



# THE JUDICIARY



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT AND LAND COURT AT NAROK**

#### **ELCLMISC NO. E001 OF 2025**

**KANTET OLE KARIANKEI .....APPLICANT**

**VERSUS**

**MARTINE OLE NKOITIKO.....**

**RESPONDENT**

### **RULING**

1. The matter for determination is the ***Chamber Summons Application*** dated ***10<sup>th</sup> January 2025***, by the Applicant herein, ***Kantet Ole Karianki***, brought under ***Rule 11(2) of the Advocates (Remuneration) Order 1962***. The applicant has sought for the following orders;

***a. There be a stay of execution of the decision of the Taxing Master made on 18th December 2024, and all consequential orders and/or certificate of taxation due to the Respondent from the Plaintiff for Ksh.1,908,588/33 pending hearing and determination of the application.***

***b. That the decision of the taxing master delivered on 18<sup>th</sup> December 2024, in so far as the same relates to the reasoning and determination***

***pertaining to the taxation of the bill of costs dated 29th January 2024, be set aside, removed, quashed, or vacated by way of reference and all the consequential orders be set aside.***

***c. That upon setting aside the said decision and certificate of costs, the court do order that the Respondent's entire bill of costs be taxed afresh.***

***d. The Applicant also prays for costs of the application.***

2. The Application is premised on the various grounds set out on the face of the Application, and on the Supporting Affidavit of ***Kantet Ole Kariankei***, sworn on even date
3. The Applicant contends that the entire amount allowed of ***Kshs. 1,908,588/33*** is manifestly ***excessive, unjustifiable***, and amounts to an ***improper exercise of discretion***. Further, that the Taxing Officer erred in principle and in law by assessing fees without proper basis, and that the award is so high as to confine access to justice only to the wealthy. The Applicant faults the decision as not being grounded on evidence or receipts supporting the disbursements claimed.
4. Further, the Applicant outlines specific errors of principle committed by the Taxing Officer, including: arbitrarily assessing instruction fees without justification; failing to correctly determine the value of the subject matter from the pleadings, which stood at ***Kshs. 850,000/=***; wrongly applying a higher rate and lumping unrelated items (3 to 26) together ("drawn to

scale”); and improperly awarding getting up for trial fees at **Kshs.333,333/33**, which items was neither applicable nor prayed for. The Taxing Officer is also accused of failing to consider the Applicant’s written submissions thus amounting to miscarriage of justice and of allowing value-added tax (VAT) for party and party bill of costs.

5. The Applicant maintains that these errors resulted in an excessive and erroneous taxation, warranting this Court’s intervention to set aside the decision and have the Bill of Costs taxed afresh.
6. In his **Supporting Affidavit, Kantet Ole Kariankei**, the Applicant herein states that this taxation reference arises from the decision of the **Taxing Officer in Narok ELCA E009 of 2022 - Kantet Ole Kariankei v. Martine Ole Nkotikio**, delivered by **Hon. Ngayo, RM** on **18th December 2024**. He annexed copies of the said ruling and the Respondent’s bill of costs as annexures **KOK1** and **KOK2**, respectively.
7. The Applicant deposes that he is aggrieved by the said ruling on the ground that the Taxing Master taxed the Respondent’s bill of costs without due regard to established principles of taxation or to his written submissions (annexed as **KOK3**). He also averred that failure to adhere to taxation principles and failure to consider his submissions led to an **excessive award** that resulted in a **miscarriage of justice**.

8. It is his contention that the awarded amount of **Kshs. 1,908,588.58** is **without proper basis, manifestly excessive**, and **hinders access to justice**. The Applicant maintains that although the Taxing Master indicated in his ruling that he had reviewed the pleadings and submissions, he failed to consider the **subject matter value of Kshs. 850,000/=**, which was clearly stated in the Defence.
  
9. **Kanet Ole Kariaikey** further challenges the award of instruction fees amounting to **Kshs. 1,000,000/=**, to the Respondent, arguing that the amount is excessive and unjustified since the subject matter of the suit was valued at **Kshs. 850,000/=**. He contends that the award was not only made without proper basis, but is also grossly unfair and manifestly excessive. The deponent further averred that the Respondent's advocate did not possess a valid practicing certificate for the year 2024, rendering him an unqualified person in law and therefore not entitled to claim or receive legal fees.
  
10. The deponent disputed the inclusion of VAT on Party and Party costs, describing it as improper and contrary to established judicial precedents. Consequently, he prays that the taxation exercise be **reconsidered and remitted** to the taxing master for review, arguing that his application is merited and should be allowed as prayed.

11. The Chamber Summons is opposed by the Respondent. Through the Law Firm of **Tuya Kariuki & Co Advocates**, the Respondent filed a **Notice of Preliminary Objection** dated **24th January 2025**. He averred that the said application is incurably defective, improper, unprocedural, and an abuse of the court process. Further, that the application offends the mandatory provisions of **Paragraph 11 of the Advocates Remuneration Order**. The Respondent urged the court to allow his PO, and the costs of the Preliminary Objection be borne by the Applicant herein
  
12. The Respondent, **Martine Ole Nkoitiko**, swore a Replying Affidavit opposing the Applicant's **Chamber Summons Application**, and averred that the instant Application is **misconceived, bad in law**, and intended to deny him fair justice. He contended that the Ruling on his Bill of Costs was delivered on **18th December 2024**, and since the Reference was filed on **10th January 2025**, it was filed out of time. Further, the Applicant failed to object to the taxation before filing the Reference, contrary to **Rule 11 of the Advocates Remuneration Order**, and did not seek leave of the court to file the objection or reference out of time.
  
13. The Respondent further contended that the application is an abuse of the court process, as the impugned **taxation ruling** was not properly placed before the court for efficient determination of the Reference. He maintained that the taxing master reasonably exercised discretion in assessing the bill of

costs, and that the Applicant has not demonstrated any real threat of execution to warrant a stay.

14. The Respondent further deposed that the Judgment in **ELCA E009 of 2022**, did not address the value of the subject matter, and that the taxing master correctly assessed the instruction fees since the value was **unascertainable**—no valuation report or indication in the pleadings was provided. He also contended that the purchase price for the **85 acres** in question was **Kshs. 850,000/=, as of 3rd May 2004**, and the value had since appreciated, justifying the instruction fees awarded.
15. The Respondent asserted that the taxing master adhered to established taxation principles, and the taxed costs relate to services rendered at the **appeal stage**. It was his contention that consolidation **of items 3 to 26** in the Bill of costs was proper, and if the Applicant required further clarification, it should have been sought from the taxing master. He also averred that the **getting up fees** awarded were commensurate to the diligence required, and that **VAT** was lawfully allowed as a proper disbursement for taxable legal services.
16. The Respondent argued that the taxing officer considered all written submissions and authorities filed by both parties, and that the taxed costs are payable to him, not his advocates. He contested the Applicant's claim that fees were awarded to an unqualified person, asserting that his **Advocates** were duly licensed, and in good standing to practice law. He further

contends that the Applicant failed to demonstrate how the taxed amount is **manifestly excessive** or to satisfy the legal grounds for setting aside the taxing master's ruling.

17. In conclusion, the Respondent contended that the application is **without merit, time-barred, and an abuse of the court process**, and therefore prays that it be **dismissed**.
18. The Applicant, **Kantet Ole Kariankei**, swore a **Further Affidavit** in support of his **Chamber Summons Application dated 10th January 2025**. He averred that the said Affidavit is made to further support his application and to respond to issues raised in the Respondent's Replying Affidavit sworn on **19<sup>th</sup> May 2025**.
19. The Applicant avers that the application is proper, well-founded in law, and properly before the court. In response to paragraph 5 of the Replying Affidavit, the Applicant averred that the impugned decision by the taxing master was duly annexed to his pleadings, filed in court, and served upon the Respondent.
20. The Applicant further deposed that unless the court grants the reliefs sought, he stands to suffer grave hardship, will be subjected to penury and rendered destitute due to an unjust taxation carried out without due regard to established taxation principles. He contended that the **instruction fees** were not properly assessed, arguing that the **value of the subject matter** was readily discernible from the pleadings and clearly referred to in the judgment.

21. In response to the Respondent's averments on VAT, the Applicant averred that on the advice of his advocates, that **Value Added Tax (VAT)** on party-and-party costs is not applicable and is unsupported by law.
22. Further, the Applicant raised the issue of the Respondent's advocate's qualification, asserting that **Mr. Tuya**, the Respondent's advocate, **did not possess a valid practicing certificate** at the time he prosecuted the Appeal and the Bill of Costs. He annexed a printout from the **Law Society of Kenya (LSK) Advocates Portal**, marked **Exhibit KOK-01**, showing that the said advocate only applied for a **practicing certificate** after the Applicant's counsel raised the issue during the taxation proceedings.
23. He further annexes a **current printout from the LSK portal**, marked **Exhibit KOK-02**, confirming that the advocate had not attained a practicing certificate for the **year 2023**, and therefore could not have been qualified to practice or claim legal fees during that period. That failure to hold a valid practicing certificate rendered the said advocate **an unqualified person**, not entitled to recover legal fees.
24. The Application was canvassed through written submissions. The Law Firm of **Okinyi Law Advocates**, filed written submissions in support of the **Chamber Summons Application dated 10th January 2025**, challenging the

***Taxing Master's Ruling delivered on 18th December 2024 in NRK ELCA E009 of 2022.***

25. It was the Applicant's submissions that his application was filed within time because, under ***Order 50 Rule 4 of the Civil Procedure Rules 2010***, time does not run between ***21st December 2024 and 13th January 2025***. As the impugned ruling was delivered on ***18th December 2024***, and the application filed on ***13<sup>th</sup> January 2025***, it was filed within the statutory period.
26. The Applicant relied on the ***Court of Appeal decision in Keziah Stella Pyman & 2 others v Paul Mwololo Mutevu & 8 others [2013] KECA 186 (KLR)***, which affirmed that the holiday period under ***Order 50 Rule 4 of CPR*** should be excluded in computing time. He urged the court to focus on substantive justice rather than technicalities.
27. Further, the Applicant submits that it is ***not mandatory*** to seek reasons from the ***taxing officer*** before filing a Reference where those reasons are already contained in the ruling itself. He relies on ***Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Ltd [2012] KEHC 4274 (KLR)***, where the court held that Paragraph 11(1) of the Remuneration Order should not be applied mechanically when reasons are evident in the ruling.
28. The Applicant challenges the taxation on the following grounds:

1. The amount of **Kshs. 1,908,588/33** allowed was **manifestly excessive** and unjustified.
  2. The taxing officer **erred in principle** and exercised discretion improperly.
  3. The taxing officer allowed **disbursements without receipts or supporting evidence**.
  4. The taxing officer **arbitrarily assessed instruction fees** at **Kshs. 1,000,000/=** without basis.
  5. The **value of the subject matter (Kshs. 850,000)** was clear from the pleadings and judgment, yet the Taxing Officer wrongly applied a higher figure.
  6. Items **3 to 26** were wrongly **lumped together** and taxed as “drawn to scale.”
  7. **Getting up fees** were improperly awarded at **Kshs. 333,333.33/=**, though the matter was an appeal, not a trial.
  8. **VAT** was wrongly imposed on a **party-and-party bill of costs**.
  9. Legal fees were **wrongly allowed to an unqualified advocate** lacking a valid practicing certificate.
29. The Applicant further submitted that the **party-and-party costs** should have been pegged on the **subject matter value of Kshs. 850,000/=**, as admitted by the Respondent and reflected in the **ELCA Judgment**. The Taxing Master, in awarding **Kshs. 1,000,000/= as instruction fees**, departed from this value without justification. The Applicant also submitted that this assessment was excessive and contrary to

the principle that “**party and party costs** are not intended to be punitive.”

30. He urged the court to **set aside the Kshs. 1,000,000/= award** and substitute it with **Kshs. 75,000/=**, under **Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014**, applicable to a subject matter value of **Kshs. 850,000/=**.
31. The Applicant also argued that getting up fees **Kshs. 333,333.33** were **erroneously awarded**, as they are not applicable to appeals unless the **Appellate Judge certifies** that the matter was of exceptional difficulty. No such certification was made in **ELCA E009 of 2022**. Reliance is placed on **Narok County Government v Kemboy Law Advocates (Misc. Application E010 of 2023) [2024] KEELC 4497 (KLR)**, where the court held that getting up fees may only be awarded upon such certification.
32. The Applicant challenges the award of **VAT at 16% (Kshs. 534,245.60)**, arguing that VAT is **not applicable** to **party-and-party costs** since such costs are not a taxable supply of services under **Section 6(1) of the VAT Act, 2015**. He relied on the case of **Shreeji Enterprises Ltd v John Munga Chai [2022] eKLR**, where the court held that **party-and-party bill of costs** do not attract **VAT**, as they are not payments for services rendered between parties. Even if VAT were applicable,

the figure taxed was **mathematically wrong**, since 16% of 1,200,000 is only **Kshs. 192,000**.

33. The Applicant further submitted that **Mr. Tuya**, the Respondent's advocate, was **unqualified** to charge legal fees as he **did not hold a practicing certificate** for **2024**, when he prosecuted the Appeal and taxation proceedings. Reliance was on **Sections 9 and 30 of the Advocates Act**, which require an advocate to have a valid **practicing certificate** to be entitled to fees. Further, that as of **14th June 2024**, when **Mr Tuya** filed written submissions on the bill of costs dated **29<sup>th</sup> January 2024**, his practicing status was not valid—a fact confirmed through **LSK records** and not rebutted by the Respondent.
34. The Applicant submits that the **Taxing Officer erred in principle, misapplied the law**, and **failed to consider** his submissions, thereby causing a **miscarriage of justice**. He urged this Court to **sets aside the Ruling of 18th December 2024, and remits the Bill of Costs for fresh taxation de novo**.
35. The Respondent, through **Tuya Kariuki & Co Advocates**, filed written submissions opposing the **Applicant's Chamber Summons dated 10th January 2025**, which sought to challenge the **Taxing Master's Ruling delivered on 18th December 2024** in **Narok ELCA E009 of 2022**. The Respondent also raised a **Preliminary Objection** and filed a

**Replying Affidavit sworn on 19th May 2025**, maintaining that the application was **defective, improper, procedural** and an **abuse of court process** and further that the application offends the mandatory provision of paragraph 11 of The Advocates Remuneration Order.

36. The Respondent identified two main issues for determination:
- i. Whether the Application offends the mandatory provisions of Paragraph 11 of the Advocates Remuneration Order; and**
  - ii. Whether the decision of the Taxing Master should be upheld.**
37. On **Whether the Application offends the mandatory provisions of Paragraph 11 of the Advocates Remuneration Order**, the Respondent submitted that the Applicant's Reference is incurably defective for failure to comply with **Para 11 of the Advocates Remuneration Order**, which mandates that an aggrieved party must give **notice in writing within fourteen (14) days** to the taxing officer, specifying the items objected to and subsequently filing a **Reference within fourteen days of receiving reasons** from the taxing officer.
38. The Respondent argued that the Applicant **did not file or annex any such notice** of objection or the reasons provided by the taxing officer, rendering the entire Reference

incompetent. The Respondent relied on several authorities to support this position being:

- ***Wahome & 3 others v Mwangi & 3 others [2023] KEELC 19252 (KLR)***, citing *Machira & Co. Advocates v Magugu [2002] 2 EA*, emphasizing that grievances arising from taxation must follow Paragraph 11.
- ***Evans Thiga Gaturu v Kenya Commercial Bank Ltd [2012] KEHC 4274 (KLR)***, holding that a reference filed before obtaining reasons or outside the prescribed time is **incompetent and premature**.
- ***Paul Gicheru t/a Gicheru & Co Advocates v Kargua (K) Construction Co. Ltd [2008] KEHC 2942 (KLR)***, where Justice Ibrahim reaffirmed that reasons must be formally sought and given under Rule 11(2), rejecting the argument that a ruling can substitute as reasons.

39. The Respondent maintained that the Applicant failed to meet these procedural requirements, and thus the reference is ***fatally defective***, and that ***Order 50 Rule 4 of the Civil Procedure Rules***, which excludes the court recess period in computation of time, does ***not apply*** to taxation matters, since the ***Advocates Act*** and ***Remuneration Order*** constitute a complete code governing such proceedings.

Reliance was placed on the following cases:

- ***George Miyare t/a Atonga Miyare & Associates Advocates v Evans Gor Semelang'o [2018] eKLR***, where the court held that ***Order 50 Rule 4*** of ***CPR***, does not apply to taxation references.

- ***Josphat Kirigia Aburi v Cooperative Bank of Kenya Ltd [2020] eKLR***, and ***Eman v Kamau & Another [2022] KEELC 2537 (KLR)***, which cases affirmed that the ***Advocates Remuneration Order*** provides a self-contained procedure that cannot be supplemented by the ***Civil Procedure Rules***.
40. The Respondent further submitted that if a Reference is filed out of time, ***leave for enlargement of time*** must be sought under Rule 11(4). However, the Applicant, ***did not seek any extension of time***, as highlighted in ***Kemboy Law Advocates v Narok County Government [2024] KEELC 269***, where the court stressed that ***extension*** is not ***automatic***, but must be formally sought. Consequently the Respondent contended that the Applicant's Reference is both ***premature and out of time***.
41. On ***Whether the decision of the taxing master should be upheld***, the Respondent submitted that the ***Taxing Master acted properly and within discretion*** when awarding ***Kshs. 1,200,000 as instruction fees***. The Respondent relied on the case of ***Kerio Valley Development Authority v Muhatia Pala Auctioneers [2023] KEHC 24850***, which held that a court should not interfere with a taxing officer's discretion, unless it is shown that the officer acted on wrong principles or failed to exercise judicial discretion.
42. It was the Respondent's submissions that the ***value of the subject matter was not ascertainable***, as no specific value

was addressed by the appellate court in **ELCA E009 of 2022**. While the initial purchase price was **Kshs. 850,000/=**, for **85 acres** in **2004**, land value had appreciated by **2022**, justifying the taxing officer's discretion. Citing the case of **Joreth Ltd v Kigano & Associates [2002] KECA 153**, the Respondent submitted that where the value cannot be determined from pleadings or judgment, the taxing master may exercise discretion based on the importance and complexity of the matter.

43. The Respondent further relied on the case of **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd (1972) EA 162**, which laid out guiding principles for fair and consistent taxation.
44. The Respondent argued that **getting up fees** were properly awarded, as they were specifically sought under **Item 2** in the **party-to-party bill of costs**. Under **Schedule 6A, Paragraph 2 of the Advocates (Remuneration) Order**, such fees are payable where issues are joined or where appeals are certified as complex. The award of **Kshs. 333,333/33 (one-third of instruction fees)** was therefore lawful and proportionate.
45. The Respondent further submitted that the inclusion of **VAT (Kshs. 534,245.60)**, asserting that legal services constitute **taxable supplies under Section 6(1) of the VAT Act, 2013**. Reliance is placed on these cases:

- ***Mathenge & Another v Belle Holdings Ltd & 2 Others (ELC Misc. Application 54 of 2022) [2023]***, citing ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR***, where the court held that costs compensate a successful litigant for services rendered by counsel, which attract VAT.
- ***E.A. Building Society Ltd v A.C.A. D'Souza & Another C.A. No. 59 of 1995***, where VAT was recognized as a lawful disbursement.
- ***Four Farms Ltd v Agricultural Finance Corporation [2015] eKLR***, which reaffirmed the inclusion of VAT in party-and-party bills.

46. The Respondent clarified that VAT was computed not solely on instruction fees, but on the ***aggregate taxable portion*** of the bill, and the Applicant failed to demonstrate any computation errors.

47. The Respondent further argued that the Applicant's claim regarding legal fees charged by an unqualified advocate is misplaced, as the present matter concerns a ***party-and-party bill of costs***, not an ***advocate-client bill***. The Respondent cites ***Samuel Omondi Adera v Lore & Co. Advocates [2022] eKLR***, where the court distinguished between the two, holding that in ***party-to-party taxation***, costs belong to the successful client, and not the advocate. Therefore, the issue of practicing certificate status is irrelevant.

48. The Respondent further submitted that the Applicant's Reference was **filed out of time, premature**, and procedurally defective, and the Applicant also failed to demonstrate any error of principle on the part of the Taxing Master. The Respondent prayed that the ***Preliminary Objection be upheld, the Chamber Summons dated 10th January 2025 be struck out***, and the Taxing Master's decision delivered on **18th December 2024**, be affirmed in full.
49. This court considered the instant ***Chamber Summons Application***, the Reply to the same, the ***Notice Of Preliminary Objection*** together with the rival written submissions, and finds as follows;- The principles that guide this Court when considering a Reference from the decision of a taxing officer are well settled through various decided cases; In the case of ***Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR***, the Court of Appeal stated:

***“The learned judge like the taxing officer was exercising judicial discretion when he allowed the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned judge acted on the wrong principles of law. The appeal to this Court from the decision of a judge on reference from a taxing officer is akin to a second appeal and should be governed by Section 72 (1) of the Civil Procedure Act. In our view, such***

***an appeal can only be allowed on any of the three grounds specified in Section 72 (1) of the Civil Procedure Act, that is to say, if the decision is contrary to law or some usage having the force of law; or the decision has failed to determine some issue(s) of law or usage having the force of law or where there is a substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits.”***

50. Further, in the case of ***Kamunyori & Company Advocates v Development Bank of Kenya Limited (2015) Civil Appeal 206 of 2006***, the court stated: -

***“Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside.”***

51. Again in the case of ***Peter Muthoka & another v Ochieng & 3 others [2019] eKLR***, the Court of Appeal held: -

***“It is not lost to us ... that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference***

***will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in MBOGO -vs- SHAH (Supra),”***

52. The principles applicable when the Court is called upon to interfere with a Taxing Master’s decision were well set out in the case of ***Republic v Competition Authority Ex Parte Ukwala Supermarket Ltd & Anor [2017] eKLR***, where he stated as follows:

***“The circumstances under which a Judge of the High Court interferes with the taxing officer’s exercise of discretion are now well known. These principles are,***

***(1).that the 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 manifestly excessive as to justify an inference that it was based on an error of principle;***

***2). it would be an error of principle to take into account irrelevant factors or to omit to consider***

**relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the 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;**

**(3). 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 reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;**

**(4). it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;**

**(5). the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;**

**(6). the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;**

**(7). the mere fact that the defendant does research before filing a defence and then puts a defence**

***informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64.***

**53.** It is trite that the courts will not interfere with the exercise of the taxing master's discretion unless it appears that such discretion has not been exercised judicially or it was exercised improperly or wrongly, by disregarding factors which he should have considered, or considering matters which were improper for him to have considered, or he failed to bring his mind to bear on the question in issue, or he had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue. See the case of ***Fredrick Otieno Outa vs Jared Otieno Odoto & 3 Others SC Petition No. 6 of 2014[2023]KESC 75(KLR).***

**54.** Bearing the above in mind, the court will proceed to determine the instant Chamber Summons Application as follows;- This court finds the issues for determination are;

- i) Whether the Notice of Preliminary Objection as raised by the Respondent is merited.***
- ii) Whether the Respondent Advocate was unqualified person for lack of practicing certificate at the time of filing the bill of costs.***
- iii) Whether the instant chamber summons Application is merited.***

**l). Whether the Notice of Preliminary Objection as raised by the Respondent is merited**

55. In his Preliminary Objection, the Respondent averred that the instant Application ***is incurably defective, improper, unprocedural*** and an ***abuse of the court process***. Further, that the application offends the mandatory provisions of para 11 of the ***Advocates Remuneration Order***.
56. On his part, the Applicant averred and submitted that the Chamber summons Application is not defective nor does it go against the set rules. He submitted that the decision of the taxing master was issued on ***18<sup>th</sup> December 2024***, and the instant Application was filed on 13<sup>th</sup> January 2025.
57. It was the Applicant's claim that the period between 21<sup>st</sup> December and 13<sup>th</sup> January does not count as provided by ***Order 50 rule 4*** of the ***Civil Procedure Act***. However, the Respondent submitted that the provisions of ***Order 50 Rule 4***

of the **CPR**, do not apply to computation of time in taxation matters.

58. Does **Order 50 rule 4 of CPR**, applies in taxation references? The court has considered the relevant provisions of law, and finds that; the time for filing a reference on taxation is not affected by **Order 50 rule 4** of the **Civil Procedure Rules (CPR)** instead, it is governed by the **Advocates (Remuneration) Order**. Order 50 rule 4 concerns matters that are not clearly defined in other rules, but Order 50 is titled "Summary proceedings". The correct rule for lodging an objection to taxation is **Paragraph 11** of the Advocates (Remuneration) Order, which stipulates that a party has **14 days** to file a written **Notice of Objection** to the taxing officer, if aggrieved by taxing master decision on taxation.
59. Therefore, the **relevant law on** the time frame for objecting to taxation is set out in Paragraph 11 of the **Advocates (Remuneration) Order**, not in **Order 50 Rule 4** of the **CPR**. Consequently under Para 11, the **time limit**, that a party must file a written notice of objection to the taxing officer is within **14 days** after the decision is made. This Court concurs with the Respondent's submissions that **Order 50 rule 4** of **CPR** is not the relevant rule for this process. Order 50 deals with "Summary proceedings" and is not the correct rule for objections to taxation.
60. Para 11 provides; “ **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.”**

**61.** The above provisions provides that if any party is aggrieved by the decision of the taxing officer, then he may write to him within **14 days** to give notice of the items he wishes to object to. The Applicant herein who was aggrieved needed to give a notice in writing within 14 Days. However, the said para 11 states that the party **may,** which is therefore discretionary. The Applicant herein did not give that Notice, but since it is discretion, this court cannot find and hold that the application herein is defective.

**62.** The para11(2) states that upon receipt of the written Notice, the taxing master shall record and forward to the objector the reasons for the taxation. However, the taxing master delivered a detailed ruling on **18<sup>th</sup> December 2024,** which explained the reasons for the taxation. This court finds no reasons to arrive at a finding that the chamber summons herein is defective for failure to have written reasons from the taxing master. **(see Evans Thiga Gaturu Advocates vs KCB (Supra).**

**63.** On the issue of the Chamber Summons having been filed way after **14 Days** from the date of delivering of the Ruling, the court takes cognizance of the fact that though the **Civil Procedure Rules** do not apply to time frame set in the **Advocates Remuneration Order**, the taxing master ruling was delivered a few days before the Christmas break, the delay of 10 days is not inordinate, and this court has unfettered powers to issue orders that are necessary for the end of justice to be met. Thus the court finds and holds that though applicant did not file the instant Reference within a period of 14 Days after the taxing master ruling, that omission cannot affect substantive justice. This court relies on **Article 159(2)(d)** of the Constitution.

**64.** For the above reasons, the court finds and holds the instant Preliminary Objection not merited, and the same is dismissed with costs.

II) **Whether the Respondent's Advocate was unqualified person for lack of practicing certificate at the time of filing the bill of costs.**

**65.** On this issue, the Applicant filed a Further Affidavit and averred that his advocate on record had advised him that the Advocate on Record for the Respondent Mr. Tuya, during the period of taxation was not qualified as he did not have a Practicing Certificate. He annexed a print out from the **LSK Advocates Portal** marked **Kok -01** to support his allegations.

- 66.** In his submissions, the Applicant relied on **Section 9** of the **Advocate Act**, on qualification for practicing as an advocate, and one of such qualifications is to have a **Practicing Certificate**. The Respondent's advocates did not respond to this allegations, and the court cannot confirm whether he had a **Practicing Certificate** or not at the time of prosecuting the Appeal and of taxation.
- 67.** This court has considered the **printout** relied upon by the Applicant, However, there was no confirmation from the **LSK** that indeed at the time of filing and prosecuting the Appeal and taxation matter, **Mr Tuya** had no **Practicing Certificate**. The court says so because the **print out** was not produced or confirmed by **LSK**, and it is not clear whether the same is from an updated **LSK portal** or not. This court finds and holds that without confirmation from **LSK** that **Mr Tuya** was not holding a valid **Practicing Certificate** at the time of filing for the taxation, then this court finds and holds that the said allegation cannot hold water, and is dismissed.

III) **Whether the instant Chamber Summons Application( Reference) is merited**

- 68.** It is not in doubt the taxing master's ruling of **18<sup>th</sup> December 2024**, was on **Party and Party bill of costs** dated **29<sup>th</sup> January 2024**. It is also not in doubt that the said bill was taxed at **Ksh 1,908, 588/33=**, which amount has been objected by the Applicant herein.

69. In the instant Application, the Applicant has objected to the amount assessed as **instruction fees**, the **Getting up fees** and the **VAT** on the **party and party bill of costs**. The Respondent has averred that the taxing master did not **err** in awarding the amount as it did.
70. The question that this court should consider and answer is whether in determining the **instruction fees**, the subject matter of the suit subject of the referenced taxed costs was ascertainable and thus whether the taxing master exercised his discretion correctly.
71. The applicant averred and submitted that the taxing master ought to have been guided by **Schedule 6** of the **Advocates Remuneration Order**, in determining the instruction fees, since the value of the property was ascertainable from the pleadings being the purchase price of **Ksh. 85,000/=**, and that is the amount that the taxing master ought to have based the taxation on.
72. The Respondent argued that though the purchase price was given as **Ksh 850, 000/=** in **2004**, for **85 acres**, the value has since gone up, and thus the said value was unascertainable. He submitted that the taxing master was correct to arrive at ksh 1000, 000/= as instructions fees.
73. The Supreme Court in the case of **Kenya Airports Authority v Otieno Ragot & Co. Advocates SCoK Petition E011 of 2023**, / discussed the essence of the **party and party bills**

**of costs** as follows; Schedule VIA provides for Party-Party costs, that is, the manner in which costs awarded to a successful party as against another party therein should be assessed/computed/taxed. The essence of such costs is to ensure a successful litigant/party receives a fair reimbursement/recompense for the costs/expenses he/she has had to incur on account of a suit. See ***Outa vs. Odoyo & 3 Others, SC Petition No 6 of 2014; [2023] KESC 75 (KLR).***

74. The essence of a ***party-to-party bill of costs*** is to recover the reasonable legal expenses incurred by the winning party in a lawsuit from the losing party. the said bill of costs details the list of the advocate's fees and expenses, which must be taxed or assessed for reasonableness and fairness by the Taxing Officer, according to the ***Advocates Remuneration Order*** to determine the final amount payable.
75. The court will concur with the Applicant submissions that the said costs being intended to compensate the winning party, should not be punitive, but be just compensation. Though the ***Advocate Remuneration Order*** provides a framework for taxation, the Taxing Officer's discretion is paramount, especially when the value of the subject matter is not easily quantifiable.
76. Was the value of the subject matter ascertained herein? In the case of ***Peter Muthoka & Another vs. Ochieng & 3 Others, Civil Appeal No. 328 of 2017; [2019] eKLR,*** the Court of Appeal stated as follows:

***“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered ,and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court. Where, however, a suit is settled, then, from a literal and practical reading of the provision ,the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.” We concur and approve of the foregoing findings by the Court of Appeal on the factors to take into consideration when determining the value of the subject matter.”***

**77.** In the case of ***D. Njogu and Co.Advocates vs. Kenya National Capital Authority, HCMisc. Applic. No. 21 of 2003; [2005] eKLR***, the court held that:

***“So, whilst I accept that the advocate may have been instructed to sue for not only the principal***

***sum, but also for interest thereon, at a specific rate, that fact alone cannot mean that the claim would be successful. In other words, the court could dismiss the whole claim, or grant part of the principal sum. Alternatively, the court could grant judgement for the whole principal sum, but without interest, or even with interest at rates other than those claimed. Effectively, therefore the value of the subject matter of the suit would remain indeterminate until the court passed its verdict on the case.***

78. From the above findings of the superior courts, it is clear that the value of the subject matter would be determined at the time the bill of costs is being taxed. The taxation herein was on an Appeal matter, and not the first instance suit. Though before the trial court, the purchase price was given at **Ksh 850,000/=** for **85 acres** in the year **2024**, at the time of taxation, the value had gone up, and indeed, the value of the subject matter was unascertainable.
79. When the value of the subject matter is unascertainable, the taxing master, has discretion to award a reasonable instruction fees. The Respondent had sought for instruction fees of **Ksh 3000,000/=**, and in his findings, the taxing master while relying in the case of **Premchand Raichand vs Quarry Services EA Ltd(1972)EA 162**, used his discretion and taxed the instruction fees at **Ksh 1000,000/=**, as reasonable reimbursement.

80. Therefore, this court finds and holds that the value of the suit property was not **ascertainable**, and thus the taxing master used his discretion to assess the instruction fees as he did at **Ksh 1000,000/=**, and this court finds no reasons to interfere with that amount.

**81.** In the case of **KANU National Elections Board & 2 others v Salah Yakub Farah [2018] eKLR**, the Court held as follows:

***“ It is trite that the court will not interfere with the exercise of the taxing master’s discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue.”***

82. The Applicant took issue with an award of **Ksh 333,333/33** as getting up fees. The Applicant submitted that this fees was neither pleaded in the **party and party bill of costs** nor merited. the Applicant urged the court to strike if off and relied

on the **schedule 6** of the **Advocates Remuneration Act**, which provides;-

**“Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule 6 and, unless the court has made an order under paragraph 50A, where Schedule 6 provides a higher and a lower scale the costs shall be taxed in accordance with the lower scale.”**

83. On the part of the Respondent, he submitted that the getting up fees was commensurate with the normal diligence and responsibility of defending an appeal, and that it was pleaded as item No.2 in the party and party bill of costs.
84. This court has considered the **party and party bill of costs**, and indeed **getting up fees** was pleaded at **Ksh.300,000/=** but not **Kshs.333.333/33** as awarded. Though the taxing master had discretion to assess the bill of costs, he ought not to have gone outside what the parties had pleaded as parties are bound by their pleadings. The Respondent sought for **Ksh.300,000/=** but the taxing master awarded **Ksh.333,333/33** which was not pleaded, and did not give reasons for awarding more than what the Respondent had pleaded in the **party and party bill of cost**.

85. Further, the court has considered **Schedule 6 (3)** on **Fees for getting up an appeal**, and it is clear that such fees is payable where at the conclusion of the hearing the court has certified that the appeal is proper for consideration of getting up fees. See the case of **Narok County Government vs Kemboy Law Advocates (Supra)**.
86. In the instance case, the court or the Judge did not certified that the appeal was a proper one for consideration of **getting up fees**, and that the taxing master should allow it. In any event, the getting up fees that was pleaded was Kshs.300,000/= and not **Ksh.333,333/33**, and therefore this court finds and holds that the taxing master erred in assessing and awarding the getting up fees as he did. See the case of **National Bank of Kenya v Rachuonyo & Rachuonyo Advocates [2021]KEHC 9047(KLR)**
87. The Applicant also objected the award of **VAT** on the **party and party bill of costs**. The Applicant submitted that the award of **Ksh 524, 245. 60/=** as **VAT** was **misguided** and **wrong** and should be struck out. The Respondent on his part submitted that the award of **Ksh 534, 245.60/=** was proper and within the discretion of the taxing master.
88. In determining whether the **VAT** was payable, this court has considered the relevant provisions of law, and case law and finds that indeed **party-to-party costs** are not subject to **VAT** because the losing party is essentially compensating the winning party, and is not receiving a taxable service from

them. **VAT** is only applied to "**advocate-client**" **bills of costs**, where a direct taxable service has been provided by an advocate to their own client.

89. In the case of **Pyramid Motors Limited v Langata Gardens Limited [2015] KEHC 5224 (KLR)**, the court held

***“On the final issue of VAT, I hold the simple view that in allowing the same the Master erred under the Value Added Tax Act, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the Plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the Plaintiff was a taxable person. I would vacate the award on VAT as the Master erred.***

90. Having found that VAT was not chargeable in **party to party bill of costs**, this court finds and holds that the taxing master erred in law in awarding **ksh 534, 245. 60** for **VAT**. Consequently, that amount is taxed off or struck out.

91. Though the Applicant did dispute the other items by alleging that they were lumped together and the taxing master held

that they were drawn up to scale, the applicant did not elaborate the real dispute, and the prejudice occasioned to him when the taxing master lumped the said items No. 3 and 26 together and indicated they were allowed as drawn. What was erroneous about that finding?

92. Having arrived at the above findings, this court finds and holds that in dealing with a reference, it could either remit the file back to the taxing master for taxation or taxed off the offending items, since at the consideration of the reference, the court is sitting as an appeal court. This court having found that the instructions fees was properly taxed and the items taxed were as per the scale, finds no reason to remit the taxation back to the taxing master.
- 93.** However, the court finds and holds that the **getting up fees** and **VAT** were wrongly awarded, and for the above reasons, the two items are **struck** out from the assessed **party and party bill of costs**, without having to refer the matter back to the taxing master.
94. Consequently, this court finds and holds that the taxing master wrongly exercised his discretion when considering the **Party and Party Bill of Costs** dated **29<sup>th</sup> January 2024**, only in as far as **Getting up Fees** and **VAT** are concerned, and the said two awards are struck out.
95. Therefore, the court allows the Reference to the extent that it proceeds to set aside the award of **ksh 333,333/33** as

**Getting up Fees** and **ksh 534, 245.60** as 16% VAT on the taxed amount of **Ksh 1,908,588.33/=**.

96. For the above reasons, this court finds and holds that if the Deputy Registrar of this court being the taxing master had already issued a **Certificate of Costs**, then the same should be amended accordingly to reflect the reduced amounts, by removing the **Getting Up Fees** and **VAT, awards**. Since the amount in dispute has been substantially reduced, this court directs that each party to bear its own costs.
97. Therefore, this court finds no reason to stay the execution of the taxing master decision of **18<sup>th</sup> December 2024** but directs him to amend the Certificate of Costs accordingly, as per the above holding of this court.
98. The upshot of the foregoing is that the Applicant's Chamber Summons Application dated **10<sup>th</sup> January 2025**, is allowed on the above terms, by setting aside the award **of ksh 333,333/33** as **Getting up fees**, and **ksh 534,245.60/=** as VAT. However, the other items remain as assessed by the taxing master.
99. Further, the **Notice of Preliminary Objection** dated **24<sup>th</sup> January 2025**, by the Respondent is dismissed with no orders as to costs.

**It is so ordered**

**Dated, Signed and delivered virtually at Narok this 13<sup>th</sup> November 2025.**

**L. Gacheru**

**Judge**

**Delivered on line in the presence of**

***Elijah Meyoki - Court Assistant***

***Mr. Okinyi for the Applicant***

***Ms. Muchiri holding brief for Mr. Tuya for Respondent.***

**L. Gacheru**

**Judge**