Chabari v Kirai & another (Environment and Land Case 51 of 2017) [2025] KEELC 7041 (KLR) (16 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7041 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CASE 51 OF 2017

JO MBOYA, J

OCTOBER 16, 2025

BETWEEN

FRANCIS KIUNGA CHABARI .... PLAINTIFF

AND

FELIX MURITHI KIRAI .... 1ST DEFENDANT

GT BANK LIMITED (FORMERLY KNOWN AS FINA BANK) .... 2ND DEFENDANT

RULING

1. Before me is the Chamber Summons application [reference] dated the 13th August 2025; brought pursuant to the provisions of Rule 11 (2) of the Advocates Remuneration Order; and wherein the applicant has sought the following reliefs:

    i. That this application be certified as urgent

    ii. That this Honourable court be pleased to set aside, vary or otherwise review the decision of the Deputy Registrar, Hon. E. Ndegwa [SRM], delivered on 17th July 2025; in respect of the plaintiff's party and Party Bill of costs dated 25th March 2024, specifically on item 1, item 2, item 11, items 17, 19, 21 and items 25-59.

    iii. That upon setting aside the decision this honourable court does remit the bill for fresh taxation before a different taxing officer.

2. The subject reference is premised on the grounds which have been highlighted in the body thereof. Furthermore, the reference is supported by the affidavit of Wandia Mugo [learned counsel for the applicant] sworn on 13th August 2025; and to which the deponent has annexed three [3] sets of documents including copy of the ruling on taxation; copy of the notice of objection to taxation; and

copy of an email correspondence from the deputy registrar/taxing officer dated 13th August 2025, respectively.

3. The Second respondent has opposed the subject application vide a replying affidavit sworn by Kristie Mandy A. Mukobi sworn on 10th September 2025; and wherein the deponent has contended that the reference was filed out of time without leave of the court. In addition, it has been contended that the bill of costs which was filed by the applicant and which birthed the certificate of taxation was incompetent and thus the subject reference is equally incompetent. Moreover, it has been posited that the reference is supported by the affidavit of learned counsel and not the client; and to this end, the affidavit is contended to be incompetent.

4. The reference came up for hearing on 7th August 2025, where upon the advocates for the parties covenanted to canvass the reference by way of written submissions. To this end, the court proceeded to and issued directions, including circumscribing timelines for the filing and exchange of the written submissions.

5. The applicant herein filed written submissions dated 17th September 2025; and wherein the applicant has highlighted three [3] key issues, namely; whether the reference was filed within the requisite time frame or otherwise; whether the supporting affidavit sworn by counsel for the applicant is competent; and whether the applicant has met the threshold to warrant review of the decision of the taxing officer, rendered on 17th July 2025 or otherwise.

6. Regarding the first issue, learned counsel for the applicant has submitted that the ruling on taxation, which is sought to be impeached, was delivered on 17th July 2025. Moreover, it has been submitted that following the delivery of the ruling, the applicant lodged a notice of objection to taxation vide letter dated 29th July 2025. For good measure, it has been submitted that the notice of objection to taxation was filed within the statutory 14 days in accordance with the provisions of rule 11 (1) of the Advocates Remuneration Order.

7. Additionally, it has been submitted that pursuant to the lodgment of the notice of objection to taxation, the deputy registrar/taxing officer responded thereto vide email dated 13th August 2025; and wherein the taxing officer informed the applicant to proceed to the correct forum. The counsel for the applicant has submitted that thereafter, same proceeded to and filed the reference. In particular, it has been contended that the reference was filed timeously and in accordance with the provisions of rule 11 (2) of the Advocates Remuneration Order.

8. Secondly, learned counsel for the applicant has submitted that the supporting affidavit sworn by counsel is competent and lawful. In particular, it has been submitted that the issues averred to and deponed vide the supporting affidavit are issues which are within the knowledge of the deponent. To this end, it has been contended that an advocate is authorized under the law to swear an affidavit in a matter wherein same is acting on behalf of a party provided that the facts/issues deponed to are within his knowledge.

9. To buttress the foregoing submissions, learned counsel for the applicant has cited and referenced inter alia the holding in Uhuru Highway development Ltd vs Central Bank (K) (2002) 1 E.A 485, Mavoko Land Development Co. Ltd vs Damaris Kavale Mutua (2018) eKLR and Kibe & 5 others vs Attorney General & 2 others (2022) KEHC, respectively.

10. Turning to the third issue, learned counsel for the applicant has submitted that the learned taxing officer improperly and injudiciously exercised her discretion in taxing the party and party bill of costs dated 25th March 2024. Furthermore, it has been posited that the award of Kshs.14,350/=only as costs to the applicant was erroneous and thus constitutes an error of principle.

11. In addition, learned counsel for the applicant has also submitted that the learned taxing officer failed to tax various items, including instruction fees, yet evidence abound that the subject matter was prosecuted by a duly retained and instructed counsel. Moreover, it has been contended that in denying and depriving the applicant of instruction fees, the learned taxing officer failed to appreciate the guiding principles pertaining to taxation of costs.

12. On the other hand, it has been submitted that by failing to tax the items which had no dates shown on the face of the bill of costs, the learned taxing officer elevated procedural technicalities in such a manner as to defeat substantive justice and the interests of the applicant. In short, learned counsel for the applicant has submitted that the applicant has met the threshold to warrant variation and or review of the certificate of taxation.

13. In support of the submissions that the applicant has established the requisite basis to warrant review of the certificate of taxation, learned counsel for the applicant has cited and referenced the decision in KTK Advocates vs Baringo County Government (2017) eKLR, wherein the court addressed the principles applicable in setting aside the certificate of taxation.

14. The second [2nd] respondent filed written submissions dated the 19th September 2025; and wherein same has adopted and relied on the replying affidavit sworn on 10th September 2025. Furthermore, learned counsel for the 2nd respondent has highlighted seven [7] key issues for consideration and determination by the court.

15. Firstly, learned counsel for the 2nd respondent has submitted that the ruling on taxation which was delivered by the learned taxing officer, contained reasons for the taxation. In particular, it has been submitted that the learned taxing officer indeed adverted to the fact that the reasons were contained in the body of the ruling.

16. To the extent that the reasons for the taxation were contained in the body of the ruling, it has been contended that the applicant herein ought to have proceeded to and filed the reference within 14 days from the date of the delivery/rendition of the ruling. For good measure, it has been submitted that the reference ought to have been filed within 14 days from 17th July 2025 [same being the date of the ruling].

17. Be that as it may, it has been submitted that the subject reference was not filed until 13th August 2025; and hence same was filed out of time without leave of the court. In this regard, it has been posited that the reference is incompetent and legally untenable.

18. In support of the foregoing submissions, learned counsel for the 2nd respondent has cited and referenced the holding in the case of Ahmed Nassir ABdikadir & Co. Advocates vs National Bank of Kenya Ltd (2006) 1 E.A; Friends Church (Quackers) Nairobi yearly meeting vs Onsongo & Co. Advocates (2021) KEHC 7484, respectively.

19. Secondly, learned counsel for the 2nd respondent has also submitted that the bill of costs which was filed by the applicant and which underpins the current reference failed to indicate the applicable schedule of the advocates remuneration order which was being invoked. In the absence of the applicable schedule of the Advocates Remuneration Order which was being invoked, it has been contended that the said bill of costs was incompetent. In addition, it has been submitted that the incompetence/defect attaching to the bill of costs permeates the subject reference. Simply put it has been contended that the reference is equally incompetent.

20. Next is the question that the party and party bill of costs which was filed was wrought with fundamental errors. In particular, it has been posited that the applicant conflated the principles

underpinning/governing party and party costs; and advocate-client costs. In this regard, it has been submitted that the bill of costs was therefore misconceived.

21. Turning to the fourth issue, learned counsel for the 2nd respondent has submitted that the learned taxing officer correctly declined to award instruction fees because what was being sought was more or less advocate's instruction fees which is not applicable in party and party costs.

22. The fifth issue, which has been canvassed by learned counsel for the 2nd respondent is to the effect that the various items, namely; items 1, 2, 11, 17, 19; and 25 – 59 which were taxed off were not properly charged. Moreover, it has been submitted that the applicant failed to indicate the dates when the services under reference were rendered. To this end, learned counsel has invoked and cited the provisions of rule 69 of the advocates remuneration order.

23. Additionally, learned counsel has cited and referenced the decision in the case of J.B Shilenje & Co. Advocates vs Kenindia Assurance Co. Ltd (2021) eKLR and Ouma vs Warega (1982) eKLR, respectively.

24. Finally, learned counsel for the 2nd respondent has submitted that the reference beforehand is incompetent for being supported by the affidavit sworn by learned counsel for the applicant, as opposed to the client. In particular, it has been contended that an advocate is not authorized to swear an affidavit on contentious, factual, or evidential matters. Furthermore, it has been submitted that the facts underpinning the reference ought to have been deponed to by the client and not the advocate.

25. Flowing from the foregoing, learned counsel for the 2nd respondent has submitted that the reference beforehand is not only premature and misconceived, but same is equally untenable. To this end, the court has been invited to find and hold that the reference is devoid of merits and thus same ought to be dismissed.

26. Having reviewed the chamber summons application [reference]; the supporting affidavit thereto, the notice of objection to taxation; the response by the 2nd respondent; and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject application turns on three key issues; namely; whether the reference was filed out of time and without leave or otherwise; whether the reference is incompetent for being supported by an affidavit sworn by counsel; and whether the applicant has established errors of principles which vitiates the certificate of taxation or otherwise.

27. Regarding the first issue, it is imperative to recall that learned counsel for the 2nd respondent has posited that the reference has been filed outside the statutory period without leave of the court. According to learned counsel for the 2nd respondent, the ruling on taxation, which was delivered on the 17th July 2025, contained the reasons for taxation. Moreover, it has been posited that the taxing officer also indicated that the reasons underpinning the taxation were contained in the body of the ruling.

28. Learned counsel for the 2nd respondent has therefore submitted that in so far as the reason[s] for the taxation were/are captured in the body of the ruling, it behooves the applicant to file the reference within 14 days from the delivery of the impugned ruling. To this end, learned counsel has cited and referenced the decision in Ahmed Nassir Abdikadir & Co. Advocates vs National Bank of Kenya (2006) 1 E.A and Friends Church (Quakers) Nairobi Yearly Meeting vs Onsongo & Co. Advocates (2021) KEHC 7484, respectively.

29. I beg to highlight that the law governing the filing/lodgment of a reference against a certificate of taxation is captured vide rule 11 of the Advocates Remuneration Order. The terms of the said rule are apt, succinct and devoid of ambiguity. Suffice it to posit that Rule 11 (1) of the Advocates'

Remuneration Order stipulates that any person aggrieved by the certificate of taxation is obliged to issue a notice of objection to taxation, highlighting the items of taxation sought to be impugned. Instructively, the notice of objection to taxation is to be lodged within 14 days from the date of delivery of the ruling of the taxing officer.

30. Furthermore, the provisions under reference are explicit to the effect that upon issuance of the notice of objection, it behooves the taxing officer to issue reasons for the taxation. For good measure, the reasons for taxation may well be contained in the ruling on taxation. However, the computation of time for purposes of filing the reference is hinged on the response from the taxing officer, either by the giving of the reason[s]; or intimating that the reason[s] are contained in the body of the Ruling on taxation.

31. I hasten to state that the reasons may very well be in the ruling on taxation, but the wording of Rule 11 (2) of the Advocates Remuneration Order are such that time for lodging the reference is dependent on the response from the taxing officer, either by supplying the reasons for taxation [if same] are not contained in the body of the ruling; or by intimating vide letter that the reasons are as per the contents of the ruling.

32. I know that the current practice is to the effect that the taxing officers render reasoned rulings on taxations. To this end, there is no gainsaying that the reasons underpinning the taxation are contained in the ruling. However, the clear provisions of the law must be upheld until such time that same are reviewed, varied and or revised. Pertinently, the computation of time for purposes of filing the reference is dependent of the reaction from the taxing officer one way; or the other. The response hold[s] the key to the filing of the reference.

33. At this juncture, it is instructive to highlight the provisions under reference. Same are reproduced as hereunder;

    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. [Emphasis Supplied].

    3. Any person aggrieved by the decision of the Judge upon any objection referred to such Judge under subparagraph (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."

34. With the contents of Rule 11 (2) in mind, it is my finding and holding that the applicant herein was obliged to file the reference within 14 days from the date of receipt of the email communication from the deputy registrar. For coherence, the 14-day duration is reckoned from 13th August 2025; and not otherwise.

35. In view of the clear and unequivocal provisions of Rule 11 (2) of the Advocates' Remuneration Order, I do not agree with the submissions by learned counsel for the 2nd respondent to the effect that the

reference ought to have been lodged within 14 days from the date of delivery of the impugned ruling. To my mind, the submission by learned counsel for the 2nd respondent is contra the clear provisions of the law. Moreover, I beg to state that where there is a contradiction between a decision of a court of concurrent jurisdiction; and the letter of the law, the latter prevails. Suffice it to state that decision[s] of Courts cannot supersede the clear Letter of the Law, unless the said provision[s] are declared unconstitutional in the conventional manner.

36. Additionally, I beg to state that the decision in the case of Ahmednassir Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2006) 1 E.A, which was referenced by the 2nd respondent, does not support the position that the reference must be lodged within 14 days of the delivery of the impugned ruling on taxation. On the contrary, the dictum in the said decision posits that it would be unnecessary to insist on further reasons. However, the common denominator is that rule 11 (2) of the Advocates Remuneration Order holds way.

37. To this end, my answer to issue number 1 is to the effect that the reference was timeously filed in accordance with the prescription of the law. In this regard, and for the reason[s] given; I overrule the objection pertaining to the competence of the reference.

38. Turning to the second issue, namely; whether the affidavit in support of the reference is incompetent in so far as same was sworn by learned counsel for the applicant and not the client, I beg to state that an advocate who is retained in a particular matter is authorized and mandated to swear an affidavit in respect of such a matter. However, it is imperative to underscore that such affidavits must relate to issues and matters which are within the knowledge of the said advocate. For good measure, the issues must not be contentious factual/evidential matters.

39. The legal position under reference has been the subject of various court pronouncement[s]. It suffices to cite and reference the decision of the Supreme court [the apex Court] in the case of Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment) where the apex court stated thus;

> This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to.
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> 137. In stating so, we echo the words of Ringera, J in Kisya Investment Limited & others v Kenya Finance Corporation Ltd HCCC No 3504 of 1993 (Unreported) that:
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> "It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso (to) order XVIII rule 3 (1) (now order 19 rule 3 of the Civil Procedure Rules failing to disclose who the sources of his information are and the grounds of his belief."

40. I beg to repeat that what is prohibited by the law is where an advocate usurps the mandate of the client and depones to contentious evidential matters. Such depositions fall outside the knowledge of the advocate. However, the bar and or prohibition does not restrict depositions that are either borne out of the record of the court and which are common ground.

41. In respect of the instant matter, learned counsel for the 2nd respondent has not highlighted any contentious evidential/factual matter which has been deponed to by learned counsel for the applicant. On the contrary, the contents of the affidavit relate to issues that are borne out of the record of the court. In addition, the issues touch on and concern what the deponent did in the course of the proceedings, including lodgment of the notice of objection to taxation.

42. I am afraid that the contention by and on behalf of learned counsel for the 2nd respondent that the affidavit in support of the reference is incompetent is born out of misreading; misapprehension; and misapplication of the ratio in the decisions that have been made by the various courts, including the apex court.

43. Turning to the last issue, namely; whether the applicant has demonstrated and established a basis for the variation/review of the decision of the taxing officer, it is important to observe that this court is clothed with the jurisdiction to review and set aside the certificate of taxation. However, the jurisdiction of this court is circumscribed to where the taxing officer took into account factors that ought not to have been taken into account; failed to take into account relevant factors; misapprehended the applicable principles governing taxation; or where the award on taxation is inordinately low or high, so as to reflect an error of principle.

44. In the case of First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] KEHC 1277 (KLR) the court [Ringera J – as he then was] stated thus;

> 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. (See Steel & Petroleum (e.a) Ltd Vs. Uganda Sugar Factory(Supra). Of course. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment. (see Nanyuki Esso Service V Touring Cars Ltd; Steel & Petroleum (e.a.) Ltd V Uganda Sugar Factory; Thomas James Arthur V Nyeri Electricity Undertakers And Joreth V Kigano & Associates). However, the Judge does have jurisdiction and it is within his discretion to reassess the bill himself; (See Steel & Petroleum (e.a.) Ltdand Thomas James Arthur). The court is not entitled to upset a taxation because in its opinion, the amount awarded was high (See Steel Construction & Petroleum Engineering (e.a.) Ltd. The other general principle is that it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and that the amount of the increase or reduction is discretionary. (See Thomas James Arthur V Nyeri Electricity Undertakers). In that respect, I must reject the submission made

on behalf of the third defendant that the taxing officer has no discretion to reduce the basic instruction fees. On the contrary, I accept the submission made on behalf of the plaintiff that such discretion exists and that the only fees which cannot be reduced are those in respect of which it is provided that the amount thereof shall not be less than what is prescribed. An example is schedule VI (1) (g) (i): the instruction fees in matrimonial causes.

45. The applicable principles that underpin the jurisdictional remit of the court while entertaining a reference, were also re-visited and expounded upon by the apex court. In the case of Outa v Odoto & 3 others (Petition 6 of 2014) [2023] KESC 75 (KLR) (22 September 2023) (Ruling), the Supreme court stated as hereunder;

> The principles of setting aside the decision of a Taxing Officer are now old hat, going by the numerous decisions of the superior courts below. As early as 1972 these principles were propounded by Spry VP, in the leading case of Premchand Raichand Limited & Another v. Quarry Services of East Africa Limited and Another; [1972] EA 162, which has been approved in a long line of subsequent rulings, for example, First American Bank of Kenya v. Shah and Others; (2002) EA 64 and Joreth Ltd v. Kigano and Associates (2002); 1 EA 92, to name but two.
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> 11. A certificate of taxation will be set aside and a single Judge can only interfere with the taxing officer's decision on taxation if;
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> a. There is an error of principle committed by the taxing officer;
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> b. The fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy;(and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).
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> c. The court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and
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> d. The award proposed is so far as practicable, consistent with previous awards in similar cases.
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> To these general principles, I may add that;
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> i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances.
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> ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,
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> iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes.

46. Bearing in mind the principles and the guidelines highlighted in the preceding paragraphs, it is now apposite to revisit the subject matter and to discern whether the learned taxing officer correctly exercised her discretion in undertaking the impugned taxation. To start with the learned taxing officer,

did not tax and or award any figures on account of instruction fees, yet the suit beforehand was indeed instituted and prosecuted by an advocate. No doubt the advocate accrued instruction fees.

47. It is common ground that the bill of costs did not advert to the date when the instructions were taken or better still the drawer of the bill of costs did not indicate the date in question in the body of the party and party bill, but such failure which is merely procedural and technical in nature, cannot be deployed to deprive and deny a successful party of instruction fees. Surely, there are procedural and technical lapses which ought not to be elevated to the level of a criminal offense, to warrant punishment of the defaulting party.

48. Additionally, I beg to state that the mere fact that a bill of costs does not contain the date[s] when the services are said to have been rendered does not by and of itself become irredeemably bad. In particular, where the services are traceable and borne by the record of the court, then it behooves the taxing officer in exercise of her discretion to cross-check the record and verify the dates. Notably, the exercise of discretion involves reviewing the record before the Taxing Officer.

49. I am alive to the provisions of Rule 69 of the Advocate Remuneration Order and the obligatory requirement that a bill of costs ought to be drawn in five columns with the 1st column highlighting the date[s] of the services charged. However, I do not apprehend that the failure to provide the dates is so fatal that the items and services rendered must be taxed off. Such kind of an endeavor would be drastic and may very well drive away a successful litigant from the seat of justice.

50. In the case of Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others (Petition 1 of 2015) [2016] KESC 2 (KLR) (Election Petitions) (26 April 2016) (Judgment), the Supreme Court of the Republic of Kenya engaged itself with instances of breach and non-compliance with procedural rules.

51. For coherence, the apex court stated thus;

> This court has on a number of occasions remarked upon the importance of rules of procedure in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice.
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> Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.
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> 66. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure could undermine the cause of justice. Hence the pertinence of article 159 (2) (d) of *the Constitution*, which proclaims that, "... courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention, and inevitably, a significant scope for discretion devolves to the courts.
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> 67. As an instance, there are times when the disregard of Rule 33 of the Supreme Court Rules clearly undermines the Court's ability to deliver justice to all the parties in a dispute. (This is concerned with the mode of instituting appeals). In such a situation, the shield of article 159 (2) (d) will not be deployed by the Court in aid of the offending litigant. Such is, however, not the case in the instant appeal. Notwithstanding the failure to adhere to all the requirements of

the Rule at the initial stages, by the appellants herein, their subsequent actions did ensure that the court was not without all the requisite documentation, for undertaking a consideration of the matter.

68. We are therefore not inclined to invalidate the appeal on the ground only that it does not stand on all fours with Rule 33 of this Court's Rules. An invalidation, indeed, would deprive the court of an opportunity to pronounce itself on substantial questions of law raised by the submissions of counsel for all the parties.

52. In my humble view, the failure by the applicant to capture the dates when the services were rendered was and is a procedural defect. Such a defect is curable either by way of the taxing officer ordering the applicant to file an amended and compliant bill of costs; or by invocation and application of the provisions of Article 159 (2d) of *the Constitution*, as well as the overriding objectives of the court.

53. To my mind, such a procedural lapse should not deny a successful litigant the right of indemnity on the basis of costs. If such kind of scenario were to hold sway, then there is a likelihood of new recruits shunning the legal profession. I am afraid that the import and tenor of the ruling on taxation which is sought to be impugned is contrary to the spirit of the decision [dicta] in the case of Premchand Raichand Limited & Another v. Quarry Services of East Africa Limited and Another; [1972] EA 162.

54. Before concluding on this matter, I beg to observe that the award of Kshs.14,350/= only as costs in favour of the successful party in a matter that was prosecuted before the Environment and Land Court is a serious error. Such an award is manifestly and inordinately low. It constitutes an error of principle.

55. In the circumstances, and taking into account the reasons that I have highlighted in the body of the Ruling; I come to the inescapable/ inevitable conclusion that the application beforehand is meritorious. Certainly, there is need to set aside the impugned certificate of taxation and to decree fresh taxation relative to the items highlighted at the foot of the notice of objection to taxation dated 29th July 2025.

56. Finally, and for the sake of completeness, I beg to state that I respectfully do not share the sentiments expressed in the decision in the case of JB Shilenje & Co. Advocates vs Kenindia Assurance Co. Ltd (2021) eKLR, where the learned judge posited that the failure to capture the date[s] when the services were rendered renders the bill of costs in question fatally deficient and invalid.

57. In my humble view, there is need to draw a dichotomy between where the word 'shall' is directory; and when same is mandatory in nature. Moreover, there is need to strike a balance between procedural technicalities and substantive justice; and when there is a conflict, the latter should forever hold sway unless the procedural defect complained of goes to the root of the substance.

58. This, to my mind, is the position discernible from the holding of the apex court in the case of Moses Mwicigi [supra].

Final Disposition.

59. For the reasons that have been highlighted in the body of the ruling, it must have become crystal clear that the reference is well grounded. Moreover, the certificate of taxation and the ruling underpinning same are fraught with various mis-directions and errors of principle.

60. Same thus lends itself to variation and setting aside.

61. In the upshot, the final orders that commend themselves unto the court are as hereunder;

i. The Chamber Summons Application dated 13th August 2025; be and is hereby allowed

ii. The certificate of taxation issued on 17th July 2025 and the attendant ruling be and are hereby set aside.

iii. The Applicant's party and party bill of costs shall be remitted to the deputy registrar/taxing officer for fresh taxation, bearing in mind that the non-inclusion of the dates when the services were rendered is a procedural technicality and thus remediable vide amendment.

iv. The taxation shall be undertaken on priority; and on the basis of the established principles of taxation.

v. Each party shall bear own costs of the reference.

62. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF OCTOBER 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant

Mr. Gichunge for the Applicant.

Mr. Juma for the 2nd Respondent.

No appearance for the 1st Respondent.