



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT  
KABARNET**

**CONSTITUTIONAL PETITION NO. E005 OF 2024**

**IN THE MATTER OF ARTICLES 1,2,3, 8, 10, 19, 21, 22,  
23, 35, 39, 40, 47, 64, 66, 159, 165 AND 259 OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
THE FUNDAMENTAL RIGHTS AND FREEDOMS AND  
PROTECTION OF RIGHTS TO OWN PROPERTY AND  
FREEDOM OF MOVEMENT UNDER ARTICLES 2, 10, 22,  
23, 35, 39, 40, 47 AND 66 OF THE CONSTITUTION OF  
KENYA 2010;**

**AND**

**IN THE MATTER OF PROTECTION UNDER RULE 4 AND  
10 OF THE CONSTITUTION OF KENYA (PROTECTION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS)  
PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTERS UNDER SECTION 26 AND 28 OF THE  
LAND REGISTRATION ACT, 2012**

**BETWEEN**

**PIUS KIPROP KIBET & 5 OTHERS.....PETITIONERS**

**VS**

**WILLEY CHEBOI & 9 OTHERS.....RESPONDENTS**

**RULING**

**Introduction**

1. This ruling is in respect of the chamber summons application/reference dated 22<sup>nd</sup> August, 2025. The application is brought under **Rule 11** of the Advocates Remuneration Order (ARO), **Sections 1A, 1B, 3A, 27** of the Civil Procedure Act and **Article 50** of the Constitution. The applicants seek the following orders:-
  - i) That the ruling of Hon. Caroline Rose Tabuche Ateya delivered on 30<sup>th</sup> July, 2025 in Kabarnet ELC Petition No. E005 of 2024 be set aside;
  - ii) That the honourable court be pleased to re-tax or order for re-taxation of items 1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 18, 19, 20 and 21 of the 1<sup>st</sup>, 4<sup>th</sup>

and 6<sup>th</sup> respondents' bills of costs, dated 24<sup>th</sup> April, 2025.

iii) That the Honourable court be pleased to grant such orders as it may consider just and proper in the circumstances.

iv) That the costs of the application be provided for.

2. The application is premised on the grounds that the taxing master awarded the respondents costs in the sum of Kshs. 1, 106, 700/-; that the ruling and the certificate of costs are erroneous, misguided, irrational, unjustified, unreasonable in the circumstances of the case and that the ruling and the certificate of cost contravene the ARO as well as basic sound principles of taxation; that the applicants moved the taxing master for reasons for her taxation but she refused, declined and/or failed to record and forward to them her reasons in support of the ruling and that they were dissatisfied with taxation of items 1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 18, 19, 20 and 21 of the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents' bills of costs, dated 24<sup>th</sup> April, 2025.

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3. The application is supported by the affidavit of Pius Kiprop Kibet sworn on 22<sup>nd</sup> August, 2022 in which the grounds on the face of the application are reiterated. The applicants have annexed to the affidavit a copy of the impugned ruling, a copy of the certificate of costs and copy of the notice of objection to taxation which they filed.

4. In the impugned ruling the taxing master rendered herself thus:-

**“This is a ruling on the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents party to party bill of costs dated 24<sup>th</sup> April 2025. The bill of costs is taxed in line with the provisions of schedule 6 of ARO 14. I have considered the bill as filed together with the submissions and proceed to tax as follows:-**

**Item 1 on instruction fees. This is a matter where the respondents oppose the petition filed by the applicant. The respondents filed a P.O that was allowed and the petition was struck out. Paragraph (j) of Schedule 6 on**

constitutional petitions and prerogative orders provides that...

I find that given the nature of the claim that was opposed, the industry and time expended, a sum of Kshs. 1,000,000 as instruction fees is reasonable and just in the circumstances.

Item 2 to 28 are taxed as drawn. The total amount is Kshs. 1, 106, 700/-.

The bill of costs dated 24/4/2025 is taxed at Kshs. 1, 106, 700/-“.

5. The reference was disposed of through written submissions.

### **SUBMISSIONS**

#### **Applicant's submissions**

6. In their submissions filed on 24<sup>th</sup> October, 2025 the applicants submit that the respondents did not file a response to the petition as contemplated under Rule 15 of the Mutunga Rules, hence the petition was undefended; that filing a notice of preliminary objection

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(PO) does not amount to filing a defence to the petition and that the taxing master was wrong in finding that the petition was defended and awarding Kshs. 1,000,000/- as instruction fees in respect thereof, which award is manifestly excessive. The reasons given by the taxing master for assessing the instruction fees at such amount are said to be neither legally sound nor supported by any principle of law.

7. Based on their contention that the petition was undefended, the applicants urge the court to assess the instruction fees at Kshs. 45,000/- as provided for under **Schedule 6A Paragraph 1(j)**.
8. Terming the petition a public interest litigation in which they were challenging the privatization of a public road, the applicants submit that the taxing master was under an obligation to consider the interests of the parties in assessing the instruction fees.
9. The applicants further submit that the firm of Wambua Kigamwa & Co. Advocates was only properly on record for the 6<sup>th</sup> respondent.

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10. It is the applicants' case that the only documents drafted in relation to the petition was the 6<sup>th</sup> respondent's memorandum of appearance and notice of preliminary objection dated 20<sup>th</sup> July, 2024.
  11. The applicants acknowledge that other documents like the 1<sup>st</sup> and the 4<sup>th</sup> respondent's preliminary objection and submissions by the 1<sup>st</sup>, 4<sup>th</sup> and the 6<sup>th</sup> respondent were filed but submits that those documents were not properly on record as they were filed out of time without the leave of the court.
  12. The applicants gives a detailed account of other items that they contend were not properly taxed and urge this court to re-tax the respondents' bill of costs at Kshs. 56,600/-.
  13. The applicants complain that during pending of this application, the respondents levied execution leading to payment of Kshs. 400,000/- to the respondents. They urge this court to order that they be refunded the overpaid amount.

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14. The applicants further urge this court to award them  
the costs of the application.

### **Respondent's submissions**

15. On their part, the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents have submitted and/or addressed the court as follows:-

**“.....the jurisdiction to deal with a reference is provided for in Order 11 of the Principal Order to the Advocates (Remuneration) Order, 1962 as follows...**

**Based on the foregoing, in this matter the decision of the Taxing Officer in respect of the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents party and party bill of costs was delivered on 30<sup>th</sup> July 2025. The petitioners were aware of the decision as they were represented by their advocate before the Taxing Officer. The petitioner's on 1<sup>st</sup> August, 2025 pursuant to order 11(1) of the Principal Order to the Advocates (Remuneration) (Amendment) Order, 1962 gave notice in writing to the Taxing Officer to record and forward reasons**

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**for the decision on the said items before proceeding to file a reference in accordance with Order 11(2) of the Principal Order to the Advocates (Remuneration) Order, 1962.**

**We submit that the court is bereft of jurisdiction to entertain the reference before reasons have been proffered. The petitioners did not wait for the reasons to be given but instead on 22<sup>nd</sup> August 2025 they filed a reference to challenge the decision of the Taxing Officer. The reference is incompetent for being filed prematurely without reasons as required by Order 11(2) of the Principal Order to the advocates (Remuneration) (Amendment) Order, 1962.**

**Had a competent reference been filed it would be clear that on item 1 the taxing officer arrived at the correct decision as she was able to identify the proper applicable schedule as being 6A(j) of the advocates**

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remuneration amendment order, 2014 being a constitutional petition. the taxing officer appreciated that a preliminary objection was a legal means of defence to a constitutional petition, the directions by the judge in the ruling delivered striking out the petition and motion for conservatory orders with costs to all the respondents was a guide; also the submissions made by the parties on the item having regard to the authorities quoted where higher awards were made, the complexity of the matter which involved the doctrine of constitutional avoidance and a number of parties involved. On this we invite the court to be guided by the authority in *Braeburn Ltd v Tony Gachoka & Another* (2009)KEHC 1760 (KLR)...

We also invite the court to consider that in matters of quantum the Taxing Officer is the best suited decision maker. We invite the court to be guided by the decision in SRD “*Souza & Others vs. Ferrao & Others*”

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**(1960)EA 602 which was a court of appeal decision. It adopted the principles stated by Buckley LJ in the estate of Ogilvie: Olgivie vs. Massey (1910) P 243...**

**On the other items in the bill of costs, they were drawn to scale and the submissions by the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents were clear and explicit on the justifications for the awards sought and further the Taxing Officer exercised her discretion based on the Principle Advocates Remuneration Amendment Order, 1962. We once again reiterate the submissions as tendered before the Taxing Officer as part of our reference point to avoid duplicity.**

**The claims by the petitioners that only the 6<sup>th</sup> respondent participated in the matter are without substance as all the three respondents appeared in the matter. The court throughout the proceedings recognized that the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents were**

participating in the proceedings and the petitioners did not at any time raise an objection as to the competence of appearance and representation until judgment was entered. The court is now functus officio on the issue of representation having delivered judgment in which party and party costs were awarded to all the respondents as can be gleaned from the eventual order emanating from the ruling. It is belated for the petitioners to seek to delve into the matter of whether the 1<sup>st</sup> and 4<sup>th</sup> respondents were duly represented in court. An estoppel arises against the petitioners from agitating the said point. It ought to be appreciated that in any event the Constitution of Kenya (Fundamental Rights and Freedoms Practice and Procedure Rules), 2013 do not have a mandatory provision of filing notices of appointment or memorandums of appearance hence the petitioners cannot seek to lock out the participation of the other parties...

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**The 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents pray that the reference be dismissed with costs...”**

**Analysis and determination**

16. I have read and considered the issues of fact and law raised by the applicants in the reference and the submissions. I have also considered and/or taken into account that the petition was disposed of preliminarily, hence did not proceed for hearing on merits.
17. Even though the petition and the accompanying notice of motion were opposed through the P.O taken up by the 6<sup>th</sup> respondent, the petition did not raised complex, difficult or novel questions of law. The amount of time expended in defending the petition and the accompanying application for interlocutory reliefs was also not a lot as suggested by the taxing master.
18. The amount awardable under **Schedule 6 Paragraph (j)** as instruction fees where a petition is defended is an amount not less than Kshs. 100,000/-. Whilst the taxing master has discretion to increase the amount payable as instruction fees, in the circumstances of this

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case where the petition was struck out preliminarily, I am not satisfied that the taxing master properly and judiciously exercised the discretion vested in her when she increased the basic instruction fees 10 times. The trend in taxation of costs in circumstances similar to those in this case indicate that the award was excessive and not anywhere near the awards payable in such circumstances.

19. In **Biko v Director of Public Prosecutions & 3 others (Constitutional Petition 30 of 2018) [2023] KEHC 22330 (KLR) (Constitutional and Human Rights) (22 September 2023) (Ruling)**, the High Court upheld the taxed amount of Kshs. 100,000/- as instruction fees. In doing so, the Court stated/held:-

**“I have read through the DR’s Ruling and the reasons for taxing the impugned items at Kshs.100, 000/= instead of Kshs.695, 000/=. This is set at paragraphs 16 - 25 of the Ruling. She considered all the issues, the law and relevant case law. The reasons she**

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**gave for reducing the instruction fees are very sound.**

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**19. As stated the petition was not struck out based on a preliminary objection but upon hearing it.**

**20. There may have been no complex issues, but the court considers other issues. This matter was filed on 26/01/2018 and finalized on 30/9/2021 - (over three (3) years). The record shows that there were three interlocutory applications and instructions had to be taken on them besides the petition, and responses had to be filed.**

**21. The getting up fees is therefore allowed at 1/3 of the instruction fees. Item 108 which had sought for Kshs.216, 667/= was reduced to Kshs.33, 333/33 and Kshs.183, 333/67 taxed off. As has been held in several decisions, the Taxing Officer exercises discretion in taxation matters. The High Court may only interfere with the exercise of**

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that discretion if there is a good reason/reasons to do so. See : (i) **Maronge & Company Advocates v Kenya Airports Authority Kisumu Court of Appeal Civil Appeal No. 262 of 2012 [2014] eKLR**, (ii) **KTDA Limited v J M Njenga & Company Advocates High Court [2008] eKLR**, (iii) **Otieno Ragot & Company Advocates v Kenya Airports Authority [2021] eKLR**.

**22. From the above analysis I do not find any reason to make this Court fault the Taxation decision by the DR dated March 1, 2022.”**

20. In **William Kabogo Gitau v Ferdinand Ndung’u Waititu [2019] KEHC 3168 (KLR)** the Court held that an increment of ten times in instruction fees, is unfair and unjust.

**“The taxing officer in taxing the Bill of Costs on the instruction fees was properly guided by the above-mentioned authority, however in arriving at a figure of Kshs.5, 000,000/- as instruction fees, fifty (50) times the instruction fees provided for under schedule**

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**6 paragraph 1 (i) (ii) of the Advocates Remuneration (Amendment) Order 2014, did not give reasons to justifying such high increment having found that the petition was not complex and was determined at a preliminary stage. It is of great importance to note what the taxing master stated thus:-**

**"The taxing officer takes cognizance of the above factors but is quick to warn herself that in the present case, as much as the matter was very important to the parties and it elicited lots of political interests across the divide as well as media publicity, the taxing officer notes that the issue of complexity was lacking as the same was never mentioned by the trial Judge and that above all, the Petition did not even go to full hearing but was determined at the application stage and most importantly that no expert was involved to discern the constitutional issues herein to warrant the matter**

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**complex or having involved specialized skill."**

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**15. From the above and considering the provisions of schedule 6 paragraph 1 (j) (ii) of the Advocates Remuneration (Amendment) Order 2014, and the assessed costs being fifty (50) times in respect of instruction fees in an opposed constitutional petition, I have no doubt in finding the sum of Kshs.5,000,000/- to be astronomical and excessive for instruction fees for a constitutional petition, and taking into account that the petition was determined on a preliminary point of law and did not proceed to full hearing.**

**16. I am further of the view, that the taxing master having in her ruling found, that the petition was not complex, that it did not go to full hearing and that no experts were involved made an error in principle in arriving at the payable instruction fees. I find the taxing officer erred in awarding the sum of Kshs.5, 000,000/- as instruction fees.**

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**This without doubt was a manifest error in principle on the award of instruction fees which in the interest of justice ought to be varied and/or set aside.....I find the petitioner has prima facie demonstrated, that the taxing officer erred in law and in principle in assessing the instruction fees and in awarding Kshs.5, 000,000/- thus an increment of ten times in instruction fees, which I find to be unfair and unjust.”**

21. In **Mark Kubai Kariuki & 5 others (suing on behalf of Deliverance Church of Kenya) vs. Japhet Noti Charo & 2 others [2015] eKLR**, the court set aside an award of Kshs.500,000.00 on instruction fees and held that that an increment of three to four times in instruction fees could be fair but not seventeen times.
22. Concerning the issue of representation, whilst this court awarded costs to the successful litigant, as at the time it gave directions on how the petition and the application for interlocutory reliefs was to be dealt with, only the 6<sup>th</sup> respondent had filed a response to the petition. No directions whatsoever were given in

respect of the preliminary objection subsequently filed by the 1<sup>st</sup> and the 4<sup>th</sup> respondents. I agree with the applicants submissions that the pleadings filed by the 1<sup>st</sup> and 4<sup>th</sup> respondents and the submissions by the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents cannot form a basis for award of costs by the taxing master as they were rejected by the court for having been filed out of time.

23. Having determined that the taxed bill of costs is excessive and out of tune with the trend of awards in similar circumstances, I find and hold that the applicants have made up a case for setting aside the ruling of the taxing master delivered on 30<sup>th</sup> July, 2025 which I hereby do. I order that the respondent/applicant's bill be re-taxed by another taxing master of this court taking into account the following circumstances of this case:-

- i) That the suit was determined preliminarily;
- ii) Some of the respondents barely participated in the petition and their pleadings/documents were not admitted by the trial court and directions given in respect thereof because they were filed out of time. Such documents/pleadings

cannot form a basis of award of costs to the respondents, especially the 1<sup>st</sup> and the 4<sup>th</sup> respondent;

- iii) The petition did not raise complex or novel issues of law. It turned on a simple question of law, whether the issues raised in it met the legal threshold of a constitutional petition;
- iv) The amount of time expended in hearing and determination of the matter is not a lot.

24. I award the cost of the application to the applicants.

25. Orders accordingly.

**Dated, signed and delivered virtually this 3<sup>rd</sup> day of December, 2025.**

**L. N. WAITHAKA**

**JUDGE**

**Ruling delivered virtually in the presence of:**

Mr. Ndungu Gichuhi for the applicant

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Mr. Mogambi for 1<sup>st</sup>, 4<sup>th</sup> & 6<sup>th</sup> respondents

N/A for the 7<sup>th</sup> respondent

Mr. Kamau for the 6<sup>th</sup> & 9<sup>th</sup> respondent

Court Asst.: Christine/Ian

ORIGINAL