

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

MISC. REFERENCE APPLICATION NO. E027 OF 2025

IN THE MATTER OF THE ADVOCATES ACT

=AND=

IN THE MATTER OF THE PARTY & PARTY BILL OF COSTS

=AND=

IN THE MATTER OF REFERENCE FROM THE FULING OF THE

TAXING OFFICER OF THE HIGH COURT AT VOI

=BETWEEN=

DOREEN TABU RODGERS.....
APPLICANT

=VERSUS=

JOSEPHAT PETER SHAMBI.....1ST
RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....2ND
RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 18th June 2025 brought under paragraph 11(1) of the Advocates Remuneration Order and all enabling provisions of the law seeking the following orders:-

- (i) THAT this Honourable Court be pleased to set aside the decision of the Honourable Deputy Registrar delivered on 10th January 2024 in respect of the taxation of the Party and Party Bill of Costs dated 27th September 2023.**
- (ii) THAT this Honourable Court be pleased to cap the total costs payable in Voi High Court Election Petition Appeal No. E002 of 2023 in accordance with the express provisions of Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.**
- (iii) THAT upon such capping of costs, this Honourable Court be pleased to refer the Party and Party Bill of Costs dated 27th September 2023 for re-taxation before a different Taxing Officer, with appropriate directions as this Honourable Court shall deem fit and just in the circumstances.**
- (iv) THAT in the alternative to prayers (i), (ii) and (iii) above, this Honourable Court be pleased to reassess and/or set aside the instruction fees awarded under Item 1 of the Party and Party Bill of Costs dated 27th September 2023, on grounds of excessiveness, misdirection and error of principle.**

(v) THAT the costs of and incidental to this Reference be awarded to the Applicant.

2. It is based on the following grounds:-

(i) Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 obligates the court at the conclusion of an election petition, to make a specific determination on the total amount of costs payable, the parties responsible for payment and the beneficiaries of such payment.

(ii) The Learned Deputy Registrar proceeded to tax the Respondent's Bill of Costs in the absence of a prior capping of total costs by the Court as required under Rule 30, thereby rendering the taxation irregular and voidable.

(iii) The Taxing Officer erroneously applied Part A (1)(i) of the Advocates (Remuneration) Order 2014, which pertains to parliamentary and gubernatorial election petitions, rather than applying the scale applicable for appeals from subordinate courts.

(iv) The Learned Deputy Registrar further erred by awarding instruction fees on appeal, despite acknowledging that the appeal presented no novel or

complex issues of law and involved no substantial additional work distinct from the petition at trial.

- (v) It is trite law that instruction fees are a distinct, static and none-off item, typically awarded at the inception of a matter and not automatically replicable on appeal unless clear justification is shown - none of which exists in this matter.**
- (vi) The amount awarded under Item 1 of the Respondent's Bill of Costs (Kshs. 500,000/=) is manifestly excessive, disproportionate to the nature and complexity of the appeal and contrary to principles of fairness and proportionality governing the taxation of costs in election matters.**
- (vii) The Taxing Officer misapplied the law and failed to exercise discretion judiciously, thereby arriving at an exorbitant and unjustified figure that prejudices the Applicant.**
- (viii) This Honourable Court is vested with jurisdiction and discretion to correct errors of principle in taxation and to ensure costs in election matters remain within reasonable, just and accessible bounds as intended by law and public policy.**

(ix) It is in the interest of justice and fairness that this Honourable Court intervenes to set aside and/or vary the impugned taxation and grant the reliefs sought.

3. The application is supported by the Affidavit of the Applicant **DORREN TAABU RODGERS** she deposed as follows:-

(i) I am the Applicant herein. In my aforesaid capacity, I am well seized of the matters deposed to herein and therefore competent to swear this affidavit.

(ii) The facts contained herein are, unless otherwise stated or indicated by the context, within my own knowledge and to the best of my belief, true and correct. Where I make legal submissions, I do so on the advice of my counsel M/s John Bwire & Associates Advocates.

(iii) On 10th January 2024 the Learned Deputy Registrar delivered a ruling on the 1st Respondent's Party and Party Bill of Costs dated 27th September 2023 taxing the same at Kshs. 732,300.00.

(iv) Under Item 1 of the said Bill of Costs, the Deputy Registrar taxed and allowed instruction fees at Kshs. 500,000.00 which I verily believe is manifestly excessive, unjustified and contrary to law and principle.

(v) I am advised and I verily believe that the taxation by the Learned Deputy Registrar was fatally flawed and ought to be set aside and/or varied for the following reasons:

(i) Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides that at the conclusion of an election petition, the court shall cap the total costs payable before taxation. The Learned Deputy Registrar erred in taxing the Bill of Costs without a capping order from the Court, thereby rendering the process irregular and unlawful.

(ii) The Learned Deputy Registrar applied Part A (1) (i) of the Advocates (Remuneration) Order 2014, which is reserved for petitions relating to Members of Parliament and Governors rather than a scale appropriate for appeals concerning Members of County Assembly, thereby inflating the instruction fee.

(iii) The Learned Deputy Registrar awarded instruction fees on appeal despite acknowledging that the appeal raised no novel or complex legal issues. I am advised that instruction fees on

appeal are not to be awarded unless justified by special complexity or novelty - circumstances that were absent in this matter.

(iv) Instruction fees are by law, a distinct and static item typically chargeable once, at the inception of proceedings. The replication of instruction fees on appeal without legal basis amounts to double compensation and is an error of principle.

(v) The award of Kshs. 500,000.00 under Item 1 was excessive and disproportionate to the simplicity of the appeal and wholly inconsistent with the doctrine of fairness, reasonableness and proportionality in taxation of election costs.

(vi) The Deputy Registrar further erred by failing to consider that I had previously been awarded only Kshs. 165,000.00 in a similar appeal before the same court and on the same subject matter - demonstrating a gross inconsistency in application of cost principles.

(vii) That the Deputy Registrar failed to give due regard to precedents in similar election disputes - where courts have consistently capped costs for appeals and petitions involving Members of

County Assembly between Kshs. 100,000.00 and Kshs. 250,000.00 thereby making the current award excessive even by parliamentary election standards.

(viii) The Deputy Registrar misapplied the principles set out in Joreth Ltd v Kigano & Associates (2002) 1 EA 92, which have since been codified under Schedule 5, Part II of the Advocates (Remuneration) (Amendment) Order, 2014, and thereby reached an erroneous award on instruction fees.

(ix) The Learned Deputy Registrar's decision was marked by selective reliance on authorities and improper intervention in the adversarial process by introducing extraneous material - conduct that reflects bias and a breach of neutrality.

(vi) THAT in light of the foregoing, it is just, fair and in the interest of due administration of justice that this Honourable Court intervenes to set aside the taxation, cap the total costs payable, and direct fresh taxation before a different taxing officer, or reassess the fees in line with the law.

(vii) THAT I respectfully urge this Honourable Court to allow the application as prayed in the Chamber Summons.

(viii) THAT I shall rely on further legal submissions at the hearing hereof.

4. The 1st Respondent filed a Replying Affidavit opposing the application as follows:-

(i) THAT I am the 1st Respondent herein thus well versed with the issues raised in the Chamber Summons dated 18th June 2025 and the Affidavits thereof as sworn on the 20th June 2025 and wishes to state as follows.

(ii) THAT the contents of paragraph 1, 2 and 3 of the Supporting Affidavit are admitted.

(iii) THAT in answer to paragraph 3 of the Supporting Affidavit. I wish to state that am advised by my Advocate on record which advise I verily believe to be correct that the Applicant did not challenge the item on instruction before the taxing master. There are thus no grounds for which the same can be challenged by way of a reference.

(iv) THAT further to paragraph 3 above. Am advised by my Advocate on record which advise I verily believe to

be correct. That the Applicant must have actively participated in the taxation otherwise whatever is being raised by way of a reference shall be raised for the first time which is contra settled legal principles since a reference is raised as an appeal.

(v) THAT in answer to paragraph 5 of the Supporting Affidavit and its particulars am advised by my advocates which advise I verily believe to be correct as herein;

(a) Am advised by Advocate on record which advise I verily believe to be correct that this court sits as an appellate court from the decision of taxing master and is thus limited to matters that arose from the taxation. No new issues can be raised.

(b) On the provisions of rule 30 of the Election (Parliamentary & County Elections) Petition Rules. Am advised by my Advocate on record which advise I verily believe to be correct that this argument was never raised before the taxing master. It cannot form the basis of this Reference where it is being raised for the first time.

(c) That further to (b) above am advised by my Advocate on record which advise I verily believe to

be correct that the provisions on capping of costs are not mandatory, it is a matter that is at the discretion of the court that is trying the election appeal.

(d) Am further advised by my Advocate on record which advise I verily believe to be correct. No application was made under Rule 30 of the

(e) On the fact that the learned Deputy Registrar applied part A(1)(i) of the Advocates Remuneration Order 2014 instead of the scale appropriate for appeals concerning Members of County Assembly. Am advised by my Advocate on record which advise I verily believe to be correct that in the absence of a request for reasons and in the absence of the decision of the taxing master this allegation remains unfounded.

(f) On the fact that the appeal raised no novel or complex legal issues I wish to state on advice by my Advocate on record that, this is incorrect. The issues involved were not the usual legal issues that would ordinarily arise from an Election Petition. There were issues that involved/concern population and statistics. There issues of

nationality and citizenship, there submissions and research on statistical data and ethnicity, there were issues of marginalization and discrimination etc.

(g) Contents to paragraph (d) are contested. Am advised by my advocate on record which advise I verily believe to be correct that instruction fees do issue, even on appeal contra the assertions made by the Applicant that they are chargeable once.

(h) In answer to paragraph (e) I wish to reiterate that the Appeal was not simple. The sheer volume of the record of appeal is evidence of the laborious nature of the dispute with issues cross cutting to areas of law such as citizenship, census, population, ethnicity, marginalization etc.

(i) That further to paragraph (f) above as a demonstration that this was not the ordinary Election Petition. The Applicant herein had brought in as parties the National Bureau of Statistics, the Principal Registrar of Persons and the Hon. Attorney General as parties.

(j) In opposition to paragraph (f) I am advised by my Advocate on record that the taxing officer did not

have the award of Kshs. 165,000 at the time of making her ruling. The same cannot form the basis of this Reference. This averment is unsupported by evidence.

(k) In reply to paragraph (g) (h) and (i) of the Supporting Affidavit. I wish to state that the taxing master is being faulted without any justifications. There was nothing placed before the taxing master by the Applicant to allow her reach the findings suggested by the Applicant.

(vi) THAT the contents of paragraph 6 of the Supporting Affidavit are contested. I am advised by my Advocate on record that taxing master reached a just finding. There are not valid grounds for setting aside the taxation. It is not correct that the taxing master failed to consider the arguments now being made by the Applicant, because there were none that were placed before the taxing master.

(vii) THAT am advised by my Advocate on record which advise I verily believe to be correct that the Application is fatally defective and incurable.

(viii) THAT am advised by my Advocate on record which advise I verily believe to be true that the

**application herein is misconceived and/or bad in law
and thus should be dismissed.**

5. The parties filed written submissions as follows; The Applicant submitted that he seeks to set aside the ruling of the Taxing Officer delivered on 10th January 2024, concerning the Party and Party Bill of Costs dated 27th September 2023.
6. The core contention is that the taxed costs, with instruction fees of Kshs. 500,000 and a total of Kshs. 732,300, are manifestly excessive and constitute a misdirection.
7. The application is merited primarily because the trial court failed to cap the total costs as mandated by Rule 30 of the Election (Parliamentary and County Elections) Petition Rules, 2017.
8. This rule requires the election court to specify a total or maximum amount of costs payable at the conclusion of a petition, a procedural safeguard intended to prevent excessive costs from deterring litigants from accessing justice.
9. The principle of capping costs is a public policy cornerstone designed to ensure election petitions remain accessible to all, regardless of financial means, thereby upholding the constitutional right to access justice.
10. The Court of Appeal in **Martha Wangari Karua v IEBC & 3 others** emphasized that high, uncapped costs are an impediment to justice and should not be punitive.

11. In the present case, which involves a nominated Member of County Assembly election, a matter of limited geographical and factual complexity compared to gubernatorial or parliamentary petitions the taxed amount is disproportionately high.
12. Persuasive authorities, such as *Gedi v Gedi & 2 others* and *Anthony Njomo Maina v Jane Njeri Kamande & 3 others*, demonstrate that appropriate caps for such petitions range between Kshs. 200,000 and Kshs. 250,000.
13. Consequently, the Taxing Officer erred in principle by taxing the bill without the guidance of a court-ordered cap, resulting in an award that is so excessive as to amount to a misdirection.
14. This warrants the intervention of this Court. The Applicant therefore prays that the Court caps the total costs at Kshs. 200,000, sets aside the ruling of the Taxing Officer, and refers the Bill of Costs for re-taxation before a different Taxing Officer under this capped amount. In the alternative, the Court should set aside the excessive instruction fees awarded.
15. Allowing this Reference will correct the error, align the costs with the spirit of the election petition rules, and ensure that the pursuit of electoral justice is not stifled by prohibitive costs.
16. The 1st Respondent, Josephat Peter Shambi, opposed the Applicant's Reference seeking re-taxation of a party and party bill of costs.

17. The 1st Respondent argues that the Reference is fundamentally flawed and should be dismissed.
18. The core contention is that the Applicant failed to properly challenge the bill of costs before the Taxing Officer, despite being served, and is now improperly raising issues for the first time.
19. The submissions assert that a Reference is an appeal from the Taxing Officer's decision, yet the Applicant did not follow the mandatory preliminary steps required by Rule 11 of the Advocates Remuneration Order, 2014.
20. Specifically, the Applicant did not serve a written notice of objection on the Taxing Officer, request reasons for the decision, or attach those reasons to the current Reference, rendering it procedurally incompetent.
21. Regarding the substantive issue of capping costs under Rule 30 of the Election Petition Rules, the 1st Respondent submits that the Taxing Officer correctly exercised jurisdiction.
22. It is argued that the power to cap costs is discretionary and rests solely with the election court at the conclusion of the petition or appeal.
23. The Taxing Officer's role, derived from the Advocates Remuneration Order, was limited to taxing the presented bill, a task performed without opposition from the Applicant.

Consequently, the Officer cannot be faulted for not exercising a jurisdiction she did not possess.

24. Finally, the 1st Respondent maintains that the Applicant has not demonstrated any error of principle by the Taxing Officer to justify judicial interference.

25. The absence of the Taxing Officer's ruling or reasons in the application prevents the court from assessing whether the discretion was exercised unreasonably or unfairly.

26. The award of costs was based on the complex and voluminous nature of the underlying appeal, which involved multifaceted legal issues.

27. The 1st Respondent concludes that the Reference is without merit and should be dismissed with costs.

28. The application dated 18th June 2025 seeking to set aside the decision of the Taxing Officer delivered on 10th January 2024 raises substantial questions regarding the taxation of costs in election matters.

29. I have carefully considered the application, the supporting and replying affidavits, and the written submissions filed by the parties.

30. The sole issue for determination is whether the taxation proceedings were vitiated by a failure to adhere to the mandatory framework for costs in election petitions, specifically

the requirement for capping under Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

31. The legal framework governing costs in election petitions is distinct and designed to serve the public interest of ensuring access to justice in electoral disputes.

32. Rule 30 of the Election Petition Rules provides a clear and mandatory procedure: "At the conclusion of a petition, the Court shall make an order specifying - (a) the total or maximum amount of costs payable...".

33. This rule is not a mere procedural formality but a substantive safeguard. As emphasized by the Court of Appeal in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR**, the primary purpose of costs in election petitions is not to punish but to facilitate access to justice.

34. The Court further stated that "awarding of costs in election petitions should not be used to barricade the vulnerable and those of modest means from accessing the court."

35. The failure by the election court to issue a capping order at the conclusion of the appeal was, therefore, a fundamental omission that created a vacuum in which the subsequent taxation occurred.

36. This omission rendered the entire taxation process before the Deputy Registrar irregular from its inception.
37. A taxing officer derives authority to tax a bill of costs from a valid order for costs.
38. In the context of election petitions, that order must comply with Rule 30 and where no cap has been set, the taxing officer is placed in an untenable position, having to tax a bill without the critical ceiling intended by the law to guide the exercise of discretion.
39. The trial court has a mandatory duty to cap the costs payable in an election petition and the power to tax a bill of costs in an election petition is only exercisable after the trial court has capped the costs.
40. Consequently, the Deputy Registrar's ruling of 10th January 2024, however well-reasoned on other aspects, was founded on a flawed and incomplete legal basis due to the absence of the requisite capping order.
41. This constitutes an error in principle that goes to the jurisdiction of the taxing process itself.
42. The 1st Respondent's procedural objections, while noteworthy, do not override this fundamental jurisdictional defect.
43. It is true that a reference under paragraph 11 of the Advocates Remuneration Order typically requires a party to have raised

objections before the Taxing Officer and to have requested reasons for the decision.

44. However, the issue of capping under Rule 30 transcends a mere objection to a specific item in the bill; it is a challenge to the very legitimacy of the taxation proceeding.

45. A party cannot be expected to have "actively participated" in a process that was legally infirm from the outset.

46. Furthermore, the duty to cap costs rests squarely with the election court, not with the parties.

47. The Applicant's failure to apply for a cap during the appeal does not absolve the court of this duty, nor does it validate a taxation conducted in the absence of one.

48. This Court, sitting as a reference court, has the inherent power and duty to correct such a clear error of law and principle to ensure the administration of justice is in conformity with statutory mandates.

49. On the merits of the instruction fee awarded, the Court also finds that the award of Kshs. 500,000 under Item 1 for an appeal arising from a petition concerning a Member of County Assembly was manifestly excessive and demonstrated a misdirection.

50. The Taxing Officer, by her own recorded reasoning acknowledged the appeal did not present novel legal issues.

51. The principles governing instruction fees on appeal are settled. As restated in the case of **Joreth Ltd v Kigano & Associates [2002] 1 EA 92**, which factors are now codified in Schedule 7 to the Advocates Remuneration Order, the value of the subject matter, the complexity of the issues, and the amount of work done are paramount considerations.
52. While the 1st Respondent argues the appeal involved complex issues of statistics and citizenship, these were, in substance, factual issues arising from the petition itself.
53. Instruction fee is primarily awarded at the inception of a matter. A separate, full instruction fee on appeal is only justifiable where the appeal introduces entirely new and complex dimensions of legal work, which was not convincingly demonstrated here.
54. Precedents from comparable matters, such as those cited by the Applicant, indicate a more proportionate range for such disputes.
55. The award, therefore, stands out as disproportionately high and amounts to an error of principle.
56. In conclusion, justice demands that the taxation ruling be set aside due to the fundamental irregularity occasioned by the non-compliance with Rule 30 of the Election Petition Rules.
57. The interests of justice and the public policy underpinning electoral dispute resolution require that costs be predictable, proportionate, and not prohibitive.

58. The application succeeds in the following terms:

- (i) THAT the ruling of the Learned Deputy Registrar (Taxing Officer) delivered on 10th January 2024 in respect of the Party and Party Bill of Costs dated 27th September 2023 is hereby set aside in its entirety.**
- (ii) THAT pursuant to Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, this Court hereby caps the total taxable party and party costs payable in Voi High Court Election Petition Appeal No. E002 of 2023 at the sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/-).**
- (iii) THAT the Party and Party Bill of Costs dated 27th September 2023 is referred back for fresh taxation.**
- (iv) THAT the said taxation shall be conducted strictly within the ceiling of the capped amount of Kshs. 250,000/- as specified in order (2) above.**

59. Each party shall bear its own costs of this Reference.

Dated, signed and delivered this 3rd day of December 2025 in open court at Voi High Court.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Mabishi/Millicent

..... **for the Applicant**

..... **for the Respondents**

ORIGINAL