



**Hannibal Wine Agencies v NCBA Bank Kenya Plc (Miscellaneous Civil Application E387 of 2024) [2025] KEHC 10949 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10949 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E387 OF 2024**

**JM OMIDO, J**

**JULY 24, 2025**

**BETWEEN**

**HANNIBAL WINE AGENCIES ..... APPLICANT**

**AND**

**NCBA BANK KENYA PLC ..... RESPONDENT**

**RULING**

1. The Applicant's Chamber Summons application dated 16<sup>th</sup> December, 2024, expressed to be brought under Rule 11 of the *Advocates (Remuneration) Order*, Sections 3 and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya and all other enabling provisions of the law seeks the following orders:
  - a. [Spent].
  - b. [Spent].
  - c. That the Applicant be granted an extension of time/leave to issue a Notice to the Taxing Officer being the Principal Magistrate, Winam Law Courts in Winam SPMCC No. E132 of 2024 *Hannibal Wine Agencies v NCBA Bank PLC* on the reasons leading to the taxed amount.
  - d. That the decision of the Taxing Master made on 6<sup>th</sup> October, 2024 in Winam SPMCC No. E132 of 2024 *Hannibal Wine Agencies v NCBA Bank PLC* awarding the sum of Ksh.74,850/- to the Respondent's Party and Party Bill of Costs dated 11<sup>th</sup> September, 2024 be set aside for the reasons that the same is too high.
  - e. That this court do make an appropriately reduced award in place of the taxed bill or give appropriate directions as to the taxing of the said Respondent's Bill of Costs.
  - f. That costs of this application be provided for.
2. The grounds upon which the application is premised are set out on its face and are as follows:



- a. The Respondents Bill of Costs has already been taxed, a Certificate of Costs issued in favour of the Respondent.
  - b. The applicant has just come to realize of these developments through a call from a third party informing him of being in possession of warrants of attachment against the Applicant.
  - c. The Applicant was never informed of the outcome of the taxation and neither was he nor Counsel served with the Certificate of Costs over the trial courts matter that had been withdrawn by consent of the parties herein.
  - d. Having perused the court file and obtained the Certificate of Costs, the Applicant herein is dissatisfied with the Taxing Master's decision which was based on an error of principle and the fees taxed awarded is manifestly high.
  - e. The Applicant appreciates that under the law, he has to bring an application challenging a Taxing Officer's decision within 14 days and having not been aware of the same, the 14 days have since lapsed.
  - f. The Applicant has moved under urgency noting that the Respondent might execute against him at anytime; thus making this application and the orders sought necessary.
  - g. The Applicant has moved to this court with a request of not being condemned to pay costs to the Respondent which do not tally or manifest the work that was put in by both the parties during the hearing, noting that this matter never proceeded to hearing or a final determination made.
  - h. The taxing master erred in law in his assessment of the fees thereby arriving at an inordinately high award.
  - i. The Applicant wishes to have a chance in court to challenge the decision of the Taxing Master where even the Taxing Officer failed to consider the submissions filed by the Applicant herein.
  - j. This application has been brought in good faith and in the earliest time that the Applicant became aware of the intended execution.
3. The application is supported by the affidavit of Lynskey Onyango, the Applicant's manager sworn on 16<sup>th</sup> December, 2024. The affidavit serves to expound on the above grounds.
  4. The application is opposed by the Respondents, who to that end grounds of opposition and a notice of preliminary objection, both dated 31<sup>st</sup> December, 2024.
  5. The Respondent's notice of preliminary objection raises the following issues:
    - a. That the application is fatally and incurably defective and the prayers sought cannot be legally obtained for the reason that the Magistrate was not sitting in the capacity of a Taxing Master so as to allow the Applicant to approach this court by way of a reference but instead the Magistrate assessed the bill of costs in proceedings before the trial court.
    - b. That the bill of costs in question was before a Magistrate's court in the proceedings before the said court and if the Applicant was aggrieved, it could only come to this court by way of an appeal and not by reference as purportedly sought in the application.
    - c. That the court has no jurisdiction to entertain a reference against an assessment of costs before a Magistrate's court (which is not a Taxing Master) since references against taxation of costs only lies in proceedings originating from the High Court.



- d. That in view of a, b, c above, the provisions in which the application has been brought under are inapplicable and hence the application is incompetent.
6. The parties agreed that the preliminary objection proceeds afore the application and I directed that the same be orally canvassed.
7. The first point that Mr. Ngeywo, learned counsel for the Respondent proffered, in his submissions in support of the preliminary objection, is that as the bill of costs dated 11<sup>th</sup> September, 2024 was assessed by the lower court, rather than taxed, a party dissatisfied with the outcome thereof can only challenge the same through an appeal and not by way of a reference.
8. Counsel relied on the authorities of *Waweru & Co. Advocates v National Bank of Kenya Limited* [2009] eKLR in which the court distinguished between assessment of costs and taxation and held that a magistrate who assesses costs is not a Taxing Master and *Kenya Power & Lighting Co. Limited v Chris Mabinda t/a Nyeri Trade Center* [2018] eKLR.
9. Counsel submitted that as consequence of the above, this court lacks jurisdiction to entertain the application as the Applicant ought to have challenged the award of costs, that was done by way of assessment, through an appeal.
10. The second point that Mr. Ngeywo put forth on the preliminary objection is that there has been unexplained delay by the Applicant to bring the application.
11. In his response, Mr. Ondego, learned counsel for the Applicant submitted that the preliminary objection as presented by the Applicant does not meet the threshold of what should amount to a preliminary objection as the same is not premised on pure points of law.
12. Counsel for the Applicant further urged that the proper manner of challenging a determination on costs was through a reference and not an appeal and that as such, the application by summons in chambers dated 16<sup>th</sup> December, 2024 was properly before this court and that this court is well seized with the requisite jurisdiction to determine the summons.
13. I have perused and considered the preliminary objection, the record in its entirety and the rival submissions. The following issues are presented for determination on the preliminary objection:
- a. Whether the notice of preliminary objection raises pure points of law that if allowed, can dispose of the application dated 16<sup>th</sup> December, 2024.
  - b. Whether the Applicant has properly moved this court.
  - c. Whether this court has jurisdiction to hear and determine the application dated 16<sup>th</sup> December, 2024.
14. I will proceed to address and determine the above issues seriatim.
15. The first point for me to determine is whether the notice of preliminary objection raises pure points of law that if allowed, can dispose of the appeal.
16. What constitutes a preliminary objection was addressed in the celebrated case of *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] EA 696 in which Sir Newbold observed as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are



correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

17. In the same case, Law JA held as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

18. Thus then, for a preliminary objection to succeed, the following tests ought to be satisfied;

- a. It should raise a pure point of law.
- b. It is argued on the assumption that all the facts pleaded by the other side are correct.
- c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
- d. A valid preliminary objection should, if successful, dispose of the suit or application.

19. The Respondent has raised a two-pronged objection claiming that:

- a. The Applicant delayed in filing the chamber summons and that the delay remains unexplained.
- b. The Applicant ought to have preferred an appeal, rather than a reference, as the costs that the Applicant challenges were not taxed by a Taxing Master but assessed by a Magistrate.

20. The first aspect is one that would, without a doubt, require the court to delve into evidentiary material to determine if there are sufficient reasons presented by the Applicant explaining the delay in filing of the application. The point is therefore not one that is purely based on law and does not therefore satisfy the test set in *Mukisa Biscuits*.

21. The second aspect – that the Applicant ought to have filed an appeal and not a reference – is in my view a pure point of law. It is an issue that is ascertainable from the record and the court does not require to look further into evidentiary material to determine or ascertain the same.

22. Notable too is the fact that should this court reach the determination, on the basis of the arguments presented by the parties, that the application is not competent (as urged by the Respondent), then the preliminary objection will have the effect of disposing of the instant matter. I am thus satisfied that the second issue as presented by the Respondent. satisfies the test in *Mukisa Biscuits*.

23. The second issue for me to determine is whether the Applicant has properly moved this court. The answer to this issue is, happily, to be found in the authority of *Benard Gichobi Njira v Kanini Njira Kathendu & another* [2025] eKLR in which this court (Limo J) held as follows on the issue of whether an Applicant, where a Magistrate has assessed costs was correct to prefer a reference rather than an appeal:

“In the first place the Applicant submitted that the learned trial magistrate was not a taxing officer under paragraph 10 of the Advocates Remuneration Order and if that was the case then it would then follow that paragraph 11 (2) thereof would not be invoked as there would be no basis to entertain the same as a ‘reference’ properly so called. Be that as it may I have considered the reference filed and looking at the wording of the main prayer under prayer 4 of the application, it is understandable why the Respondents have termed it as a disguised appeal. The decision by the learned trial magistrate that he had jurisdiction to determine the



issue of costs dissatisfied the Applicant and being aggrieved I do agree with the Respondents that the available remedy was to appeal against the ruling.”

24. I take a similar persuasion that where a Magistrate assesses costs, the remedy than an aggrieved party has is an appeal. On the other hand, where a Taxing Officer taxes costs, the remedy to a dissatisfied party is a reference. It is to be recalled that while a Magistrate sits in the lower court when conducting an assessment of costs, a Taxing Officer sits in the High Court, in his/her ministerial and administrative capacity. Thus then, the former’s decision is challenged on appeal and the latter’s through a reference. It then follows that the Applicant has not properly moved this court.
25. The third issue for me to determine, is whether this court has jurisdiction to hear and determine the application dated 16<sup>th</sup> December, 2024. On this, I do not find it difficult to reach the finding, following my resolution of the second issue that this court has not been properly moved, that I do not have jurisdiction to entertain and determine the Applicant’s chamber summons, as the requisite jurisdiction can only be invoked by way of an appeal.
26. Being of the foregoing findings, I reach the result that the application dated 16<sup>th</sup> December, 2024 is incompetent. I proceed to strike it out.
27. Section 27 of the *Civil Procedure Act* dictates that costs ought to follow the event. Accordingly, the Applicant shall bear the Respondent’s costs, which I assess at Ksh.6,000/-.
28. This file is hereby closed.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 24<sup>TH</sup> DAY OF JULY, 2025.**

**JOE M. OMIDO.**

**JUDGE**

For Applicant: Ms. Elly for Mr. Ogaro.

For Respondent: Mr. Songole.

Court Assistants: Mr. Ngoge & Mr. Juma.

