

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISC. CIVIL APPLICATION NO. E1072 OF 2025

GURU NANAK RAMGARHIA SIKH
HOSPITAL.....APPLICANT

-VERSUS-

KENNEDY KWEYU SHIKUKU T/A
ESHIKONI AUCTIONEERS....

.....**RESPONDENT**

RULING

1. For determination is the **motion dated 11/07/2025** filed by Guru Nanak Ramgarhia Sikh Hospital (hereafter the Applicant) as against Kennedy Kweyu Shikuku t/a Eshikoni Auctioneers pursuant to **Section 1A, 1B & 3A of the Civil Procedure Act (CPA)** and the **Auctioneer Rules** seeking orders: -

- 1) *That the honourable Court be pleased to grant leave to the Applicant to file this reference.*
- 2) *That the ruling and order of the Taxing Master dated 11/07/2025 be set aside.*
- 3) *That the Respondent's bill of costs dated 04/09/2024 be taxed afresh by this honourable Court.*

- 4) *That the costs of this application be provided for.*
2. The motion is premised on grounds found at the supporting affidavit sworn by Navnit Arora, on even date, who cites being the Chief Executive Officer (CEO) of the Applicant.
 3. Kennedy Kweyu Shikuku t/a Eshikoni Auctioneers (hereafter the Respondent) opposes the Applicant's motion by way of grounds of opposition and a notice of preliminary objection both dated 05/08/2025.
 4. Directions were taken on disposal of the motion and preliminary objection by way of written submissions, the respective parties duly complied. Having considered the material on record, the Court postulates that the issue(s) for determination concern-
 - 1) *Whether the Respondent's PO is merited?*
 - 2) *Whether the Applicant's motion is merited?*
 - 3) *Who ought to bear the costs of the application?*

Whether the Respondent's preliminary objection is merited?

5. In urging the instant motion, the Applicant has relied on among others the provision Section 3A of the CPA which specifically reserves "the inherent power of the court ***to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court***", to wit, this Court's inherent powers was judiciously addressed by the Court of Appeal in Rose Njoki King'au &

Another v Shaba Trustees Limited & Another [2018] eKLR and requires no restatement.

6. Nevertheless, a cursory review of the Applicant's affidavit material, the instant proceedings appear to stem from an auctioneer's bill of costs dated 04/09/2024 that was **"assessed"** by the learned magistrate on 11/07/2025. The use of the words "assessed" rather than "taxed" is deliberate and will become apparent later in this ruling.
7. In opposing the motion, vide his preliminary objection, the Respondent objects to the motion on grounds-; that the motion application is incurably and fatally defective; that a decision of Magistrate under **Rule 55(3) & (4) of the Auctioneer's Rules** cannot be challenged by way of reference; that the proper way is under **Rule 55(5) of the Auctioneer's Rules**, a memorandum of appeal by way of chamber summons setting out the grounds of appeal; and that the application is misconceived, vexatious and an abuse of the Court process.
8. What I garner to be the Respondent's objection is that the Applicant's challenge of the learned magistrate's decision through the instant proceedings is incompetent for want of compliance with rules of procedure. With the above in reserve, as to the nature of a preliminary objection, the same has since been settled within our jurisdiction in the

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celebrated decision of **Mukisa Biscuits Manufacturing Company Ltd.** It was held therein that -;

“So far as I am aware, 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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

See also-; **Oraro v Mbaja (2005) KLR 141.**

9. Meanwhile, the Court of Appeal in **Kigwor Company Limited v Samedy Trading Company Limited [2021] KECA 810 (KLR)** cited with approval the decision of the

Supreme Court in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)** where the latter Court emphasized that:-

“[16] It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR).”

10. With the above dicta in reserve, Rule 55 of the Auctioneers Rules provides that-;

(1)

(2) *Where a dispute arises as to the amount of fees payable to an auctioneer—*

1) in proceedings before the High Court; or

2) where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules (Cap. 21, Sub. Leg.), may on the application of any party to the dispute assess the fee payable.

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- 3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.
- 4) An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.
- 5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.

11. Ex facie, determination of disputed auctioneer costs emanating from auctioneer's instruction, within the pecuniary jurisdiction of the subordinate Court, takes the archetypal of **"assessment"** by a magistrate, and not taxation.

12. That said, vide its submissions, the Applicant argues that on the auspices of the **Civil Procedure Rules (CPR) 2010, Order 51 Rule 1 of the CPR** abolished chamber summons as a mode of bringing applications, to wit, all applications are now brought by notice of motion. Therefore, the present application is properly instituted. Given that the Auctioneer Rules were enacted in 2006 and the CPR in 2010, the latter

takes precedence to the extent of any procedural inconsistency.

13. Further, while calling to aid the decisions in **Susan K. Baur v Shashikant Shamjo Shah & Another [2011] eKLR** and **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR**, the Applicant posits that the Respondent's objection concerns form rather than substance therefore this Court ought not elevate procedural technicalities over substantive justice, contrary to the Constitutional dictate in the **Article 159(2)(d)**.
14. The Respondent on his part summarily relies on the decision in *Opportunity Kenya v Wanjala t/a Mako Auctioneers [2024] KEHC 3297 (KLR)* to argue that the Applicant invoked the procedure of a reference, yet such procedure only applies to taxation of costs under the Advocates (Remuneration) Order as opposed to the Auctioneers' costs are governed by the Auctioneers Rules. Since the Auctioneers' Rules makes it clear that appeal is the only remedy, the Applicant's application to have leave to file a reference is incurably and fatally defective and should be struck out with costs to the Respondent. That the proper way of challenging the decision of a magistrate is a memorandum of appeal by way of chamber summons setting out the grounds of appeal.

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15. Having considered the above arguments, at the risk of repetition and rightly posited by the Respondent, **Rule 55 (3) & (4) of the Auctioneer Rules** provides that challenging a magistrate's assessment of auctioneer costs, shall be, a memorandum of appeal by way of chamber summons to a judge, within seven (7) days of the decision. My understanding of the above provision is that the memorandum of appeal, takes the form of a chamber summons, to wit, the aggrieved party sets out the grounds of appeal therein.
16. It is ostensible from the pleadings filed before this Court that what has been presented is a notice of motion application and not a chamber summons application. That said, I note that on the face of the grounds in the motion and the affidavit in support thereof, the Applicant undoubtedly sets out the grounds upon which it's challenging the magistrate's assessment of the Respondent's bill of costs.
17. The question that begs as this juncture is whether the application as presented is incompetent. I do not agree with the Applicant's submission, that given the Auctioneer Rules were enacted in 2006 and the CPR in 2010, the latter takes precedence to the extent of any procedural inconsistency. The Auctioneer's Rules is explicit as to the form in which a

challenge of the magistrates' decision emanating from an assessment of an auctioneer's bill of costs takes. The latter cannot be overlooked whereas it is trite that procedure is the handmaiden of justice.

18. However, during the dispensation of the Constitution 2010, Courts have always attempted champion substance rather than form, where applicable. To the foregoing end, I wholly concur with the rendition of **Kasango, J. in Alfred Ochieng Opiyo t/a Ochieng Opiyo & Co Advocates v Export Hydro Pump & Services (Africa) Limited [2018] KEHC 6246 (KLR)** wherein she observed that -;

*“.....more importantly, an application cannot be defeated by such failure because the only difference between the two formats is that a chamber summons is intended to be heard in chambers whilst notice of motion is intended to be heard in open court. The courts, however, presently hear all applications in open court whether they be by chamber summons or notice of motion. This change of attitude of hearing applications was captured by M. J. Anyara Emukule, J in the case **Susan K. Baur v Shashikant Shamji Shah & Another [2011] eKLR** where the learned judge stated:*

“The difference between a Summons in Chambers and a Notice of Motion is today very much blurred. In the olden days, summons in chambers was heard in chambers unless the court adjourned it for good reason to be heard in open court. Similarly, Motions were heard in open court unless the court as stated in Order L, rule 1 directed that it be heard in chambers. Today, both Chamber Summons and Motions may and are heard in chambers, and in open court. So that christening an application a Chamber Summons or a Notice of Motion when the rules provide otherwise does not go to the root or basis of the claim, and is merely a matter of form not substance. It does not render the application fatally defective.”

19. The difficulty in the matter would have been presented if in the said notice of motion, the Applicant failed to set out the grounds of appeal upon which he seeks to challenge the decision of the taxing officer. While the grounds in the motion or affidavit in support, do not exactly set up as grounds of appeal as would a memorandum of appeal, it is discernable on the face of both, that the Applicant contends that the taxing officer failed completely to take into account the written submissions of the Applicant relating to Items 4, 5, 6, 7, 8, 9, 11, 12 and 13 the same could have been taxed

as provided by the Auctioneer Rules; and that the auctioneer's bill of costs herein dated 04/09/2024, was improperly taxed and is manifestly high and therefore the amount as taxed on is not in accordance with the rules of assessment as provided for under the Auctioneer Rules.

20. In the end, the Court reasonably believes that the application meets the muster in substance, with respect to the provisions of **Rule 55 (3) & (4) of the Auctioneer Rules**, to wit, the objection by the Respondent is not well taken and is accordingly declined.

Whether the Applicant's motion is merited?

21. It warrants mentioning that the just like an advocate's bill of costs, assessment of an auctioneer's bill of costs draws comparison with regards to the applicable principles, espoused in the of-cited decision in **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd [1972] EA 162.**

22. Applying the emanating dicta therefrom, in respect of an auctioneer, mutatis mutandis, it was distilled that in considering assessment of costs-:

- 1),
- 2) *that a successful litigant ought to be fairly reimbursed for the costs he has had to incur,*

- 3) *that the general level of remuneration of Advocates must be such as to attract recruits to the profession,*
- 4) *so far as practicable there should be consistency in the award made and,*
- 5) *the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.*

23. Predominantly, the undergirding dictate from the aforecaptioned decision with respect to taxation and or assessment of a bill of costs, was that:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat is too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

24. Further, concerning the applicable principles, the late Majanja J. in the persuasive decision in **St. Elizabeth Academy Karen Limited v Joseph Gikonyo t/a Garam Investments [2022] KEHC 133 (KLR)** succinctly put it that-;

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“A Court dealing with appeal from the assessment or taxation of costs must exercise caution since the assessment or taxation is based on exercise of discretion on the part of the assessing or taxing officer. Such assessment or taxation can only be interfered with when it is demonstrably shown that the decision was based on an error of principle or the fee awarded was manifestly high as to justify an interference. (See Oscar Otieno Odongo t/a Odongo Investment Auctioneers v Sukari Industries Limited MGR HC Misc. Application No. 293 of 2018 [2019] eKLR, First American Bank of Kenya v Shah & Others ML HCCC No. 2255 of 2000 and Behan and Okero v Pan African Insurance KSM HC Misc. Case No. 229 of 2003”

25. As earlier noted, the Applicant takes issue with the awards by the magistrate on Items 4, 5, 6, 7, 8, 9, 11, 12 & 13 with respect to the auctioneer’s bill of costs. Ideally, the contestation is that the items were improperly taxed and are manifestly high and therefore the amount as taxed on is not in accordance with the rules of assessment as provided for under the Auctioneer Rules

26. At this point, I find it useful to quote in extenso the relevant facets of the impugned ruling of the magistrate. By his

terse ruling delivered on 11/05/2025 “Annexure NA-4”, he proceeded to address himself as follows-;

“Having considered the auctioneer's bill of costs dated 4th September 2024 I hereby order that the same is taxed and allowed in the sum of Kshs. 158,955.35/-. A certificate of costs shall issue.....”.

27. Here, it is evident that the auctioneer’s bill of costs “Annexure NA-1” was strongly challenged by the Applicant in their submissions “Annexure NA-2”. The magistrate merely stated that the bill of costs was considered and proceeded to tax and allow the same with no explanations. While I concede that Courts are generally deluged with heavy caseloads and it is not possible to go into excessively great lengths in rendering decisions, it is notable, the ruling did not attempt to restate the respective parties’ arguments or give reasons for its decision. As a matter of good practice, and exhortation of Order 21 Rule 4 & 5 of the CPR, the magistrate ought to have addressed herself to each of the contested Items. A general award could not suffice.

28. Assessment just like taxation is not a mathematical exercise, and the magistrate in this case enjoys wide latitude or discretion. However, as observed by Ojwang J (as he then was) in Republic v Minister for Agriculture;

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W'Njuguna & 8 others (Ex parte) [2006] KEHC 3504 (KLR), taxation of costs, is a judicial function to be conducted regularly, based on rational established criteria encapsulated in principles, which are clearly expressed for the parties to perceive with ease. As things stand, the Court itself is unable to deduce, and therefore interrogate the correctness of the criteria and reasoning by which the magistrate arrived at his conclusion.

29. In the Court's considered view, the taxing officer's summary ruling is devoid of reasons, is irregular and in the circumstance did not do justice to the parties' respective submissions on the contested items. In the circumstances, the Applicant's application must be allowed. The decision of the Taxing officer dated 11/07/2025 is hereby set aside and the auctioneer's bill of costs shall be assessed afresh before a different Taxing Officer. Each party is directed to bear their own costs.

Delivered Dated and Signed at Nairobi this 12th March, 2026.

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JANET MULWA.
JUDGE