

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLMISC NO. E023 OF 2025

MARGARET OGESARE MOGOKO APPLICANT

VERSUS

EDWARD MOGUSO MOGOKO & 13 OTHERS RESPONDENTS

RULING

(Applicants aggrieved by taxation of costs by the trial Magistrate in a matter filed before the Magistrates Court; applicants filing a reference to this court pursuant to Rule 11 of the Advocates Remuneration Order; argument of the respondents being that they should have filed an appeal and not a reference; court not persuaded that the avenue is to appeal; a reference can be filed on taxation of costs by a Magistrate; court persuaded to disturb the taxed costs and retaxing some of the contested items)

1. The applicant was plaintiff in the suit Kisii MCELC No. E005 of 2024 with the respondents being defendants. She filed that suit through the law firm of M/s Oguttu Mboya Ochwal & Partners Advocates. Her case was dismissed on 18 March 2025 for non-cooperation on mediation directions. Thereafter the respondent filed a party and party bill of costs which was taxed at Kshs. 131,400/= on 13 August 2025. The applicant did not file any reference to this court within 14 days. She has now approached court through this miscellaneous cause filed by the law firm of M/s C.A Kerubo & Company Advocates. Ten prayers are sought but I can distil them to the following two substantive orders :
 - (1) Enlargement of time to allow the reference out of time.
 - (2) That taxation of items 1, 4, 21 and 26 be set aside and for this court to tax them afresh.
2. The grounds in support of the application and the affidavit in support thereof are unnecessary lengthy and prolix covering over 10 pages. What is important is that the applicant acknowledges that she is out of time and she is aggrieved by the taxation of the items I have pointed out above which I will elaborate later.
3. The application is opposed by the respondent who filed a replying affidavit. He contends that the applicant ought to have filed an appeal, and not a reference, if aggrieved by the

decision of the trial Magistrate on the party and party bill of costs. He argues that a reference is only for matters before the High Court upon taxation by a Deputy Registrar. He further raises issue that there has been no compliance with Order 9 Rule 9 by the law firm of M/s C.A Kerubo & Company Advocates, and the law firm is improperly on record.

4. The application was urged through written submissions and I have taken note of the submissions filed.
5. In his submissions, Mr. Nyambati, learned counsel for the respondents, repeated the argument in the replying affidavit that the applicant ought to have filed an appeal and not a reference under Rule 11 of the Advocates Remuneration Order. No authority was however provided to support this argument.
6. On the part of the applicant reference was made to Rules 10 and 11 (1) and (2), of the Advocates Remuneration Order and Section 27 of the Civil Procedure Act. It was urged that a Magistrate's determination on a party and party bill of costs gives rise to a reference.

Well, Paragraphs 10 and 11 do not actually mention Magistrates and taxation of party and party bill of costs because they are drawn as follows :

10. Taxing officer

The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

11. Objection to decision on taxation and appeal to Court of Appeal

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

7. Rule 10 talks of taxation being done by the Registrar or a Deputy Registrar of the High Court, or in respect of a special category of bills in relation to trade marks then the Registrar of Trade Marks. Rule 11 talks of objections to taxations and reference to a judge if aggrieved by a taxation and appeal to the Court of Appeal with leave. These rules do not mention Magistrates and taxation of party and party bills in the Magistrates' Court.
8. The applicable rule, in my opinion, is Rule 2, of the Advocates Remuneration Order which was not cited by counsel. It provides as follows :

2. Application of Order

This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) and in a Tribunal established under the Rent Restriction Act (Cap. 296).

9. From the foregoing, it will be seen that the Advocates Remuneration Order applies for taxation of costs, not only in the High Court, but also in subordinate courts (other than muslim courts). A Magistrates' Court pursuant to Article 169 (1) (a) of the Constitution is a subordinate court so it falls under the Advocates Remuneration Order.
10. In addition to the above, taxation of contentious matters is covered in Part III of the Advocates Remuneration Order. Rule 49 provides as follows :

49. Application of Part III

(1) This Part shall apply to contentious matters and the taxation of costs as between advocate and client and between party and party in contentious and other proceedings.

(2) In this Part, the expression "the Court" means the High Court or any judge thereof or a resident Magistrate Court or any magistrate sitting as a member of a resident Magistrate Court (emphasis mine).

11. From the above, it will be seen that the definition of 'court' does not cover only the High Court, but also Magistrates' Courts.
12. My view therefore is The Advocates Remuneration Order and the procedure laid down therein on taxation of costs, subsequent reference to the High Court (which will include courts of equal status) and further appeal to the Court of Appeal, will also apply to taxation of costs in the Magistrates' Court. It would not add up to me why a taxation of costs in the Magistrates' Court would invite a whole appeal, while taxation of costs by the Deputy Registrar on a High Court matter would invite a reference, yet at the end of the day, what is taxed are bills of costs. I would thus favour an interpretation which allows an aggrieved party a reference, which is a less onerous process than an appeal. Moreover, it should be remembered that in an appeal there will be entitlement to further instruction fees on appeal which will only compound the costs. A reference on the other hand, generally does not attract instruction fees (See Rule 13).
13. I am thus not persuaded by Mr. Nyambati's arguments that the applicant ought to have filed an appeal rather than a reference to this court.
14. What the applicant needed to do was of course file the reference within 14 days after being provided with reasons as provided by Rule 11 (2) of the Advocates' Remuneration Order. In our case, the ruling was on 13 August 2025 and the ruling was in-built with reasons ; the reference ought to have been filed before 27 August 2025. None was filed thus the prayer in this application to be allowed to file the reference out of time.
15. In my discretion, I will allow the reference out of time and I see no prejudice to the respondent.
16. There is a preliminary point raised that the application is fatal because of non-compliance with Order 9 Rule 9. Order 9 Rule 9 applies inter alia where there is change of counsel after judgment. It is drawn as follows :

9 . Change to be effected by order of court or consent of parties

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

17. From the above, it will be discerned that where one was represented by counsel and needs to change to another counsel after judgment, then he/she is required to obtain consent from the outgoing advocate or obtain an order of court to effect the change of counsel. In our case I see a notice of change of advocates filed and served on 18 September 2025 with no protest from the law firm of M/s Oguttu Mboya Ochwal & Partners. I have also seen that the said firm wrote an email on 15 October 2025 to the applicant pointing out that they have no objection to her appointing another firm of advocates. I also see a letter dated 25 October 2025 from M/s Oguttu Mboya Ochwal & Partners to the applicant sending her the original file. It is true that there is no formal consent filed but it is as clear as day that the outgoing counsel had no issue with any incoming counsel and I think it would be stretching Order 9 Rule 9 too thin to insist that only a consent would count in such instance. I overrule the objection on the representation of M/s C.A Kerubo & Co for the applicant.
18. Let me get to the substance of the matter which is on taxation of items 1, 4, 21, and 26.
19. Item 1 was instruction fees which was billed at Kshs. 200,000/= and taxed at Kshs.100,000/=. Item 4 was attending court for hearing of an application dated 15 February 2024 on 18 February 2024 and was billed at Kshs. 5,000/= and taxed at Kshs. 3,000/=. Item 21 was for service of a replying affidavit done on 28 November 2024 and billed at Kshs. 2,000/=. I see nothing in the ruling on this item. Item 26 is to court fees of Kshs. 1,600/= for filing a Memorandum of Appearance and application.
20. The suit was filed in the Magistrates' Court and therefore Schedule 7 of the Advocates Remuneration Order applies.
21. Regarding instruction fees, I see that the suit was commenced through a plaint. The applicant sued some 14 persons and she claimed that they maliciously evicted her from her parents' home in the land parcel Nyaribari Chache/Birongo/36. It would appear that the defendants/respondents were her close relatives as she pleaded that the 1st defendant is her brother. In the suit, she asked for orders that she be reinstated back to the suit premises and a permanent injunction to restrain the respondents from interfering with her possession of the suit premises.

22. It will be seen that no specific sum was sued for and thus paragraph 2 of Schedule 7 applies. It provides as follows :

2. In any suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the judgment (other than proceedings falling under paragraph 3 below); such costs as the court in its discretion but not less than Kshs. 20,000 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Kshs. 50,000.

23. No defence was filed and thus the amount awardable ought not to have been less than Kshs. 20,000/= and not more than Kshs. 50,000/=. The court awarded Kshs. 100,000/= . I agree with the applicant that this was erroneous, for the sum should not have exceeded Kshs. 50,000/=. I observe further that the case did not proceed for hearing but was struck out at a preliminary stage. Moreover, the parties are close relatives. In light of that I am persuaded that a sum of Kshs. 20,000/= should have been appropriate.

24. On item 4 I see no issue, because the remuneration order at paragraph 5 of Schedule 7, provides for Kshs. 3,000/= for attendance “on any application, notice of motion, chamber summons or execution proceedings, to include taking instructions to proceed or oppose, drawing application, engrossing and filing.” The only clarification I make on Item No. 4 is that the attendance was on 19 February 2024 and not 18 February 2024. Though counsel for the applicant asked for Kshs. 1,400/= I think the taxing officer was correct to award Kshs. 3,000/=. I see no reason to disturb the award of Kshs. 3,000/= for it was an attendance to argue an application.

25. Item 21 was for service of a replying affidavit. I have actually seen no award for this item and it is not specified in the ruling. It is not clear to me if it was awarded or not as it is not noted in the body of the ruling. It was billed for service of a replying affidavit which was done in Kisii and therefore what ought to have been awarded was Kshs. 1,400/= under paragraph 10, i.e service within three kilometers of the court. So, I will award Kshs. 1,400/= and not Kshs. 2,000/-. In his submissions counsel for the applicant urged for an award of Kshs. 1,000/= but it is obvious that the correct sum is Kshs. 1,400/= as I have pointed out above.

26. The last item is item No.26 which was Kshs. 1,600/= as filing fees on the Memorandum of Appearance and an application. The sum should be clear from the receipt. I have seen the receipt dated 15 February 2024 for Kshs. 1,600/= being Kshs. 100/= for the Memorandum of Appearance and Kshs. 1,500/= for filing an application. I wonder what

the quarrel is. The money is receipted and is as clear as day. The applicant surely cannot complain regarding this award.

27. Since the taxation of the other items were not contested, my total brings me to Kshs. 50,800/=. I substitute the decision of the taxing officer, taxing the costs herein at Kshs. 131,400/= and in place thereof order the costs of the respondents taxed at Kshs. 50,800/=.
28. There will be no orders as to costs regarding this reference.
29. Orders accordingly.

DATED AND DELIVERED THIS 10 DAY OF DECEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Otieno for the applicant

Mr. G.M Nyambati for the respondents

Court Assistant – David Ochieng.