County Government of Nyamira v Omesa Mogeni & Company (Environment and Land Miscellaneous Case E002 of 2025) [2025] KEELC 6063 (KLR) (18 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6063 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT AND LAND MISCELLANEOUS CASE E002 OF 2025

DO OHUNGO, J

SEPTEMBER 18, 2025

BETWEEN

COUNTY GOVERNMENT OF NYAMIRA ..... APPLICANT

AND

OMESA MOGENI & COMPANY ..... RESPONDENT

RULING

1. This is a reference from the ruling delivered by the Deputy Registrar on 27th December 2024 in Nyamira ELC Misc. Application No. E011 of 2024 wherein the Respondent's Advocate/Client Bill of Costs dated 30th August 2024 was taxed at Kshs 86,324,00. The bill was filed after the Applicant represented the Respondent in Nyamira ELC Petition No. E001 of 2023 wherein judgment was delivered on 15th February 2024.

2. The substance of the reference is in Chamber Summons dated 27th December 2024, through which the Applicant is seeking the following orders:

    1. This Honourable Court be pleased to, ex parte, in the first instance order that there be a stay of execution of the taxation ruling delivered on 27.12.2024 in Nyamira ELC Misc. No. E011 of 2024 pending hearing and determination of the instant reference;

    2. The Learned Deputy Registrar's decision on taxation under items nos. I (instruction fees); 4 (service) and 6 (drawings) vide his ruling delivered on 27.12.2024 be set aside and in its place the Honourable Judge be pleased to freshly determine the amounts properly payable under the said items;

    3. Costs of these (sic) application be borne by the Respondent.

3. The application is based on the grounds listed on its face and id supported by an affidavit sworn by Erastus M. Orina, the County Attorney, Nyamira County. He deposed that that Applicant was

aggrieved by the taxation on item numbers 1, 4 and 6 of the said bill of costs and that it was in the interest of justice that the orders sought in the application be granted.

4. The Respondent opposed the application through a replying affidavit sworn by John Angwenyi Nyangeri, an Associate in the Respondent firm. He deposed that party and party costs which had been taxed were unchallenged and that advocate client costs were to be assessed at party and party costs increased by one half. He added that the Taxing Master's discretion was properly exercised and that the mere fact that a party finds taxed costs high is not a ground for review.

5. The Respondent also filed a supplementary affidavit sworn on 25th April 2025 by John Angwenyi Nyangeri in which he deposed that upon reviewing the e-Filing portal, it came to his attention that the Applicant had not filed any notice of objection to the Taxing Master's ruling and that in the circumstances, this Court lacked jurisdiction.

6. The Applicant responded through a supplementary affidavit sworn by Erastus M. Orina on 14th May 2025. He deposed that the Respondent's supplementary affidavit was un-procedural since only an applicant had a right of reply through such an affidavit. He added that the Applicant timeously filed a notice of objection dated 27th December 2024 which was acknowledged by the Deputy Registrar on 13th January 2025. That the notice of objection was filed in Nyamira ELC Misc. Application No. E011 of 2024 being the file in which taxation took place.

7. The application was canvassed through written submissions. The Applicant filed submissions dated 8th April 2025 in which it argued that party and party costs as taxed in the parent file are not an automatic basis for assessment of advocate client costs and that if the Respondent wanted party and party costs in the parent to be the basis for assessment of advocate client costs, it ought to have expressly pleaded so. That instead, the Respondent pleaded its bill under Part B (a) of Schedule VI of the *Advocates (Remuneration) Order (ARO)* as opposed to Part B (b) of Schedule VI of the *ARO*.

8. The Applicant went on to submit that parties are bound by their pleadings and that the modes of assessment under Part B of Schedule VI of the *ARO* are disjunctive as opposed to conjunctive. That the Taxing Master departed from the Respondent's bill as filed thereby basing instruction fees on a figure that was manifestly disproportionate to the work done by the Respondent. The Applicant also contended that the Taxing Master failed to appreciate that the party and party costs taxed in the parent file were in respect of numerous parties, yet the Respondent's bill was in respect of representing one party.

9. Regarding items 4 and 6 of the bill, the Applicant argued that there were no reasons given by the Taxing Master for the said items. Relying on several decided cases including *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR, *Kinyua Muyaa & Co. Advocates v Kenya Ports Authority Oensin Scheme & 8 others* [2017] eKLR, and *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, the Applicant urged the Court to allow the reference.

10. On its part, the Respondent filed submissions dated 13th May 2025. It argued that the Applicant did not file notice of objection as required by Paragraph 11 of the *ARO* and that in the circumstances, this reference is incurably defective and the Court lacks jurisdiction to hear and determine it. It relied, inter alia, on the cases of *Matiri Mburu & Chepkemboi Advocates v Occidental Insurance Company Limited* [2017] eKLR, *Elijah Njuguna Njoki v Peter Muriu Njuguna & 4 others* [2021] eKLR, and *Machira & Co. Advocates v Arthur K. Magugu & another* [2012] eKLR in support of those arguments.

11. The Respondent went on to argue, without prejudice to the foregoing submissions, that the Taxing Master did not err in adopting the instruction fees awarded in the party and party bill as the basis for

determining the instruction fees in the advocate client bill. It further agued that the value of the subject matter was determinable and that none of the parties objected or gave an alternative valuation.

12. The Respondent further submitted that the Applicant has failed to demonstrate how the Taxing Master erred or any wrong exercise of discretion. That on the contrary, it is the Respondent that should complain that the Taxing Master ignored the value of the subject matter by awarding Kshs 50 Million instead of Kshs 150 Million. The Respondent therefore urged this Court to dismiss the reference.

13. I have carefully considered the application, the affidavits and the submissions by all parties. The issues that arise for determination are whether the Court has jurisdiction, whether the Taxing Officer properly exercised discretion in taxing the disputed items and whether the reliefs sought in the application should issue.

14. Jurisdiction is the entry point in any matter that the Court is called upon to determine. Without it, the proceedings come to a certain end, and the Court cannot take any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. If the Court proceeds in a matter in which it lacks jurisdiction, its determination would amount to a nullity. The Supreme Court reiterated that position in *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR.

15. This reference arises from the ruling delivered by the Deputy Registrar on 27th December 2024 in Nyamira ELC Misc. Application No. E011 of 2024 upon taxation of the Respondent's Advocate/ Client Bill of Costs dated 30th August 2024. The Applicant is dissatisfied with the said ruling.

16. Paragraph 11 (1) of the *ARO* provides as follows:

> 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.

17. The Respondent has contended that the Applicant did not file any notice of objection. The Applicant has on the other hand contended that it filed a notice of objection dated 27th December 2024 which was acknowledged by the Deputy Registrar on 13th January 2025. I have had occasion to peruse the record in Nyamira ELC Misc. Application No. E011 of 2024. I have verified that the Applicant indeed filed the notice of objection in the e-Filing Portal on 6th January 2025 at 1738 hours. The Deputy Registrar endorsed the notice as contended by the Applicant. It follows therefore that this reference is properly before this Court and that the Court has jurisdiction to hear and determine it.

18. A perusal of the notice of objection shows that the Applicant is objecting to the decision of the Taxing Master on item numbers 1, 4 and 6 of the bill. Item number 1 is on instruction and getting up fees, item number 4 is on service while item number 6 is on drawings.

19. The objective of the *ARO* is to ascertain reasonable costs incurred in the course of litigation. The Supreme Court held in *Kenya Airports Authority v Otieno Ragot and Company Advocates* [2024] KESC 44 (KLR) as follows:

> Therefore, ... the *Advocates Remuneration Order*, just as its name suggests, relates to the remuneration of advocates. As evinced by rule 2 thereof, it relates to assessment of costs incurred in a contentious matter which can be reimbursed to a successful party/litigant by the other party. More specifically, it prescribes and regulates the remuneration of advocates in respect of professional business undertaken, and the recompense of costs/expenses incurred by a successful party in a suit. The overall objective is to prevent exploitation of parties to a suit/transaction with regard to remuneration of advocates and compensation of

costs or expenses incurred by a successful party as well as maintain the standards of the legal profession. Differently put, it is to ensure that fees/costs paid to an advocate and a successful party are reasonable. Of importance, is that what amounts to reasonable costs can only be determined on a case-by-case basis.

20. The principles that guide the Court while considering a reference were identified by the Court of Appeal in *Kipkorir Titoo & Kiara Advocates vs. Deposit Protection Fund Board* [2005] eKLR as follows:

> On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I: "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases"
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> An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur v Nyeri Electricity Undertaking* (*supra*) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel* (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - *D'Souza v Ferrao* [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji v Kanji Naran Patel* (No. 2) (*supra*).

21. The Applicant has contended that the instruction fees of Kshs 75 Million and getting up fees of Kshs 11,250,000 which the Taxing Officer awarded were manifestly disproportionate to the work done by the Respondent. The Applicant also contends that the Respondent pleaded its bill under Part B (a) of Schedule VI of the *ARO* and that the instruction fees and getting up fees ought to have been determined under Part B (a) of Schedule VI as opposed to Part B (b) of Schedule VI of the *ARO*.

22. Part A of Schedule VI deals with party and party costs while Part B thereof deals with advocate and client costs. I suppose that the Applicant meant to submit that the Respondent's bill was pleaded under Part A of Schedule VI as opposed to Part B thereof. I have perused the bill Respondent's bill in question. Its heading reads "Advocate-client Bill of Costs." There is nowhere in the bill where it is pleaded that the bill was drawn under Part A of Schedule VI. If anything, the heading leaves no doubt that the bill is an advocate-client bill of costs drawn under Part B of Schedule VI.

23. Without offering any alternative figures on quantum of instruction fees and getting up fees, the Respondent has generically argued that the sums awarded by the Taxing Officer are disproportionate to the work done. In the case of *Joreth Limited v Kigano & Associates* [2002] eKLR, the Court of Appeal addressed the issue of determination of instruction fees thus:

> We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer

is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.

24. To properly tax a bill, the Taxing Officer must correctly ascertain the subject matter of the suit and thereafter the value of the subject matter. Both the subject matter and its value are principally to be determined from the pleadings or the judgment or where parties have entered into a settlement. If the pleadings, judgment or settlement are silent on the value of the subject matter then the Taxing Officer can use his discretion to determine just instructions fees, taking into account the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances.

25. As the Court of Appeal held in *Kamunyori & Company Advocates v Development Bank of Kenya Limited* [2015] KECA 595 (KLR), failure to ascertain the correct subject matter in a suit for the purpose of taxation and failure to ascribe the correct value to the subject matter are errors of principle which warrant a Judge interfering with the Taxing Officer's decision.

26. Regarding the manner of determining instruction fees in an advocate client bill of costs, it is now settled that the Taxing Officer must do so judiciously and that his is not reduced to a mere mechanical role of simply tallying figures by increasing party and party instructions fees by one half. The Supreme Court held so in *Kenya Airports Authority v Otieno Ragot and Company Advocates* (*supra*) where it stated thus:

> 66. Looking at Part B, which provides in part that the minimum fees as between an advocate and client shall be the fees prescribed in Part A increased by one-half, it is clear that in assessing Advocate-Client costs/fees under Part B, including instruction fees therein, the Taxing Officer is required to take into account Part A. As to whether this means that such a Taxing Officer is simply to increase the instruction fees determined/ascertained in Part A by one-half or 50%, we are not persuaded in the least. ...
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> 67. It follows that contrary to the impugned majority judgment, a Taxing Officer is clothed with discretion when determining/assessing instruction fees even where the Party-Party costs have been taxed. This is evident in the phrase "on every taxation the Taxing Officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party..." The said position is further buttressed by the marginal note to the Rule 11 which makes reference to, "Discretion of a Taxing Officer".
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> 68. ... Bearing the above in mind, we find that the proper interpretation of Schedule VI Part B is that in assessing fees thereunder, including instruction fees, a Taxing Officer is required to exercise his/her discretion guided by the prescribed scale of fees in Part A. To our minds, that does not mean, as the impugned majority judgment found, that a Taxing Officer is simply to apply the mathematical formula to the instruction fees ascertained in the taxed Party-Party costs. Failure to evaluate a disputed item under taxation and determine it judiciously is contrary to the clear provisions of Rule 16 of the *Advocates Remuneration Order*. Besides, a Taxing Officer being a judicial

officer exercising a judicial mandate cannot be said to be performing such mandate mechanically or merely as a formality.

70. ... if the instruction fee in a certificate of Party-Party costs is disputed when it comes to the assessment of the same in Advocate-Client costs under Part B of Schedule VI, the Taxing Officer should subject the disputed items to evaluation and judicial determination according to the circumstances of each case. The instruction fees in the Party-Party certificate of costs once disputed must be ascertained and the certificate cannot be applied hook, line and sinker in the assessment of instruction fees under Part B.

27. I have carefully read the ruling that is the subject of this reference, the record in Nyamira ELC Petition No. E001 of 2023 as well as the judgment delivered therein on 15th February 2024, and the ruling delivered on 27th December 2024 in respect of the Petitioner's party and party bill of costs in Nyamira ELC Petition No. E001 of 2023.

28. From the onset, I must remind the parties that the proper practice of filing a reference is to file it in the file in which the taxation was done so that the Court determining the reference has all the required materials and the entire record in one folder. In this case, the advocate client bill was properly filed and taxed in Nyamira ELC Misc. Application No. E011 of 2024, in which file the Applicant also filed the notice of objection dated 27th December 2024.

29. However, for some unexplained reason, when it came to filing the application required under Paragraph 11 (2) of the *ARO*, the Applicant leapfrogged to a totally new file, Nyamira ELCL Misc. Application No. E002 of 2025. The application under Paragraph 11 (2) of the *ARO* is a continuation of the reference already commenced through the notice of objection and should be filed in the same file as the notice. Filing it in a new file makes it cumbersome for the Court determining the reference to access all the material that were before the Taxing Officer and further has the potential of multiplying costs unnecessarily if the costs of the reference end up being determined as a fresh cause.

30. Upon perusal of the ruling that is the subject of this reference, I have not seen any specific and unambiguous identification by the Taxing Master of the subject matter in Nyamira ELC Petition No. E001 of 2023. There is some reference in the ruling to the nature of the reliefs sought in the petition and complexity of the dispute but no clear identification of the subject matter.

31. The Respondent, being the party that moved the Taxing Officer through the advocate client bill of costs, was required to properly plead its case by specifically identifying the subject matter, ascribing a value to it and the quantifying instruction fees based on the value. In its framing of particulars of item 1 of its bill of costs dated 30th August 2024, the Respondent pleaded thus:

> Instruction Fees due to the complexity of the matter, including extensive research, consultations, and strategic preparation and with an estimated subject matter value at Kshs 10 Billion, that is the leading municipality on revenue collection in Nyamira county.

32. It is manifest that the Respondent neither identified the subject matter nor attached any value to it in the bill of costs. It bypassed those elementary steps and galloped straight into proposing both instruction fees and getting up fees.

33. Equally, without specifically identifying the subject matter of the suit, the Taxing Officer then proceeded to consider the value of the unclear subject matter as follows:

> ...it is clear that the value of the subject matter was not determined in the petition, however, the applicant advocate filed a Valuation report dated 6th of October, 2024. There is also an affidavit of Affirmation of the maker of the said report one Victor Mairura Bosire sworn on even date affirming the averments contained in the said report. I have perused the said valuation report carefully and considered its contents. The said report is concluded by stating that the value of the developments on the 125 plots in the disputed area of Keroka Market amounts to Kshs. 5,625,000,000 (Kenya Shillings Five Billion, Six Hundred and Twenty Five Million Kenya Shillings).
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> Going by the valuation report ... this court awards the Applicant Kshs. 75,000,000 (Kenya Shillings Seventy Five Million) which is the fees awarded in the party and party bill of costs increased by 50%.

34. I have also perused the valuation report that the Taxing Officer referred to. The report was a valuation of "approximately 125 plots, hived from Land Reference Number East Kitutu/Mwang'era/118, originally reserved for Keroka Market" and was introduced into the proceedings for purposes of taxation of the Petitioner's party and party bill of costs. It was not part of the material that was before the trial Court as of the date of the judgment. The report valued "the land and developments for the disputed area [at] Kshs 5.625 billion."

35. Judging from the manner in which the instruction fees were arrived at, it is apparent that the Taxing Officer assumed that the subject matter of the petition was the approximately 125 plots and the developments thereon. It is also clear that the Taxing Officer simply arrived at the instruction fees by increasing the instruction fees awarded in the party and party bill of costs by one half. Beyond the arithmetic, there was no evaluation and judicial determination. The situation is compounded by the failure to correctly identify the subject matter.

36. Upon perusing the judgment delivered in Nyamira ELC Petition No. E001 of 2023 on 15th February 2024, I note that at paragraph 1 thereof the trial Court described the petition as being "over the boundary of Keroka town." I further note that at paragraph 13 of the judgment, the trial Court referred to a ruling on jurisdiction which it delivered on 24th May 2023 in which it quoted itself as having held thus:

> Among the issues raised in this Petition is who should collect revenue in Keroka Town. Such revenue include rates and rents by the 2 County Governments that have a common boundary on the said town. The other issue is where the boundary is. The 2nd Interested Party admits that the issue of the boundary between the Petitioner's ward Rigomba in Nyamira and that of Ichuni in Kisii County is in issue. Should this Court determine prayer numbers (c) (g) and (k) of the Petition which fall under Article 162 (2) (b) of the *Constitution* it will have discharged its mandate. This is in fact the dominant issue. It falls under occupation of land. This Court therefore has jurisdiction under Article 162 (2) (b). Once the same is sorted out, all other issues will take their shape, including the collection of revenues. Unless there are other underlying issues not brought out before this Court.

37. The trial Court considered prayer numbers c, g, and k of the petition to be"the dominant issue" in the proceedings. The Court reproduced the said prayers as follows:

    c. A declaration be and is hereby issued that the National Land Commission should investigate and erect beacons in Keroka town so as to solve the border dispute between Nyamira and Kisii Counties over the town.

g. A mandatory order compelling the National Land Commission to investigate and erect beacons in the disputed territory in Keroka town, within three months from the date of this Order, so as to resolve the simmering boundary disputes pitting Nyamira and Kisii Counties.

k. A mandatory order compelling the National Land Commission to file in this Honourable Court Affidavits demonstrating compliance with the Court Orders at the expiry of the periods within which they have been ordered to act.

38. The Petitioner did not claim to own the whole of Land Reference Number East Kitutu/ Mwang'era/118 and the developments thereon. The dispute before the trial Court was not on ownership of the parcel and the developments on it. Instead, it was purely over the delimitation, demarcation and recognition of the boundaries of Keroka Town and who should collect revenue in Keroka Town. The subject matter of the suit had nothing to do with the value of the plots in Keroka Town and developments thereon. The Taxing Officer erred and wrongly exercised discretion in the manner in which it dealt with identification of the subject matter of the suit and determination the value thereof. Consequently, this Court is entitled to interfere with the taxation on item number 1 of the bill as regards both instruction fees and fees for getting up.

39. I now turn to items 4 and 6 of the bill. The Applicant argued that the Taxing Officer did not give any reasons to justify taxation of the said items. A reading of the subject ruling shows that no reason was given to explain how the figure of Kshs 10,000 was arrived at in respect of item 4. As the Supreme Court stated in *Kenya Airports Authority v Otieno Ragot and Company Advocates* (*supra*), disputed items of a bill must be evaluated and determined judiciously, in compliance with Rule 16 of the *ARO*. The issue is not whether the sum awarded is reasonable but how it was arrived at. It may very well be that if the proper procedure is followed, the award may change significantly.

40. Regarding item 6 of the bill, I note that the Taxing Officer gave reasons to justify the sums awarded thereunder. Among others, he considered a notice of appointment of advocates dated 28th August 2023, replying affidavits, accompanying annexures and submissions. I find no reason to warrant interfering with taxation of the said item.

41. In view of the foregoing discourse, I find merit in this reference, in so far as it concerns taxation of item numbers I and 4 of the Respondent's Advocate/Client Bill of Costs dated 30th August 2024. The Applicant is entitled to setting aside of the said items.

42. I have considered whether to go ahead and tax item numbers I and 4 of the bill. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* (*supra*), the Court of Appeal held as follows:

> We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - *D'Souza v Ferrao* [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji v Kanji Naran Patel* (No. 2) (*supra*).

43. In line with the general practice which is to remit the question of quantum for the decision of the Taxing Officer, I will remit determination of quantum of item numbers I and 4 to the Taxing Officer. I will however offer guidelines on the subject matter of the suit.

44. I therefore make the following orders:

a. The Taxing Officer's decision dated and delivered on 27th December 2024 by which he taxed item number 1 on instruction fees and getting up fees at Kshs 75,000,000 and Kshs 11,250,000 respectively is hereby set aside.

b. The Taxing Officer's decision dated and delivered on 27th December 2024 by which he taxed item number 4 on service at Kshs 10,000 is hereby set aside.

c. Item numbers 1 and 4 of the Respondent's Advocate/Client Bill of Costs dated 30th August 2024 be taxed afresh.

d. In undertaking (c) above, the Taxing Officer to bear in mind that the subject matter of Nyamira ELC Petition No. E001 of 2023 was the delimitation, demarcation and recognition of the boundaries of Keroka Town and who should collect revenue in Keroka Town.

e. Each party shall bear own costs of this reference.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 18TH DAY OF SEPTEMBER, 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Applicant

Mr Angwenyi for the Respondent

Court Assistant: B Kerubo