

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC. APP. NO. E349 OF 2025

OWINO OKEYO & CO. ADVOCATES.....APPLICANT

-VERSUS-

KENYA NATIONAL ASSURANCE CO. (2001) LTD.....1ST RESPONDENT

C.M KAMANDE T/A CHAKA AGENCIES.....2ND RESPONDENT

(A Reference from the Ruling by Hon. Eric Otieno Wambo, Principal Magistrate, sitting as a Taxing Master, delivered on 8th October 2024).

RULING

1. The applicant filed a Notice of Motion application dated 2nd April 2025 under the provisions of Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The applicant seeks orders that the Certificate of Taxation dated 24th January 2025, together with all consequential orders be set aside, and that the taxation of the respondents' party and party bill of costs dated 22nd August 2023 be set aside and the bill be remitted for fresh taxation before a different Taxing Master.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Stephen Owino, an Advocate of the High Court of Kenya and learned Counsel for the applicant herein. Mr. Owino averred that a Ruling on the respondents' party and party bill of costs dated 22nd August 2023 was delivered on 8th October 2024, and the bill was taxed as drawn. He claimed that was done despite the applicant never

having been notified of the taxation date, which as per the Case Tracking System was slated for 9th April 2024. Counsel asserted that since no notice of taxation was served on the applicant and no affidavit of service exists in the Court record, the applicant was denied an opportunity to contest the respondents' party and party bill of costs both at the taxation stage and at the delivery of the Ruling.

3. Mr. Owino stated that following the delivery of the taxation Ruling, a Certificate of Taxation dated 24th January 2025 was issued against the applicant. He contended that the taxed amount is excessively high, unjust, and resulted from a misdirection by the Taxing Master who failed to apply the principles of reasonableness, proportionality, and fairness. He averred that the taxation proceedings were procedurally flawed, fundamentally unfair, and conducted in violation of the applicant's right to be heard. He deposed that the applicant is apprehensive that execution may proceed at any time, exposing them to irreparable financial harm, while no prejudice would be suffered by the respondents if the orders sought herein are granted.
4. In opposition to the application, the respondents filed a replying affidavit sworn on 5th May 2025 by Ms Christine Adhiambo Oraro, an Advocate of the High Court of Kenya and learned Counsel for the respondents. Ms Oraro deposed that the bill of costs dated 22nd August 2023, together with a taxation notice scheduling the matter for 14th November 2023, was duly served upon the applicant's Advocates, as evidenced by the affidavit of service on record. She averred that on 14th November 2023, the applicant was represented by Counsel, who sought and obtained fourteen (14) days to file a response to the respondents' bill of costs, and the parties were later directed to file written submissions before taxation of the said bill of costs on 7th December 2023. She

stated that when the matter came up on the said date, the applicant had not complied, and requested for more time, resulting in an extension of thirty (30) days and rescheduling of the taxation to 9th April 2024.

5. Ms Oraro stated that on 9th April 2024, the applicant still failed to file any response, after which the Court treated the respondents' bill of costs as unopposed and fixed a ruling date for the same on 14th May 2024, and once again granted leave to the applicant to file its response before the said date. She contended that the applicant deliberately failed to participate in the taxation proceedings despite being afforded multiple opportunities to do so, and even after receipt of notifications through the Court and the e-filing system. She asserted that the taxed amount was reasonable, lawful, and proportionate to the nature and history of the suit filed in 2003, thus the instant application was brought in bad faith and was meant to deny the respondents the fruits of their judgment.
6. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 20th May 2025 by the law firm of S. O Owino & Associates Advocates, while the respondents' submissions were filed by the law firm of M/s Christine Oraro & Company Advocates on 9th June 2025.
7. Ms Okomo, learned Counsel for the applicant submitted that the Certificate of Taxation and the underlying taxation proceedings ought to be set aside on grounds that they were conducted in breach of the Advocates (Remuneration) Order, the principles of natural justice and constitutional guarantees of a fair hearing. She contended that the applicant was denied a meaningful opportunity to challenge the respondents' bill of costs because no notice of taxation or ruling dates were served on the applicant, leading to the taxation proceeding *ex*

parte. She stated that although the delivery of the ruling underwent several adjournments from April to October 2024, but none of the dates were communicated to the applicant. She further stated that the affidavit of service relied upon by the respondents does not contain signed acknowledgments to confirm service.

8. Counsel cited the case of **Kenyariri & Associates Advocates v Kenyariri** [2022] KEHC 27 (KLR) and argued that the failure to notify the applicant of taxation of the respondents' party and party bill of costs explained the delay in filing a Notice of Objection under Paragraph 11 of the Advocates (Remuneration) Order. She asserted that the Taxing Officer acted on an error of principle by taxing the bill of costs as drawn without scrutiny or justification, contrary to the established principles of taxation as established by the Court in the case of **Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and Others No.3** [1972] EA 162, thereby resulting in an inflated and injudicious award.
9. Ms Okomo submitted that the execution of the certificate of taxation already extracted for Kshs.617,341.00, would occasion irreparable harm to the applicant, whereas the respondents would suffer no prejudice if the taxation was re-opened. She relied on the case of **Republic v Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati** [2008] KEHC 3915 (KLR), and asserted that a procedurally flawed process must be quashed and the right to be heard protected. Counsel urged this Court to exercise its discretion under Paragraph 11(4) of the Advocates (Remuneration) Order, Section 3A of the Civil Procedure Act and Articles 50 and 159 of the Constitution of Kenya and stay execution of the taxed costs, set

aside the Certificate of Taxation, and remit the respondents' bill of costs for fresh taxation before a different Taxing Officer.

10. Ms Wambugu, learned Counsel for the 1st respondent submitted that the respondents' bill of costs dated 22nd August 2023 was properly and lawfully taxed. She stated that the Taxing Officer exercised his discretion judiciously and reasonably, while taking into account the fact that the suit was filed in 2003, it involved a substantive claim of Kshs.2,002,167.40, and that the bill of costs arose from decisions delivered in 2015 and 2021, awarding the respondents costs of the suit. Counsel asserted that the applicant was duly served with the respondents' bill of costs and the taxation notice on 23rd August 2023, and attended Court on several occasions including 14th November 2023, 7th December 2023, and 9th April 2024, where it repeatedly sought time to respond but never filed submissions or any opposition to the said bill of costs.
11. Ms Wambugu argued that the applicant cannot rely on lack of participation to set aside the Ruling, having failed to utilize the opportunities granted. She submitted that the Taxing Master correctly applied the Advocates Remuneration (Amendment) Order, 1997, taxed each item as drawn, determined the value of the subject matter from the Judgment, and acted in accordance with established principles of taxation. Counsel contended that if any error occurred, it was by the Taxing Master failing to award getting-up fees for the Appeal, which she invited this Court to review. She asserted that all items, including disbursements, were supported by receipts and Court records. She dismissed the applicant's claims of non-service as unfounded and contradicted by the applicant's own Court attendances. She relied on the cases of **Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and another** (supra) and **First American Bank of Kenya v Shah and others**

[2002] 1 EA 64, and argued that the applicant has neither demonstrated an error of principle nor shown that the amount taxed is excessive.

ANALYSIS AND DETERMINATION.

12. Having considered the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the respondents and the written submissions by Counsel for the parties, the issues that arise for determination are –

- i) Whether this Court's jurisdiction to grant the orders sought herein has been properly invoked; and**
- ii) Whether the applicant is entitled to the reliefs sought in the instant application.**

Whether this Court's jurisdiction to grant the orders sought herein has been properly invoked.

13. Upon perusal of the Court record, the application and the affidavit filed in this matter, it is noteworthy that there is a question of whether or not this Court's jurisdiction to hear and determine the instant application was properly invoked. It is now well settled that the issue of jurisdiction need not be raised by the parties to the suit, as the Court may *suo moto* determine whether it has jurisdiction, particularly, where lack of jurisdiction is inferred from the documents filed, as is the case herein.

14. In the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [1989] KLR 1, Nyarangi, JA, held that –

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

15. On perusal of the applicant's application and the reliefs being sought, it is evident that the applicant challenges the Taxing Officer's taxation of the respondents' party and party bill of costs dated 22nd August 2023, together with the resultant Certificate of Taxation issued on 24th January 2025 on grounds *inter alia*, that the applicant was not served with the taxation and/or ruling notices, the said bill of costs was taxed at an excessively high and unjust amount and that the Taxing Master misdirected himself and failed to apply the guiding principles of reasonableness, proportionality, and fairness.
16. The procedure for objecting to a Taxing Officer's decision is provided for under Rule 11(1) & (2) of the Advocates Remuneration Order, which states as hereunder –
 - 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.***

17. It is undisputed that prior to the filing of the Reference herein, which challenges the Taxing Master's taxation of the respondents' party and party bill of costs dated 22nd August 2023, the applicant neither complied with the provisions of Rule 11(1) of the Advocates Remuneration Order, which obligates a party to issue the Taxing Officer with a Notice of Objection, nor did the applicant pray for extension of time to comply with the provisions of Rule 11(4) of the Advocates Remuneration Order, so as to properly invoke the jurisdiction of this Court.
18. In the often cited case of **Matiri Mburu & Chepkemboi Advocates v Occidental Insurance Company Limited** [2017] KEHC 1032 (KLR), the Court in striking out a Reference held as follows-

...the provisions of Paragraph 11 of the Remuneration Order serve several purposes. Firstly, the requirement that a party seeking reasons gives a notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing master of his objection. Thus, the taxing master, adverse party and ultimately the reference court in their respective roles can focus on the specific matter objected to rather than entire bills of costs, which often run into several pages. The objective is obvious: the expeditious disposal of taxation disputes. Thus, compliances with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily as the Applicant appears to suggest.

19. This Court's jurisdiction to hear and determine a Reference is invoked upon compliance with the provisions of Rule 11(1) of the Advocates (Remuneration) Order. Further, this Court has repeatedly held that a Notice of Objection performs a function similar to that of a memorandum of appeal. As such, failure

to file and serve such a Notice is not a mere procedural lapse capable of being excused under the provisions of Article 159(2)(d) of the Constitution in the interest of substantive justice. Instead, such non-compliance is fatal, as it goes to the very foundation of the High Court's jurisdiction to hear and determine a Reference and/or an application challenging a Taxing Master's decision on a bill of costs.

20. In the case of **Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others** [2016] KESC 2 (KLR), the Supreme Court of Kenya considered the importance of adherence to the laid down procedures in approaching a Court of law and stated as hereunder -

This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of the constitution, which proclaims that, "...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial

intervention; and inevitably, a significant scope for discretion devolves to the courts.

21. In the circumstances of this Reference, this Court holds that adherence to Rule 11(1) of the Advocates Remuneration Order was mandatory and non-compliance with the provisions thereunder is fatal.
22. I therefore find that the jurisdiction of this Court to hear and determine the instant Reference was not properly invoked. As such, I have no jurisdiction to hear and determine the Reference herein on its merits.
23. The upshot is that the Reference herein is fatally defective and it is hereby struck out with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 20th day of February 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Okomo for the applicant

No appearance for the respondents

Ms B. Wokabi – Court Assistant.