REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCLC NO. 210 OF 2017
(PREVIOUSLY HCCC NUMBER 69 0F 2006)

FERNANDO VISCJHI & ANOTHER ..... PLAINTIFF

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VERSUS

ROBERT MUKARE MULEWA & OTHERS ..... DEFENDANTS

RULING

1. In the Chamber Summons dated 22nd April 2025 the following orders are sought:
    a. **That this court be pleased to enlarge time to allow the applicant to give notice of objection to taxation of the bill of costs dated 6th August 2024 and to file reference to that taxed bill of costs;**
    b. **That pending the filing of the notice of objection to taxation and filing the reference to the ruling dated 18th November 2024 this court be pleased to set aside and or review the ruling of Hon. I. Thamara, delivered on 18th day of November 2024 and to stay execution of the certificate of costs taxed at Kenya Shillings 13,469 885.33 and dated 18th November 2024;**
    c. **That alternatively, this court be pleased to remit the bill of costs dated 6th August 2024 for taxation a fresh before a different Taxing Master and allow the applicant to file submissions to that bill or the Court taxes that bill of costs afresh;**
    d. **The costs of the application be provided for.**
2. The application is supported by the sworn affidavit of **Belinda Mbuu**, Chief Executive Officer of the applicant.
3. The grounds upon which the application is premised are that in mid-March 2025, the applicant received a postal package containing a copy of the letter requesting settlement for a bill of course taxed at **Kenya Shillings 13,469 885.33** of the taxation proceedings. That after the applicant's counter claim was dismissed with cost to the

respondents on 23rd November 2023 the respondent file a bill of costs dated 6th August 2024; that the respondent's advocates served the applicants former advocates a copy of the bill of costs but those formal advocate refused service claiming she had ceased acting for the applicant. The Taxing Master proceeded to tax the bill *ex parte* but noted in the introduction that the applicant's advocate on record had not filed an application to cease acting to justify her refusal to receive service of the copy of the bill of costs; that in Taxing the bill *ex parte* the Taxing Master erred in principle in failing to recognize the basic instruction fee payable for the subject matter valued at Kenya Shillings 95,000,000/= before venturing to consider whether to reduce or increase it, and instead awarded the basic instruction fees for the subject matter value at 95,000,000/- before varying it as required in the taxation principle and awarded the instruction fee at Kenya Shillings 10,000,000/-.

4. Based on that error in principle, the instruction fees and the getting up fees as taxed by the Taxing Master are excessive and the interference of this court is justified in that regard. The applicant's advocates have never informed the applicant that they had been served with a bill of costs.

The Response

5. The response to the application was filed in the form of a Replying Affidavit dated 2nd July 2025 sworn by **Jane Oloo,** advocate. The gist of her response is that the application is fatally defective as the deponent, Belinda Boo, has never been authorized by the applicant, Mumbu Holdings Limited, to file the application on its behalf and the application ought to be struck out with costs; that the party and party bill of costs was filed on 7th August 2024 and the 7th respondent herein was issued with a notice of taxation dated 6th August 2024 informing it that taxation of the bill of costs would be

on 7th October 2024. Notice of taxation was served upon the applicant's former advocates who declined service on the ground that they had no instructions from their client. Despite that claim, the said advocates had not filed an application to cease acting in the matter. The deponent referred to an affidavit of service dated 17th October 2024 marked as exhibit J0-3 in her affidavit. When the matter came up on 7th October 2024, there was no appearance by both the applicant or its counsel and nobody to held the counsel's brief, and there was no response filed to the party and party bill of costs; that the taxation proceeded ex parte and the court scheduled the ruling for 18th November 2024. Notice dated 5th November 2024 was served on 8th November 2024 upon the applicant's then advocates. Subsequently the ruling on the taxation was delivered on 18th November 2024 and a letter dated 31st January 2025 demanding that the applicant pay the decretal sum of **Kenya Shillings 13,469 885.33** as per the certificate of costs, was sent to the applicant; that the applicant has failed to indicate when it received the letter dated 1st January 2025 but merely stated that it received the demand in mid-March 2025 without attaching evidence; that the applicant has failed to demonstrate with cogent evidence why it failed to respond to the bill of costs and only blames its former advocate, but that advocate had been served with the bill of costs. There is no evidence that the respondent has commenced execution; that the decision of the Taxing Master to tax the bill of costs at **Kenya Shillings 13,469 885.33** was correct given the valuation report that placed the property value at Kenya shillings 95,000,000/- without considering the developments thereon, the nature of the subject matter, time spent in the litigation that is over 17 years, the work done and the importance of the property to the parties.

Applicant's Submissions

6. The applicant filed submissions dated 23rd June 2025 counsel for the applicant submitted that **Rule 72** the **Advocates Remuneration Order** requires the Taxing officer to dispense with the service of the bill of costs on a person entitled to receive a bill or the advocate if that person cannot be found; that after the applicant's advocate refused service of the bill of costs on her, the Taxing officer did not direct service upon the applicant before dispensing with service despite being permitted by law to serve process through process servers.
7. It was also submitted that under **Order 50 R 6** of the Civil Procedure Rules, courts can enlarge time when the law mandates an action within a specified; that the applicant was expected to challenge the taxation within 14 days from the date of taxation but only became aware of the taxation more than 3 months later. The applicant asserts that it wishes to challenge the taxation because it was not based on principles of taxation. The applicant cited *Nicholas Kiptoo Arap Korir Salat Versus Independent Electoral & Boundaries Commission and 7* Others regarding extension of time to file a reference challenging the taxation. It is stated that the applicant should be allowed to object to the taxation because the Taxing officer ignored established principles of Taxing a subject matter whose value is known and factors and also factors to be considered before enhancing the base instructions fees; that the delay in objecting to the taxation was because of the advocates refusal of service of the bill of costs. It is averred that the applicant became aware of the delay when they received a copy of the demand to enforce the taxation which was sent to them through post. The applicant admits that there has been delay, but states that it acted expeditiously and instructed an advocate to object to the taxation and the court should excuse the delay for the sake of substantive justice. Counsel proceeded to state that it is in the public interest

that the applicant be allowed to challenge the taxation because if it is not challenged, it will permit levying of exorbitant legal fees to the detriment of the public seeking to be represented, and will scare off members of the public from getting advocates because of astronomical fees and thus defeat justice as the cost of accessing justice will be out of many ordinary Kenyans reach due to the levying of instruction fees which are 10% about the value of the subject matter and which is too high. It was submitted that the mistake of the applicant's advocate should not be visited upon the applicant but should be ignored for the sake of doing justice; that arguing that the negligence of the advocate should be taken to another forum away from this court will not achieve justice in the taxation issue.

Respondents' submissions

8. The respondent filed submissions dated 23rd July 2025. It was submitted that the applicant had been served and an affidavit of service dated 17th October 2024 had been filed in court; that the applicant's advocate had declined service on the basis of not having instructions to continue representing the applicant; that there was however no application to cease acting filed in court by the applicants' former advocate and therefore that firm of advocates is deemed to be the firm that was still on record for the applicant by the time of taxation. Despite that, no response to the bill of costs was filed.
9. Regarding compliance with the law, it was submitted that the applicant's application is not properly before the court because of the contents of the Advocates Remuneration Order at **paragraph 11;** that the applicant has filed the application after **5** months from

the date the Taxing Master taxed the respondents bill of costs; that ARO shows that the applicant should have sought leave of court before filing the present application, and the case of *Kitoni Versus EK Mutua & Company Advocates 2023 KEHC 24150 KLR* were cited for that proposition.

10. The respondent also submitted that the applicant's application is premature because no letter has been addressed to the Taxing officer, stating the items of taxation to which he objects, has been exhibited to the application. The case of *Wambeyi Makomere and Company Advocate versus Moses Omondi Oloo 2021 KEHC 5034 KLR Misc. Civil Application No. 550 Of 2012 Nakuru* was cited as authority in this regard.

11. It was further argued that there is neither a letter from the applicant nor a letter from the Taxing Master stating the reasons for taxation attached to the application and therefore it should be dismissed. The case of *Kiprono Singoei & Another Versus Bayete Cooperative Society And Two Others 2017 KEELC 14006 KLR* and *P.M.Malonza T/A Malonza & Company Advocate Versus Board Of Directors Kenya To National Hospital 2014 K E H C 878 KLR* were cited in this regard.

12. Lastly, it was submitted that the decision by the Taxing Master is criticized on the basis that the amount awarded is successive, *Republic Versus Commissioner of Domestic Taxes Supermarket Limited and Two Others 2018 EKLR* sets out the principles upon which the judge may interfere with the Taxing officer's exercise of discretion. *Joreth Limited Versus Kiganjo Associates 2002 eKLR* was also relied on for the exercise of the Taxing Master's discretion to assess an instruction fee as he considers just, taking into account amongst other matters, the nature and importance of the case, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge and all other relevant circumstances.

13. It was submitted that though the Taxing Master considered the value of the suit property, the nature of the subject matter, time spent in the litigation and the work done, and that her decision was correct. Counsel asked the court to dismiss the application with costs to the 7th respondent

Analysis and Determination

14. Upon an examination of the court record, it appears that on 7th October 2024, the respondent's advocates appeared before the Deputy Registrar and indicated that they have filed their bill of costs but had not filed an affidavit of service and taxation was rescheduled to 28th October 2024.

15. On the 28th October 2024, the respondent's advocates appeared alone before the Taxing Master when he informed her that the bill of costs was between the 6th and 7th defendants only and that they had been served; that the firm that had represented the applicant had been served but they had indicated that they had no instructions. Counsel pointed out that there was no leave to cease acting and prayed that the bill be taxed as drawn. The Taxing Master ordered the ruling would be delivered on 18th November 2024, on which date she delivered the ruling virtually.

16. In her ruling, the Taxing Master recorded that though the respondent's advocates had been served with the bill, they had declined service on grounds that they no longer represented the applicant; she also noted that there was no application to cease acting that had been filed by that firm. After setting out those comments, she proceeded to tax the bill of costs in substance. She taxed the bill of costs at **Kenya Shillings 13,469 885.33**.

17. It is correct that parties ought to be given a hearing in any dispute that comes before a court or a tribunal. The rules of natural justice reign supreme in our jurisprudence. The right to be heard in

an impartial setting are guaranteed by **Article 50** of the Constitution.

> **“Fair hearing.**
> **50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

18. In the present case, it is not that the applicant was not accorded a chance to present her case. Her advocate on record was served with the Bill of costs and taxation notice and she failed to attend the taxation. She also failed to inform the applicant of the existence of such a bill of costs, citing lack of instructions from the applicant.

19. At the end of litigation, the unsuccessful party may walk away without undertaking any further action if they are not intent on appealing. At the end of the case it is also apparent that the advocate representing that party may falsely consider themselves to have exhausted their brief. The test of whether they have exhausted their brief is in rules. The usual course of action to take is to file an application to cease acting, or seek more instructions if they are served with process post-judgment. This court is persuaded that there is still that vestigial duty even after judgment has been delivered. It is usual to consider, as the Taxing Master did, that such an advocate to be still serving the litigant if no application to cease acting is made. Order 9 rule 5 CPR provides as follows:

> “5. Change of advocate [Order 9, rule 5]
> A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

20. In this court's considered view, representation at taxation must be deemed to be included in Order 9 Rule 5 as it falls between judgment and review or appeal if any is to be filed.

21. Also, the CPR addresses the issue of an advocate's departure from a matter and the taking up of the brief by another. **Order 9 Rule 9** states as follows:

> "9. Change to be effected by order of court or consent of parties [Order 9, rule 9]
> 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."

22. It is doubtful then, at the cumulative reading of the foregoing provisions of Order 9 Rule 5 and Rule 9 CPR and Rule 7 ARO, and in the absence of an application for leave to come on record for the applicant after judgment under **Order 9,** whether the present advocate has audience before this court. However, this court can only intervene in matters of representation when called upon to do so and it will address the merits of the application. **Rule 72** of the ARO provides as follows:

> "72. Notice of taxation to be given by Taxing officer
> When a bill of costs has been lodged for taxation as aforesaid the registrar shall, upon payment of the fee prescribed, issue to the party lodging the bill a notice of the date and time (being not less than five days after the issue of such notice, unless a shorter time is specially allowed by the registrar) fixed for taxation thereof and shall also issue a copy of such notice, accompanied by a copy of the bill, to each advocate and other person whose name is endorsed on the bill as entitled to receive notice of the taxation thereof:
> Provided that where any person so entitled to receive notice cannot be found at his last-known address for service the Taxing

officer may in his discretion by order in writing dispense with service of notice upon such person."

23. Where counsel has been appearing for a party and has not filed an application to cease acting, **Rule 72** recognizes that he can be served. Matters regarding instructions of counsel or lack thereof are strictly privy between counsel and his client and the court can not be presumed to know whether counsel has instructions or not. Such an unfair burthen can not be foisted upon the court's shoulders, or on the advocate for the adversarial side. Evidence of lack of instructions is adduced by way of action-the lodging of an application to cease acting-and there was none in the present case.

24. In the light of the foregoing discussion of the provisions of Order 9 Rule 5 and 9 CPA and Rule 72 ARO, this court takes the view that it was not incumbent upon the respondent's counsel to seek service upon the applicant when she had counsel for her on the record. This court thus finds that the Taxing Master did not err when she proceeded with the taxation after the refusal to receive service on the part of the applicant's erstwhile advocate.

25. On substance, I must first indicate that perchance this court were to extend time as sought, it would have to be on the basis of great probability of merit in respect of the substance of the application. The substance of the application is the taxation sums addressed therein, being instructions fees and getting up fees, and a cursory examination of the actions of the taxing Master *vis a vis* the record before court is necessary. Counsel argued that the Taxing Master failed to arrive at a base instruction fee first before venturing to consider whether to increase them or reduce them in a ruling. I have examined that ruling. The Taxing Master stated as follows:

"The sale agreement dated 25th September 2005 referred to in the judgment shows that the purchase price of the suit property was 25,000 Euros. PW3 Branze Matemu testified that he had prepared a valuation report and had valued the property at

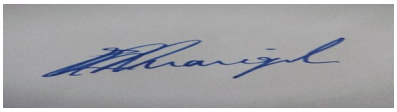
Kenya shillings 95,000,000/= without considering the developments in the suit property. This sum is what would have been deemed as the value of the subject property. In addition to the value of the subject matter, the court notes that is suit was filed in 2006. According to paragraph 2 of the judgment, the 6th and 7th defendants applied to the court to be joined as defendants and this was allowed in March 2006. The suit was determined in November 2023 which is over 17 years since the 6th and 7th defendants were joined to the suit. The matter was not complex as no novel issue was raised. However, looking at the volume of the court file so much work and time was spent in defending the suit. Considering the value of the subject matter the time spent in litigating the suit that is over 17 years and the work done I find that a sum of Kenya shillings 10, 000,000/- million is reasonable as instruction fees. Kenya shillings 90 000,000/- is taxed off."

26. I have examined the court record and noted the valuation report which has been mentioned by the Taxing Master. It was commissioned by the applicant. It is clear that the Taxing Master appreciated the fact that though the valuation report also indicated that Kshs 95,000,000/-, that was just the value of the land. The land is 6.425 acres according to the valuation report. The land is situate at Watamu, a tourism destination. There are hotel structures thereon. The report states that since its mandate did not cover the structures, it ignored them. Only the current market value of the land was given. Photographs of the hotel infrastructure on the property were part of that valuation report. In the evidence of the parties, it was categorical the land had buildings erected thereon. While examining the record of proceedings, evidence that was brought out by the 7th defendant was that there is a hotel on the suit land what many times more than the value in the valuation report. It cannot be stated categorically that the Taxing Master considered that evidence from the proceedings and the valuation report. That notwithstanding, in this court’s view, it was an error on the part of the Taxing Master to express herself only on the value of

the land while she knew that there were buildings thereon, without addressing the value of those buildings even a bit. The mere existence of hotel infrastructure on the land is an indicator that the instruction fee charged, and consequently the getting up fees, may have been cumulatively higher perchance the Taxing Master had established the base instructions fees with that factor in mind.

27. The upshot of the foregoing is that this court is of the view that it ought not interfere with the Taxing Master's decision and the entire application dated **22/4/25** is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Malindi on this 19th February 2026.



MWANGI NJOROGE,
JUDGE, ELC, MALINDI.