



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAORK
ELCLA CASE NO. E007 OF 2025

TETO OLE MOMPOSHI

Suing as Legal Representative of the estate of Simintei Momposhi(Deceased).....APPELLANT/APPLICANT

VERSUS

JOHN LEITATO RONKO.....1ST
RESPONDENT

DANIEL KIPAILOI MOMPOSHI.....2ND
RESPONDENT

CAPEFIELD LIMITED..... 3RD
RESPONDENT/OBJECTOR

RULING

1. The Appellant/Applicant herein filed an Appeal vide a **Memorandum of Appeal** dated **30th April 2025**, having been aggrieved by the whole of the Ruling of the Deputy Registrar in **Narok MCELC E036 of 2024**, which was delivered on **10th April 2025**, on the grounds that the Deputy Registrar erred in law by determining that the 3rd Respondent was entitled to costs, yet it entered appearance without being served with Summons to Enter Appearance and that the **Party to Party costs** awarded, were made

without proper legal basis nor followed principles set in law while arriving at the same.

2. The Appellant/Applicant filed the instant Notice of Motion Application dated **23rd May 2025**, and sought for orders that;

i) Spent

ii) That this court do issue a stay of execution of the attachment and sale of the Appellants livestock or any other property as described in the Proclamation Notice dated 15th May 2025 by Indomitable Auctioneers pending hearing and determination of the Application and the instant Appeal.

iii) That the court do order a stay of execution of Ruling made by the Honourable Phylis Shinyada in Narok MCELC/E036/2024 Teto Ole Momposhi versus John Leitato Ronko, Daniel Kipailoi Momposhi, Capefiled Limited, delivered on 10th April 2025, and consequential orders pending hearing and final determination of the Applicant's Appeal.

3. Subsequent to filing of the Notice of Motion Applicant, the 3rd Respondent/Objector filed a **Notice of Preliminary Objection** dated **23rd June 2025**, on the grounds that;

- i) That the Appeal herein is incompetent, incurably defective and nullity ab initio, having been instituted in contravention of the express procedural framework governing challenges to decisions arising from taxation of costs;***
- ii) That the Appellant has improperly invoked the appellate jurisdiction on this court in a matter where no right of appeal lies as of right or at all, thereby rendering the entire appellate process jurisdictionally untenable and procedurally irregular;***
- iii) That the court is divested of jurisdiction to entertain the Appeal as framed, and the same ought to be struck out ex debito justitiae;***
- iv) That in any event, the suit/objection/appeal as brought, is time barred by dint of Rule 11 of the Advocates Remuneration Order. He prays that the entire appeal be struck out with costs.***

4. On **24th June 2025**, when the matter came up for hearing of the Application the court ordered that the **status quo** be maintained. The **status quo** was that there should be no execution or attachment based on the **bill of costs** until the **Preliminary Objection** is heard and determined.

5. The Preliminary Objection was canvassed by way of written submissions. The 3rd Respondent/Objector filed its

submissions dated **22nd July 2025**, and submitted **that** its Preliminary Objection dated **23rd June 2025**, should be upheld and the entire Appeal struck out with costs because this Court lacks jurisdiction.

6. The 3rd Respondent argued that jurisdiction is everything as held in ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR***, and that a court must satisfy itself that it has authority to hear a matter as was held in the case of ***Phoenix of E.A. Assurance Co. Ltd v S. M. Thiga t/a Newspaper Service [2019] eKLR***.
7. The 3rd Respondent submitted that the Appeal herein challenges the Ruling of the Taxing Officer delivered on **10th April 2025**, yet the Appellant failed to comply with the mandatory procedure prescribed under **Rule 11** of the ***Advocates (Remuneration) Order***, which requires a Notice of Objection, request for reasons, and a Reference to a judge by Chamber Summons.
8. As emphasized in ***Busia Municipal Council v T/a Manwari & Co. Advocates [2010] KEHC 1296 (KLR), Rule 11***, that is the only procedure for objecting to a taxing officer's decision and is not optional. It further submitted that the Appellant did not file a **Notice of Objection**, did not seek reasons; did not file a Reference, and instead lodged a Memorandum of Appeal outside the prescribed **14 days** without seeking enlargement of time. The Ruling was delivered on **10th April 2025**, and the Appellant's Memorandum of Appeal was filed on **2nd May 2025**.

9. The 3rd Respondent further submitted on the blatant disregard of mandatory procedures which renders the instant Appeal ***fatally incompetent, improperly*** before this Court, and is therefore ***a nullity ab initio***. Reliance was placed in the case of ***Ufundi Co-operative Savings & Credit Society v Njeri Onyango & Co. Advocates [2015] KEHC 4070 (KLR)***, which held that parties who fail to comply with ***Rule 11 of Advocates Remuneration Order***, cannot seek refuge under ***Article 159(2) of the Constitution***.
10. Further reliance was sought in the case of ***Kihara Ndiba & Co. Advocates v Estate of Eliud Njoroge Kuria (Deceased) [2023] KEHC 24432 (KLR)***, which recognised that failure to comply with mandatory timelines and procedures constitutes a proper basis for a Preliminary Objection.
11. It was further submitted that the Appellant/Applicant has improperly invoked the appellate jurisdiction of this Court in a matter where ***no Appeal*** lies as of right. On costs, the 3rd Respondent relies on the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR***, which restates that costs follow the event.
12. Accordingly, the 3rd Respondent urged the Court to find that the Appeal is incompetent, the Court lacks jurisdiction, and therefore the instant Appeal should be struck out with costs.

13. The Appellant/Applicant opposed the **Preliminary Objection** through its submissions dated **30th September 2025**, filed by **Okinyi Law Advocates**, on the basis that the 3rd Respondent's reliance on **Rule 11** of the **Advocates (Remuneration) Order** is fundamentally misplaced because the impugned decision did not emanate from a **taxing officer** within the meaning of **Rule 10** of the Order, which expressly designates a "Registrar or a District or Deputy Registrar of the High Court" as the taxing officer, and not a Magistrate in the Subordinate Court.
14. It was further submitted that the **bill of costs** in **Narok MCELC E036 of 2023**, was filed and determined in the subordinate court, and therefore what occurred was an assessment or ascertainment of costs by a magistrate pursuant to **Order 21 Rule 9(1) and (2)** of the **Civil Procedure Rules**, which governs the manner in which costs in subordinate courts are fixed, agreed, certified, or taxed, with sub-rule (2) expressly providing that in subordinate courts, the certificate of costs is signed "by the magistrate."
15. The Appellant further submitted that the 3rd Respondent's **Preliminary Objection** is misguided because it is premised on a procedure designed exclusively for taxation before the High Court and superior courts, whereas the instant matter arose from a subordinate court assessment. Further noting that the confusion may have arisen from the erroneous citation of the ruling as emanating from the "High Court of Kenya at Narok, in **ELC Case No. E036 of 2024**" instead of

the correct designation “**Narok MCELC E036 of 2024,**” which is a clear error apparent on the record.

16. Reliance was placed on the case of **Bernard Gichobi Njira v Kanini Njira Kathendu & another [2015] eklr,** to reinforce the position that magistrates assess costs in subordinate courts regardless of the terminology used, and thus Rule 11 of the Advocates (Remuneration) Order does not apply.
17. Consequently, the Appellant argued that the **Preliminary Objection** dated **23rd June 2025** is incurably misguided, devoid of merit, and only fit for dismissal.
18. This court has carefully considered the instant Preliminary Objection, the rival written submissions in support and against the same, and finds as follows;
19. From the court’s record, it is evident that the Appellant/Applicant herein filed **Narok CMELC NO. E036 of 2024,** against the Respondents herein over land parcel No. **Cis Mara /Olkinyei/815** for various prayer among them a declaration that the transfer of the suit land from the deceased(**Simintei Momposhi**) to 1st and 2nd Defendants(Respondents herein) was **fraudulent** and otherwise **illegal, irregular** and consequently **null** and **void**.
20. The suit was opposed by the Defendants thereon(Respondents) herein who filed their Statements of

Defence, on various dates. The 3rd Defendant (now Respondent) filed an application to challenge the jurisdiction of the trial court. However, before the application could be heard, the Appellant/Applicant herein withdrew the whole suit, which withdrawal was allowed, and the Defendants were directed to file Bills of costs for taxation.

21. The 1st, 2nd and 3rd Defendants(Respondents) filed their Bill of costs, and the Appellant (As Plaintiff) filed his response in opposition to the two Bills of costs, through his Replying Affidavit dated **14th January 2025**. Vide a Ruling dated 3rd **April 2025**, the trial magistrate taxed the bill of costs at **Ksh 989, 700/=** for the 1st and 2nd Defendants, and **Ksh 1,580, 000/=** for the 3rd Defendant.
22. Aggrieved by the said Ruling, the Appellant filed the instant Appeal, wherein he urged the court to set aside the said Ruling of the trial court, and allow the Appeal. The Appellant also sought for stay of execution of the said bill of costs pending the hearing of the Appeal.
23. The 3rd Respondent filed a **Notice of Preliminary Objection** dated **23rd June 2025**, and averred that the Appeal herein is incompetent and incurably defective for having been brought as an appeal instead of invoking the provisions of **Rule 11(3)** of the **Advocates Remuneration Order**. Therefore, the court has no jurisdiction, as the said appeal is time barred and should be struck out.

24. Consequently, the court granted ***status quo*** order, on **24th June 2025**, wherein the status quo was defined as no execution or attachment based on the Bill of Costs until the Preliminary Objection is heard and determined. The said Preliminary Objection was canvassed by way of written submissions, which the court has considered.
25. The issue for determination is whether the instant Preliminary Objection is merited.
26. Preliminary Objection is defined in the case of ***Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696*** as;
- “ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.***
27. The instant Preliminary Objection is based on the contravention of **Rule 11(3)** of the **Advocates Remuneration Order**, and has challenged the jurisdiction of this court to hear and determine this Appeal. Therefore, this court finds and holds that the instant objection is on a point

of law, and thus fits into the description of a Preliminary Objection as described above.

28. Being an Objection on a pure point of law, and challenge to jurisdiction of this court, is it merited?
29. The Appeal in question is a challenge over the taxation of the bill of costs by the trial court. It is trite that costs before the subordinate courts are assessed by the magistrate as per the provisions of the **Advocates Remuneration Order**. The said assessment can be challenged before the Superior courts.
- 30.** Given that the costs before the subordinate courts are not taxed by the taxing master, then a dissatisfied party cannot file a **Reference** to the High court or ELC. A challenge to the assessment of costs by a magistrate in a subordinate court is technically done by an application to the High Court or ELC invoking its supervisory jurisdiction or inherent powers, of the court rather than a formal "Reference" or a standard "Appeal" of challenging a judgment. See the case of **Richard Otieno Oloo vs Anastacia Anditi Oloo & Another [2019]eklr.**
31. Assessment of Costs in the subordinate courts are assessed by a magistrate who dealt with the matter using **Schedule 7** of the **Advocates Remuneration Order**, whereas costs in the High Court are "taxed" by a taxing officer using **Schedule 6** of **Advocates Remuneration Order**.

32. On the other hand a “Reference” is defined under **Rule 11** of the Advocates Remuneration Order for challenging a taxation decision made by a taxing officer or Deputy Registrar. A magistrate who assesses costs does it in his/her capacity as a judicial officer, not a taxing officer and therefore a challenge to his/her decision is not a "Reference" within that specific rule. See the case of **Leisure Lodges Limited Nairobi (Milimani) HCWC No. 28 of 1996.**

33. Having stated as above, has the Appellant invoked the right procedure in filing the instant Appeal. Courts have time and often held that a challenge on the assessment of costs is done through **Section 27** of the Civil Procedure Act, wherein the court invokes its inherent supervisory power, and cannot be done through a formal Appeal. See the case of **Maru v Ruto [2025] KEHC 3947 (KLR)**, where the court held;

“I agree with the above holding of Mrima J as it bolsters the argument that this Court can also invoke its powers under Section 27 of the Civil Procedure Act to check assessments of costs by the Magistrates Court.”

34. Therefore, the procedure of filing such a challenge is slightly different from filing a full appeal against the main judgment of the case. Such a challenge is usually lodged as a **Miscellaneous Civil Application** to the superior court or the court supervising the said subordinate court.

35. In the cases of ***Mathiu Elijah Solo v Joseph Murira [2009] eKLR***, and Richard ***Otieno Oloo v Anastacia Anditi Oloo & another [2019] eKLR***, the court held ;

***“I associate myself fully with the logic and reasoning of Kasango J to the effect that, despite the lacunae on the issue, this Court can very well invoke its inherent powers to check assessments of costs by the Magistrates Court. I therefore find that I have the necessary jurisdiction to entertain the present Application.*”**

36. From the above, it is clear that a challenge against the ***“assessment of costs”*** made by the subordinate Court does not fall under the provisions of ***Rule 11 of the Advocates Remuneration Order*** and thus should not also be described as a “Reference” within the meaning ascribed therein. Instead, it is ***Section 27*** of the ***Civil Procedure Act*** and/or the High Court’s(ELC) inherent or supervisory powers which can be invoked to cure any “lacuna” in the process or procedure of challenging the “assessment of costs” by the subordinate Courts.

37. Though the parties filed bills of costs before the trial court for taxation, superior courts have frowned at such a practice as was held in the case of ***Mathiu Elijah Solo Vs. Joseph Murira High Court Misc. Case No. 5 of 2008;(Supra)***, where Justice Kasango held;

***“There is no provision in the Advocate’s (Remuneration) Order for taxation of*”**

Subordinate Court's Costs. A practice is however arising, where parties in the subordinate court file laborious and detailed bill of costs, and then engage the magistrate in the process of taxation. That in my view is uncalled for and should be discouraged. Subordinate court's party and party costs should be assessed, following the provisions of Schedule VII of the Order. Where a party desires to invoke the learned magistrate in exercise of his discretion on instruction fee, such should be addressed when the court makes an order for costs to be paid."

38. It is clear that the above matter was filed as a ***Misc. Civil Application*** and not ***an Appeal***. The Appellant herein should have invoked the right procedure and not file an Appeal.
39. Though the 3rd Respondent's Preliminary Objection was to the effect that the Appellant contravened the provisions of ***Rule 11(3)*** of the ***Advocates Remuneration Order*** by failing to file ***Notice*** to the ***taxing master*** within ***14 days***, and filing a ***Reference*** within ***14 Days*** of receipt of ***written Notice***, this court finds and holds that this being a Challenge of ***assessment of costs*** before the subordinate Court, then the said challenge was not through a ***Reference***, but through an ***ELC Misc. Application***, and thus the ***Preliminary Objection*** is ***not merited*** and is thus ***not upheld*** by this court.

40. However, it is evident that the Appellant has invoked the wrong procedure of challenging the said **bill of costs** or **assessment of costs** by the trial court. For these reasons, the court finds the instant appeal is **fatally defective** and is **incompetent**.

41. Consequently, this Appeal is **struck out** entirely with costs to the 3rd Respondents herein.

42. Having struck out the entire Appeal herein, the status quo order issued earlier on are hereby vacated.

It is so ordered.

Dated, signed and delivered virtually at Narok this 10th day of December 2025

***L. Gacheru
Judge***

Delivered online in the presence of

Elijah Meyoki - Court Assistant

Mr Okinyi for the Appellant/Applicant

N/A for 1st Respondent

N/A for 2nd Respondent

Mr Ligami for the 3rd Respondent/Objector

***L. Gacheru
Judge***