily grant costs but has the discretion to do so under circumstances set under the provisions of Rule 39 of the National Environmental Tribunal Procedure Rules 2003 which I have reproduced in the foregoing paragraphs.
130. In *First American Bank of Kenya Vs Shah and Others [2002] 1 EA 64 at 69* the Learned Judge stated as follows;
- ' First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle'.
131. Therefore, the questions to be answered in setting aside the ruling on taxation issued on March 25, 2022 is:
- a. Whether there was an error of principle
 - b. Whether the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.
132. The principle that should guide the tribunal in awarding costs as envisaged under Rule 39 of the National Environmental Tribunal Procedure Rules 2003 is that:
- a. The tribunal should be of the opinion that the party has acted
 - i. frivolously or
 - ii. vexatiously or
 - iii. that his conduct in making, pursuing or resisting an Appeal was wholly unreasonable;
 - b. Against the Authority, where it considers that the decision against which the Appeal is brought wholly unreasonable; or
 - c. As respects any costs or expenses incurred, or any allowances paid, as a result of a postponement or adjournment of a hearing at the request of a party.
133. However, a reading of the ruling shows that the reason for the Tribunal awarding costs to the 1st-18th Respondent is found at paragraph 14 of the said ruling and it states
- ' We have reviewed the matter; the substance of the Appeal and the consent recorded and find that the Appellant are the proper party entitled to and award of costs. The matter was determined by a settlement. However, substantial work had already been undertaken in the matter. In the end, the consent itself compromised the Appeal by acceding to the concerns of the Appellant.'
134. The tribunal, in its ruling at paragraph 14 is making a case for awarding costs to the 1st- 18th Respondents by stating that although settlement was by consent, it appreciates that the Appellants



(1st- 18th Respondents herein) had put in a substantial amount of work in preparing for the Appeal and that the consent was really a concession on the part of the 1st and 2nd Respondents (The Applicant and 19th respondent herein.) to the Appeal. Essentially, the Tribunal is making a finding that the conduct of the Applicant and 19th Respondent in resisting the Appeal was wholly unreasonable. I make this deduction from a reading of paragraph 14 and 15 of the ruling despite the fact that the Tribunal did not expressly say so.

135. The Applicant's submissions that its decision to oppose the Appeal was borne of the need to protect its interest to the extent of not losing its license and investment committed to the flower farm business are not entirely true. The tribunal in its ruling while making a case for awarding of costs to the 1st -18th Respondent states that the consent recorded was for all intent and purpose a concession of the Appeal.

136. At paragraph 15, the tribunal goes on to say

' In the circumstances we have no hesitation in finding that the costs if this Appeal should be awarded to them and borne by the 1st and 2nd Respondents jointly and severally.'

137. In view of the foregoing, I find that the Tribunal took into account the relevant principles in making a determination on whether to award costs or not. I have no reason to interfere in its discretion.

C. Whether there was an error in taxation.

138. The National Environment Tribunal has jurisdiction to make an order for costs pursuant to Section 129(3)(c) of EMCA and Rule 39 of the National Environment Tribunal Procedure Rules, 2003. Rule 39 has been set out in the foregoing paragraphs. Section 129(3)(c) provides as follows

(3) Upon any appeal, the Tribunal may

(a)

(b)

(c) Make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

139. Schedule 11 makes provision for costs of proceedings before Tribunals other than those under Schedule 8 and 9 of the Advocates (Remuneration) (Amendment) Order, 2014.

140. Schedule 11 (3) provides that when taxing costs consideration shall be given by the taxing officer to either the value of the subject matter or where the value of the subject matter cannot be determined, to the following criteria:

(a) The nature and importance of the proceedings;

(b) The complexity of the matter and the difficulty or novelty of the question raised;

(c) The amount or value of the subject matter,

(d) The time expended by the advocate(s),

(e) The number and importance of the documents prepared or perused, without regard to length.

141. Where the value of the subject matter can be ascertained from the pleadings filed, then Party and Party costs are computed as provided under Schedule 11 (8). Where the value of the subject matter cannot be ascertained, the scale is provided for under Schedule 11(9).



142. Schedule 11(9) provides as follows:
9. Where the value of the subject matter cannot be ascertained such costs as the court in its discretion but not less than Kshs 35,280 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) such figure being left to the discretion of the court.
143. The National Environment Tribunal in its Ruling on the Bill of Costs delivered on March 25, 2022 exercised its discretion under Schedule 11(9) of the Advocates (Remuneration) (Amendment) Order, 2014 in awarding instruction fees under Item No 1 of Kshs 3,000,000/= as the value of the subject matter could not be ascertained.
144. Schedule 11(9) importantly, allows the tribunal discretion to determine the instruction fee for a matter whose value cannot be ascertained but sets the minimum at Kshs 35,280.
145. The Applicant herein has not laid any basis for this court to interfere with the Tribunal's discretion in taxing Item No 1 at Kshs 3,000,000 (Three million only), to be paid to the 1st- 18th Respondents herein.
146. The 19th Respondent raised an important question. According to it, the taxing master faltered on assessment of instruction fees by disregarding the provisions of paragraph 4 of the 11th schedule of the Advocates Remuneration Order where 50% of instruction fees should be discounted on matters settled by consent of the parties.
147. Paragraph 8 (a) of Schedule 11 deals with matters in which the valued of the subject matter can be ascertained. Paragraph 8 (b) provides for reducing the fee prescribed in 8 (a) by 50 % where the lower scale applies.
148. In the present case, the value of the subject matter of the dispute before the Tribunal was not ascertained. The Tribunal, therefore had to proceed under Paragraph 9 of the of schedule 11. The applicant also acknowledges that this was the proper paragraph for the tribunal to proceed only that, according to it, the amount awarded as instruction fee should have been Kshs. 35,280
149. Under paragraph 9, there is no provision for reducing the fee by 50%. The provisions of paragraph 9 is as follows;
- Where the value of the subject matter cannot be ascertained such costs as the court in its discretion but not less than Kshs 35,280 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) such figure being left to the discretion of the court.
150. In the circumstances, I find that it was not necessary and the law does not provide for a reduction of the instruction fee by 50% where the value of the subject matter is not ascertained.
151. On the question of getting- up fees, Schedule 11 of the Advocates (Remuneration) (Amendment) Order, 2014 does not provide for it and therefore, I find that the sum of Kshs 1,000,000/= awarded by the National Environment Tribunal was not justified.

DISPOSITION.

152. The duty of a Taxing Officer is an exercise of lawful discretion. I have no reason to question the exercise of discretion by the Taxing Officer in this matter as relates to the instruction fee. The Respondent/ Applicant has not established a basis upon which this court should interfere with the Taxing Officer's award.



153. However, I find that the Tribunal misapprehended the law in awarding getting up fees.
154. Consequently, Chamber Summons application dated April 22, 2022 partially succeeds and I order as follows;
- a. The decision of the Taxing Master (National Environmental Tribunal) in so far as it awarded Getting-up Fees of Kshs 1,000,000 to the 1st-18th Respondent as against the Applicant and 19th Respondent jointly and severally is set aside.
 - b. The decision of the Taxing master (National Environmental Tribunal) in so far as it awarded Instruction Fees of Kshs 3, 000,000 to the 1st- 18th Respondents as against the Applicant and 19th Respondent jointly and severally is upheld.
 - c. Each party shall bear own costs in respect of this application.
155. It's so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 17TH DAY OF NOVEMBER, 2022

L. A. OMOLLO

JUDGE

In the presence of:-

Mr. Makora for the Applicant.

N/A for the 1st-18th Respondent.

Mr. Makora for Mr. Gitonga for the 19th Respondent.

Court clerk; Ms. Monica Wanjohi.

