

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

ELRC CAUSE NO. 1352 OF 2018

(Before Hon. Lady Justice Hellen Wasilwa, J)

**KBC STAFF RETIREMENT BENEFITS
SCHEME.....CLAIMANT/APPLICANT**

VS

**MORARA OMOKE & CO. ADVOCATES.....1ST
RESPONDENT**

**KENYA BROADCASTING CORPORATION.....2ND
RESPONDENT**

**GICHAMBA & CO. ADVOCATES.....3RD
RESPONDENT**

RULING

1 The Claimant/Applicant filed a Notice of Motion dated 10th November 2025 seeking orders that: -

1. *Spent*
2. *pending the hearing and determination of this application, there be an immediate interim stay of the ongoing taxation proceedings in respect of the Advocate-Client Bill of Costs filed by the 1st Respondent on 7 June 2023, including the re-taxation scheduled for 24th November 2025*
3. *this Honourable Court be pleased to review, vary, and/or set aside the restrictive order made on 16th November 2022 which directed that there be a freezing of any change in representation of the*

Scheme pending the taxation and settlement of the costs of the previous advocates

- 4. following the setting aside of the restrictive order, leave be granted to Gikera & Vadgama Advocates to immediately come on record for the Applicant, KBC Staff Retirement Benefits Scheme, in place of the 1st Respondent*
- 5. the computations filed by the firm of Morara Omoke Advocates on 18th July 2022, amounting to over Kshs. 18 Billion, be declared null and void and struck out from the court record on account of being filed without instructions, authority, or participation of the Claimant/Applicant*
- 6. this Honourable Court be pleased to direct that the Applicant Scheme be allowed to file its own correct computation of sums owed pursuant to the judgment delivered on 27th April 2022.*
- 7. upon the filing of the Applicant's computation, the Court do hear the parties on the proper value of the subject matter and adopt an accurate and lawful figure, which shall thereafter serve as the singular basis for any subsequent taxation of costs*
- 8. the costs of this application be provided for.*

Claimant/Applicant's Case

- 2 The Applicant avers that the court entered judgment in this matter on 27th April 2022 in its favour and directed that computations of the sums due be filed within sixty (60) days by the parties.

- 3 Subsequently, its then advocates, Morara Omoke & Company Advocates (1st Respondent), subsequently filed an Advocate-Client Bill of Costs dated 7th June 2023, claiming an astronomical amount of Kshs. 1,436,299,975.69, which demonstrated a complete breakdown of the advocate-client relationship.
- 4 Despite the breakdown, the said firm had proceeded to file purported computations on 18th July 2022, allegedly on behalf of the Applicant, without any instructions of involvement of the Scheme.
- 5 The Applicant avers that the said computations were unauthorized, and appear designed primarily to justify and inflate the Advocate-Client Bill of Costs, rather than to represent the Scheme's true position.
- 6 The Applicant avers that it thus formally withdrew instructions from the said advocates and engaged the 3rd Respondent to take over conduct of the matter. Applications dated 4th October 2022 and 11th October 2022 were duly filed seeking leave for the said firm to come on record.
- 7 The Applicant avers that on 16th November 2022, the Court issued an order directing that the fees of the outgoing counsel be settled first, thereby freezing any change in representation until the conclusion of the taxation of the 1st Respondent's costs.

- 8 The Applicant avers that the effect of this order has been highly prejudicial to itself, effectively denying it the right to legal representation of its choice and binding it to actions taken by a firm it no longer retains.
- 9 It is the Applicant's case that the ongoing taxation proceedings are based on the disputed and unauthorized computations filed by the former advocates, which have never been adopted or validated by the Court, yet are being used to determine the value of the subject matter.
- 10 It further avers that these computations have further been erroneously relied upon in Misc. E002 of 2024, where they were accepted as the value of the subject matter despite the Applicant's express repudiation of them.
- 11 The Applicant avers that the continued reliance on these tainted computations and the restraint on change of representation violates the Applicant's constitutional right to a fair hearing and representation of choice under Article 50(1) of the Constitution, and perpetuates substantial injustice.
- 12 The Applicant avers that is in the interest of justice and fairness that this Court reviews and sets aside the orders of 16th November 2022, stays further taxation proceedings, and allows the Applicant to file accurate computations reflective of the true position.
- 13 The Applicant avers that no prejudice will be occasioned to the Respondents if this application is allowed, since the

confirmation of the decretal sum will allow for certainty on the fees payable whereas the Applicant stands to suffer irreparable prejudice if the present situation persists.

- 14 It is the Applicant's case that the continued restraint on the Scheme's choice of counsel prevents it from formally challenging the unauthorized computations in the main suit. Failure to secure a stay will result in a taxation award based on fal. figures, leading to an unjust, excessive financial liability that will cause irreparable prejudice and potentially lead to the collapse of the KBC Staff Retirement Benefits Scheme.
- 15 The Applicant avers that the basis for calculating costs must be a sum that has been adopted and validated by the Court. The present taxation is flawed as it relies on figures that the Claimant has consistently rejected and which were not determined by the judgment of 27th April 2022.
- 16 The Applicant avers that the primary rationale for the previous rulings cited by the 1st Respondent including the ruling of the Court of Appeal in CIVIL APPLICATION NO. E293 OF 2025, was the existence of a severe and unresolvable dispute regarding the true value of the subject matter upon which the 1st Respondent sought to base its fees.
- 17 The Applicant avers that following intensive engagement and in compliance with the spirit of the judgment of 27th April 2022, the Applicant and the 2nd Respondent

successfully undertook a comprehensive reconciliation of the unremitted pension contributions owed.

- 18 The Applicant avers that the outcome of this reconciliation process is the definitive establishment of the true and agreed principal debt as at the relevant dates, and the computation of interest thereon.
- 19 The Applicant avers that the 'Reconciled Computations' prepared jointly by the Applicant and the 2nd Respondent, clearly sets out the true financial position of the debt. This reconciled figure of approximately Kshs. 1,608,139,273.98 stands in stark contrast to the Kshs, 18 Billion claimed by the 1* Respondent and which forms the fictitious basis of its taxation claim.
- 20 The Applicant avers that the doctrine of *res judicata* cannot apply where the subsequent application is founded upon a material fact that arose after the previous judicial determination, or upon the definitive resolution of a fact that was previously in contention. The final reconciliation of the debt falls squarely into the latter category.

1st Respondent's Case

- 21 In opposition to the application, the 1st Respondent filed a notice of preliminary objection dated 19th November 2025 on the following grounds:
 1. *This Honourable Court lacks the jurisdiction to entertain the Application for the following reasons:*
 - a. *The Application offends the Res Judicata doctrine. It raises issues that have been fully settled by this*

Court and the Court of Appeal. More specifically, it raises the issue of stay of taxation proceedings that has been addressed by the Ruling of the Court of Appeal in CIVIL APPLICATION NO. E293 OF 2025 rendered on July 04, 2025; this Court's Rulings by Honorable Justice Ocharo Kebira dated April 30, 2025 and October 23, 2025 in MISCELLANEOUS REFERENCE APPLICATION NO. E002 OF 2024 which have all declined to stay the taxation proceedings.

- b. The Application offends the well laid appellate mechanisms prescribed in law by raising issues such as the Subject Matter Value of the taxation proceedings in MISCELLANEOUS REFERENCE APPLICATION NO. E002 OF 2024. The Subject Matter Value and the question of Computations filed in this Court have been substantively adjudicated upon by this Court at Paragraph 69-70 of the Ruling by Honorable Justice Ocharo Kebira delivered on April 30, 2025. The Claimant's Application also delves into the merits of this Court's judgment in ELRC CAUSE 1352 OF 2018 which ought to be prosecuted through the appellate mechanism.*
- c. The Application offends the Sub Judice doctrine by raising issues of stay of taxation proceedings that are live before the Court of Appeal in CIVIL APPLICATION NO E444 OF 2025 and CIVIL APPLICATION NO E636 OF 2025, which Applications are yet to be heard. CIVIL APPLICATION NO E444 OF 2025 is coming up for a hearing on the matter of urgency on November 26, 2025.*

- d. The Application is in the nature taxation proceedings. Contrary to Order 11 of the Advocates (Remuneration) Order, the Application calls upon this Court to conduct taxation in the course of an ordinary claim which jurisdiction is in the realm of a taxing officer only. This Court may only determine the kind of taxation issues urged by the Claimant in a taxation reference. Taxation reference proceedings have been completed with finality in MISCELLANEOUS REFERENCE APPLICATION NO. E002 OF 2024.*
- e. The Application has been filed by Advocates who are not on record for the Claimant before this Court which has not issued an order under Order 9 Rule 9 of the Civil Procedure rules allowing Gikera and Vadgama Advocates to come on record for the Claimant. Gikera and Vadgama Advocates are therefore strangers to these proceedings.*
- 2. The Client's Application is frivolous, vexatious; and an egregious abuse of the court process calculated to circumvent well laid appellate and taxation reference procedures. The elements of frivolity and abuse of the court process are particularised below:*
- a. The Applicant is engaged in blatant forum shopping where it has filed this same application for stay before different judges in this Court and the Court of Appeal with the sole intention of engineering a dubious stay of taxation proceedings.*

- b. The Application is a disguised appeal and/or a taxation reference calculated to have this Honourable Court violate the functus officio doctrine and illegally sit on appeal in its own decisions in respect of issues such as the Subject Matter Value in the taxation of the Advocate Client Bill of Costs dated June 07, 2023. The Subject Matter Value and the question of Computations filed in this Court have been finally settled by this Court at Paragraph 69-70 of the Ruling by Honorable Justice Ocharo Kebira. A substantial portion of these issues shall be the subject of the Claimant's Intended Appeal in respect of the Ruling by Honorable Justice Ocharo Kebira delivered on April 30, 2025 in MISCELLANEOUS REFERENCE APPLICATION NO. E002 OF 2024.*
- c. The Application conflates various proceedings namely MISCELLANEOUS APPLICATION NO. E117 OF 2023; MISCELLANEOUS REFERENCE APPLICATION NO. E002 OF 2024, ELRC CAUSE 1352 OF 2018; and CIVIL APPLICATION NO E444 OF 2025 and CIVIL APPLICATION NO E636 OF 2025 before the Court of Appeal, which is not tenable in law as each court is vested with distinct jurisdiction. In addition to the Application being meritoriously questionable, it is administratively improper as it ought to have been filed as a miscellaneous application.*
- d. The Application seeks to stay the Orders of another judge of equal jurisdiction. First, the*

prayers for stay of taxation proceedings seek to stay the Orders of Honorable Justice Ocharo in the rulings dated April 30, 2025 and October 23, 2025 in MISCELLANEOUS REFERENCE APPLICATION NO. E002 OF 2024. Second, the Application seeks to Appeal the Ruling by Honorable Lady Justice Maureen Onyango rendered on November 16, 2022 directing explicitly that the outgoing counsel's bill of costs be taxed and payment made following which the incoming counsel will be allowed to come on record. Furthermore, Honourable Lady Justice Anna Mwaure Ngibuini on February 13, 2024 by consent of the outgoing and the incoming counsel directed that applications in respect of representation of the Claimant be deferred until proceedings in respect of the outgoing counsel's bill of costs are determined in line with the November 16, 2022 decision.

Claimant/Applicant's Submissions

22 The Applicant submitted on eight issues: whether the Preliminary Objection raises pure points of law within the meaning of Mukisa Biscuit; Whether the Applicant's Motion is barred by res judicata or functus officio; Whether this Court lacks jurisdiction by reason of appellate finality or alleged *sub judice* proceedings; Whether the Application improperly seeks to re-open taxation or sit on appeal over a decision of a court of concurrent jurisdiction; Whether the Application is incompetent for alleged failure to comply with Order 9 Rule 9; Whether the Application

constitutes an abuse of the court process; Whether, in light of the reconciled computations and public interest considerations, the Application is merited.

- 23 On the first issue, the Applicant submitted that a preliminary objection must be founded on a pure point of law, assumed to be correct on the facts as pleaded, and must be capable of disposing of the matter without the court engaging in factual inquiry as held in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***.
- 24 The Applicant submitted that every limb of the objection depends on disputed or contested facts, including: Whether the Applicant adopted, authorized or validated the disputed computations of Kshs. 18,421,704,159; Whether the reconciliation ordered by this Court has now produced a definitive and binding debt figure; Whether the Applicant is forum shopping or pursuing legitimate judicial clarification; Whether the Applicant's conduct amounts to delay or abuse.
- 25 It is the Applicant's submission that matters cannot be resolved without evaluating affidavit evidence and the procedural history of the dispute. The Preliminary Objection is therefore incompetent and should be dismissed on this basis alone.
- 26 On the second issue, the Applicant submitted that Section 7 of the Civil Procedure Act requires that the issue raised must have been directly and substantially in issue and

finally determined in earlier proceedings. It contends that the main issue it raises is the adoption of the final reconciled subject-matter value arising from this court's judgment of 27th April 2022 has never been finally determined.

- 27 The Applicant submitted that this Court expressly directed the parties to reconcile accounts and file computations. That reconciliation, as severally pleaded by the Applicant, was ongoing at the time of the prior rulings cited by the Respondent. The Applicant distanced itself from the computations filed by the Applicant as those were not only not the correct figures but were filed without proper instructions from the client.
- 28 The Applicant submitted that this position is inherently self-authenticating. If, as the 1st Respondent insists, the true debt were indeed in the region of Kshs. 18 billion, the Applicant would be the aggrieved party by any attempt to downplay or reduce that figure. The Applicant would stand to suffer colossal financial loss if the debt were crystallized at a figure lower than what is lawfully owed.
- 29 The Applicant submitted that it defies both logic and commercial common sense to suggest that it would voluntarily, deliberately, and without compulsion insist on a figure that is over Kshs. 16 billion lower than what it is allegedly entitled to recover. No rational creditor acts against its own financial interest in this manner, particularly where the funds in question are held in trust for pensioners and retirees.

- 30 The Applicant submitted that the figure of Kshs. 18,421,704,159 has no factual or legal foundation. It is not a reconciled debt. It is not a judicially adopted figure. It is an arithmetically inflated computation that collapsed once subjected to the reconciliation process as ordered by this Court.
- 31 The Applicant submitted that the 1st Respondent is not the judgment creditor. It does not bear the risk of under-recovery. Its financial interest lies solely in maximizing the subject-matter value for purposes of taxation. That interest, while understandable from a private standpoint, cannot override objective truth, fiduciary responsibility, or the Court's duty to ensure that costs are grounded on reality rather than exaggeration.
- 32 The Applicant submitted that the ruling of Hon. Justice Ocharo Kebira delivered on 30th April 2025 did not adopt the disputed figure as the definitive debt. The learned Judge merely observed that the taxing officer ought to have relied on the judgment and the computations then on record, while acknowledging that the adoption of computations was a matter falling within the remit of the trial court that issued the decree.
- 33 The Applicant submitted that the completed reconciliation process after the ruling has yielded a definitive principal and interest figure of Kshs. 1,608,139,273.98. This is a new and material factual development.

- 34 The Applicant submitted that 1st Respondent's invocation of the doctrine of *functus officio* is legally unsustainable and on a fundamental misapprehension of both the doctrine itself and the procedural history of this matter.
- 35 The Applicant submitted that the doctrine of *functus officio* applies only where a court has fully, finally, and conclusively exercised its jurisdiction over a specific issue, leaving nothing further for judicial determination. This principle was articulated by the Supreme Court in ***Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR***, where the Court held that *functus officio* applies "only after the delivery of a final judgment or decision" and does not bar a court from exercising residual or supervisory jurisdiction necessary to give effect to its decision.
- 36 It is the Applicant's submission that in respect to the instant application, this Court has never rendered a final determination on the reconciled debt figure arising from its judgment of 27th April 2022. To the contrary, the court expressly directed the parties to undertake reconciliation and file computations. Until that reconciliation was completed, it was legally and logically impossible for the Court to adopt a final subject-matter value.
- 37 The Applicant submitted that it does not seek to review, vary, or appeal against the judgment of 27th April 2022. Nor does it seek to revisit the merits of liability. It merely seeks directions necessary to give effect to that judgment and to prevent its misapplication during taxation.

- 38 The Applicant submitted that the Respondent's argument, if accepted, would produce an absurd and unjust outcome: it would freeze an unresolved, provisional computation in time; immunise it from correction even after reconciliation; and elevate an interim arithmetic assumption into a substantive decree. Courts have consistently rejected such mechanistic application of *functus officio*, particularly where it would defeat substantive justice.
- 39 The Applicant submitted that appellate finality does not attach to matters that were never determined. A court cannot be *functus officio* in respect of an issue it deliberately left open for future determination. Thus, it is legally untenable to suggest that a court seized of a reference on taxation, and therefore exercising a supervisory and corrective jurisdiction over the taxing officer, could make a final and binding determination on an issue that was expressly reserved for the trial court that issued the decree.
- 40 The Applicant submitted that the jurisdiction exercised by Hon. Justice Ocharo Kebira in the reference proceedings was limited in scope and nature. A reference under Rule 11 of the Advocates (Remuneration) Order does not confer upon the reference court the power to determine substantive questions of fact or law that were not conclusively settled by the trial court. Its mandate is confined to interrogating whether the taxing officer committed an error of principle or exercised discretion improperly.

- 41 The Applicant submitted that the adoption of reconciled computations arising from a judgment is not an incidental or procedural matter; it is a substantive judicial act that directly affects the crystallisation of the decretal sum and the rights of the judgment creditor and debtor. Such an act can only be undertaken by the court that issued the judgment or by an appellate court properly seized of the matter. It cannot be effected indirectly, by implication, or through obiter observations in a reference ruling.
- 42 The Applicant submitted that it was this Court that expressly directed the parties to undertake reconciliation and file computations. That direction carried with it a retained jurisdiction to consider, interrogate, and adopt or reject, the reconciled figures once filed. Until that exercise was undertaken by this Court, no final determination on the subject matter value could lawfully occur. To suggest otherwise would amount to permitting a court of concurrent jurisdiction, in a collateral proceeding, to usurp the trial court's residual mandate and effectively vary the consequences of its judgment without hearing the matter substantively. Such an approach would offend foundational principles of judicial hierarchy, procedural fairness, and jurisdictional competence.
- 43 It is the Applicant's submission that the Respondent's contention that Justice Kebira made a final determination on the adoption of the computations is not only unsupported by the text of the ruling but is also legally impermissible. The only court competent to adopt the

reconciled computations arising from the Judgment of 27th April 2022 remains this Court.

- 44 On the third issue, the Applicant submitted that it seeks a review of the said orders, but not for the purpose of undermining the authority of this Court or relitigating settled issues. Rather, the review is sought to address a subsequent and material development that has fundamentally altered the basis upon which those orders were made.
- 45 The Applicant submitted that the Court directed that taxation of costs be prioritized, taxation proceedings were already underway and then concluded. A reference was subsequently filed challenging that taxation on the specific ground that the value of the subject matter as applied by the taxing master was disputed. It is for this reason that re-taxation was ordered. The re-taxation was not a procedural a judicial acknowledgment that taxation could not lawfully proceed in the absence of clarity on the subject matter value. This application is therefore not collateral to the re-taxation order, it is integral to its implementation.
- 46 It is the Applicant's submission that review available where there is discovery of new and important matter, or where it is necessary to prevent an error apparent on the face of the record, or to avoid injustice. The completion of the court ordered reconciliation and the crystallization of the true subject matter value constitute precisely such new and material circumstances.

- 47 The Applicant submitted that this application seeks to align them with the current factual and legal reality, so as to bring finality to the long-standing dispute over fees. This Court retains jurisdiction to review its interlocutory directions where doing so is necessary to give effect to its substantive judgment and to prevent injustice.
- 48 The Applicant submitted that taxation on a fictitious or arithmetically erroneous subject matter value would be unlawful, regardless of any prior procedural sequencing agreed upon by parties. Consent cannot cure illegality, nor can it fetter the Court's duty to ensure that its processes yield lawful and proportionate outcomes.
- 49 It was further submitted that the allegation of delay is equally hollow. The Applicant moved the Court promptly upon completion of the reconciliation process and upon the order of the court for re-taxation of the costs, the very process ordered by this Court. Delay cannot be computed against a party for awaiting compliance with a court directive.
- 50 On the fourth issue, the Applicant submitted that for *sub judice* to apply, there must be a previously instituted suit between the same parties, pending before a court of competent jurisdiction, in which the matter in issue is directly and substantially the same.
- 51 It is the Applicant's submission that the proceedings pending before the Court of Appeal concern leave to appeal, stay of proceedings, and jurisdictional questions

arising from the ruling of 30th April 2025. They do not concern the adoption of reconciled computations arising from this Court's decree. The issues, reliefs sought, and jurisdiction invoked are distinct. Section 6 of the Civil Procedure Act is therefore inapplicable, and the *sub judice* argument collapses.

52 The Applicant submitted that it does not invite this Court to tax the Advocate-Client Bill of Costs, reassess specific items, or substitute the discretion of the taxing officer. That jurisdiction remains intact and undisturbed. What the Applicant seeks is a threshold determination on the factual and legal basis upon which taxation may lawfully proceed. Courts have inherent jurisdiction to prevent their processes from being used to achieve unjust enrichment.

53 On the fifth issue, the Applicant submitted that it does not contend that it can unilaterally change advocates without leave. To the contrary, the Application seeks the leave of this Court for its current advocates to come on record. The Applicant is therefore in full compliance with both the letter and spirit of Order 9 Rule 9. It is neither surprising nor legally consequential that the 1st Respondent, being the Applicant's former advocate and now an adverse party with a direct pecuniary interest in the outcome, does not consent to the change. That refusal is precisely what necessitates judicial intervention.

54 The Applicant submitted that the right of a litigant to be represented by counsel of its choice is a core component of the right to a fair hearing under Article 50 of the

Constitution. That right assumes heightened importance where the relationship between a litigant and its former advocate has irretrievably broken down and has mutated into an adversarial contest.

55 It was submitted that the Applicant and its former counsel are not merely in disagreement; they are in active litigation against each other over fees. The parties are, in every practical sense, at war. In such circumstances, it would be both unrealistic and unjust to expect the former advocate to advance the Applicant's interests impartially or to present to the Court material that undermines the advocate's own financial claim.

56 The Applicant submitted that it has been placed in an impossible position. Without leave to change representation, it remains formally represented by a party whose interests are diametrically opposed to its own. That is not representation in any meaningful sense; it is effective disenfranchisement.

57 The Applicant submitted that Order 9 Rule 9 was never intended to operate as a gag order against litigants, nor to trap a party in representation by an advocate who has become an opponent. Its purpose is to prevent disorderly changes of advocates, not to shield self-serving conduct or to entrench inequality of arms.

58 It is the Applicant's submission that granting leave for its current advocates to come on record is not only lawful; it is necessary to preserve its constitutional right to be

heard, to ensure equality of arms, and to enable this Court to receive full, candid, and adversarial assistance on the true value of the subject matter.

- 59 On the sixth issue, the Applicant submitted that abuse of process is not established by the number of applications a party has filed, nor by the persistence with which a party seeks judicial clarification. As the Court of Appeal explained in ***Muchanga Investments Ltd v Safaris Unlimited (Afvica) Ltd & 2 Others [2009] eKLR***, employed for an ulterior purpose, or in a abuse of process arises where court process manner that is oppressive, vexatious, or intended to harass the opposing party.
- 60 It is the Applicant's submission that the application does not fall within any of these categories. It does not seek to delay proceedings, to relitigate matters conclusively determined, or to overwhelm the Respondent through procedural maneuvering. Rather, it seeks a single, narrowly tailored determination that goes to the foundation of taxation itself the correct and reconciled value of the subject matter.
- 61 The Applicant submitted that the application invites the Court to intervene precisely to ensure that its processes are not weaponized to achieve an outcome that is arithmetically indefensible, legally unsustainable, and morally indefensible.
- 62 On the final issue, the Applicant submitted that is a public pension scheme, and the monies in issue are not corporate surplus or discretionary funds, but contributions

held in trust for retirees and contributors who had no participation in, and no control over, the litigation strategy or the fee arrangements that now underpin the contested Bill of Costs.

- 63 The Applicant submitted that equity demands that the Court interrogate who ultimately bears the burden of costs awarded. In the instant case, it is not the faceless corporate entity, but pensioners who stand to suffer the consequences of inflated fees extracted from the scheme.
- 64 The Applicant submitted that is bound by fiduciary obligations to act in the best interests of its members. It would be in breach of those obligations were it to acquiesce in taxation proceedings premised on a fictitious subject matter value. The Court, as the ultimate guardian of equitable outcomes, must not compel a fiduciary to violate its duties through rigid adherence to procedural form.
- 65 It is the Applicant's submission that to permit taxation on a subject matter value that exceeds the reconciled debt by over Kshs. 16 billion would not merely be an error of discretion; it would be an abdication of the equitable role. It would sanction unjust enrichment at the expense of vulnerable beneficiaries and undermine public confidence in the fairness of judicial process is aligned with, rather than opposed to, public interest as it seeks to ensure that the court's processes produce outcomes that are lawful, proportionate and defensible not only in law but in conscience.

1st Respondent's Submissions

- 66 The Respondent submitted two issues: whether this Court has the jurisdiction to entertain the Application; and whether the Client's Application is frivolous, vexatious; and an egregious abuse of the court process.
- 67 On the first issue, the Respondent submitted that the application offends the *res judicata* doctrine by raising issues of stay of taxation proceedings and the determination of the Subject Matter Value for taxation of the Advocate's Bill of Costs, which issues have already been judicially determined by the Court of Appeal, this Court and the Taxing Officer. Specifically, it raises the issue of stay of taxation proceedings that has been addressed by Rulings of the Court of Appeal, this Court and the Taxing Officer.
- 68 The Respondent submitted that this is the sixth time that the Client seeks to stay taxation proceedings in respect of the Advocate's Bill of Costs after the failure of all the other five previous attempts, namely: Civil Application No. E293 of 2025 where the Court of Appeal refused to grant stay of taxation proceedings in a Ruling rendered on July 04, 2025; Civil Application No E636 of 2025 where the Court refused to stay the taxation proceedings *ex parte*; Cause No. 1352 of 2018 where the Hon. Justice Anna Mwaure on February 13, 2024 by consent of the Advocate and the Client directed that taxation proceedings be concluded before other proceedings in the Main Suit in line with the

November 16, 2022 decision by Hon. Lady Justice Maureen Onyango; Nairobi ELRC Miscellaneous Reference Application No. E002 of 2024 in a ruling dated October 23, 2025 by Hon. Justice Ocharo Kebira; and Nairobi ELRC Miscellaneous Reference Application No. E002 of 2024 where the Hon. Taxing Officer, D.O. Mbeja refused to stay taxation proceedings.

- 69 The Respondent submitted that this Court lacks the jurisdiction to entertain the question of the subject matter value for purposes of taxation of the Advocate's Bill of Costs as well as the questions as to whether the Client gave instructions to the Advocate to file the computations which issues have been raised under prayers 2, 5,6 and 7 of the instant Application by the Client. These issues have been judicially determined and cannot therefore be brought up once again for this Court to resolve.
- 70 The Respondent submitted that the application offends the well laid appellate mechanisms prescribed in law by raising issues such as the subject matter value of the taxation proceedings in **Miscellaneous Reference Application No. E002 of 2024** under prayers 2, 5,6 and 7 of the instant application. The subject matter value and the question of computations filed in this court have been substantively adjudicated upon by this court at paragraph 69-70 of the ruling by Justice Ocharo Kebira delivered on April 30, 2025 in Miscellaneous Reference Application No. E002 of 2024.

- 71 It is the Respondent's submission that this court cannot entertain questions on the subject matter value and computations as prayed for in the client's application as this would be tantamount to seating on appeal in respect of the ruling delivered on April 30, 2025 by Justice Ocharo Kebira.
- 72 The Respondent submitted that under prayer 3 and 4 of the application seeks an appeal of the order by Justice Maureen Onyango rendered on November 16, 2022, in a staggering 1089 days after the ruling was rendered which amounts to unreasonable delay and indolence. Further, the Applicant filed the appeal before this court, which issued the order instead of the Court of Appeal. The Appeal is in the wrong forum.
- 73 It is the Respondent's submission that the stay orders ought to be vacated, the application dismissed and the warrants issued reinstated to enable her pursue judgment. Further, the Applicant who filed this application has not bothered to prosecute it since they obtained stay orders. This clearly demonstrate that there was not a pursuit of justice but just an attempt at frustrating the Claimant/Respondent
- 74 The Respondent submitted that the Applicant seeks an appeal against the ruling of the taxation proceedings which had been entered by consent between the Client and the Advocate. By consent of the outgoing and the incoming counsel, Justice Anna Mwaure on February 13, 2024 directed that applications in respect of

representation of the Claimant be deferred until proceedings in respect of the outgoing counsel's bill of costs are determined in line with the November 16, 2022 decision. The Client consented to the taxation proceedings being concluded and payments to the Advocate be made first before any other proceedings in the main suit. An appeal against an order entered by consent is impossible and illegal in view of Section 67 (2) of the Civil Procedure Act.

- 75 The Respondent submitted that the application delves into the merits of the judgment in ELRC Cause 1352 Of 2018 under prayer 5,6 and 7 by raising questions about the value of the judgment awarded to the client as a result of the advocate representing it in the main suit. This issue ought to be prosecuted before the Court of Appeal and not before this court.
- 76 The Respondent submitted that the application offends the *sub judice* doctrine by raising issues of stay of taxation proceedings that are live before the Court of Appeal in *Civil Application No E444 of 2025 and Civil Application No E636 of 2025*, which applications are yet to be heard and determined. Civil Application No E444 of 2025 is coming up for a hearing soon after being certified urgent by the Court of Appeal on November 26, 2025.
- 77 The Respondent submitted that the Application is, in substance, a taxation proceeding disguised as an ordinary motion, contrary to Order 11 of the Advocates

(Remuneration) Order which vests original jurisdiction for taxation in the Taxing Officer.

- 78 The Respondent submitted that taxation was undertaken in Miscellaneous Application No. E117 of 2023, followed by a taxation reference in Miscellaneous Reference Application No. E002 of 2024, culminating in the ruling of 30th April 2025, and that the taxation process is currently ongoing before the Taxing Officer strictly in compliance with that ruling.
- 79 The Respondent submitted that the prayers inviting this Court to re-determine taxation issues amount to employing an unknown procedure and constitute an abuse of the Court's rules and process.
- 80 The Respondent submitted that the Application was filed by advocates who were not properly on record, in contravention of Order 9 Rule 9 of the Civil Procedure Rules, as no leave had been granted allowing the incoming advocates to come on record prior to taxation and settlement of the outgoing Advocate's costs.
- 81 The Respondent relied on ***Gituro v Maki & 3 others (Civil Appeal (Application) E050 of 2023) [2024] KECA 1204 (KLR)***, where pleadings filed by advocates not properly on record were struck out.
- 82 On the second issue, the Respondent submitted that the Application is frivolous, vexatious and an egregious abuse of the court process, brought solely to delay taxation and

frustrate payment, and therefore falls for striking out. It relied on ***Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR, Trust Bank Limited v Amin Company Ltd (2000) KLR 164, and County Council of Nandi v Ezekiel Kibet Rutto & 6 others [2013] eKLR***, on the meaning and treatment of frivolous, vexatious and abusive pleadings.

- 83 I have examined all the averments and submissions of the parties. The applicant has filed an application for review of this court's orders of 16th November 2022 which directed a freeze of any change of representation of the scheme pending taxation. The same order directed that change of counsel could only occur after the taxation which is still pending before court.
- 84 The applicant further seeks to be allowed to bring another counsel on record to defend their interest having fallen out of favour with their previous counsel now seeking to tax the bill of costs.
- 85 The respondents raised a preliminary objection before court averring that this court cannot determine the issue in court as it will be sitting on appeal on orders granted by a court of competent jurisdiction. The powers of this court to review its order emanate from the ELRC procedure Rule 2024 at rule 74 which state as follows:

(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no

appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

- (a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;*
- (b) on account of some mistake or error apparent on the face of the record;*
- (c) if the judgment or ruling requires clarification; or*
- (d) for any other sufficient reason.*

- (2) An application for review of a decree or order of the Court under sub-rule(1) shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station*
- (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or ruling or order to be reviewed . Review.*
- (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.*
- (5) Where an application for review is granted, the Court may review its decision to conform to the*

findings of the review or quash its decision and order that the suit be heard again.

(6) A n order made of or a review of a decree or order shall not be subject to further review.

86 The court can indeed review its order for sufficient reason. In the courts ruling of 13/2/2024, a similar preliminary objection had been raised on whether this court can review its order and it was dismissed accordingly. The issues raised in the preliminary objection are thus *res judicata* and the preliminary objection is found to be without merit.

87 The applicant have averred that they have a good reason to warrant being allowed to bring in another counsel having fallen out of favour with their previous counsel who is taxing the bill they are opposed to.

88 Indeed this is a good reason to allow new counsel for the claimants and especially in view of the fact that this is a constitutional imperative provide for under article 50(1)(g) of the Constitution on the right to representation. It is indeed true that previous orders of the court barred change in counsels before taxation is done. It is however true that it is in respect of the same taxation that the applicants seek to be represented.

89 I therefore find that allowing the applicants an opportunity to be represented by counsel of their own choice is reasonable in the circumstances and of good cause.

90 I therefore allow the application for review and allow a review of orders of 16/11/22 and allow the applicants to be represented by counsel of their own choice.

91 The firm of Gikena and Vadama advocates are hence forth allowed outcome on record for the applicants. The new firm is free to file a substantive application. The rest of the application is struck out having been field by counsel not on record. Costs in the cause.

Dated, Signed and Delivered Virtually at Nairobi this 14th Day of January, 2026.

**HELLEN WASILWA
JUDGE**