REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELCL REFERENCE NO. E010 0F 2025

ARISING FROM ELCL MISC. APPLICATION NO. E123 OF 2025

EURRY MABONGA T/A MABONGA & CO. ADVOCATES…….

……APPLICANT

-VERSUS-

AGRICULTURAL DEVELOPMENT CORPORATION……1st RESPONDENT/OBJECTOR

AGRICULTURAL FINANCE CORPORATION……2nd RESPONDENT/OBJECTOR

ADC/AFC DEVELOPMENT HOUSE LLP……3rd RESPONDENT/OBJECTOR

RULING

1. By a Chamber Summons application dated 14th October, 2025 brought pursuant to **Rule 11(2)** of the **Advocates Remuneration Order**, **2014** the Respondents/Objectors seek the following orders:

a. ***THAT this Honorable Court be pleased to set aside the whole decision of the Hon. Deputy Registrar given on the 18th September 2025.***

b. ***THAT the costs of this Application be in the cause.***

2. The summons is based on the grounds on the face thereof and supported by the affidavit of Rose Muohi, the Property Manager of the 3rd Respondent/Objector. She deponed that they oppose the ruling of the taxing officer delivered on 18th September 2025, for various reasons being that he had no jurisdiction to tax the bill of costs and failed to consider their contention that the Applicant had no valid instructions to act for them.

3. The Property Manager of the 3rd Respondent/Objector deponed that where the retainership of an advocate by a client is in dispute, the issue can only be determined by a Judge of the Environment and Land Court, and that the impugned ruling was therefore erroneous.

4. Further, she stated, the Deputy Registrar failed to acknowledge the fact that as at the time of the Objectors filing their submissions, the Applicant had not served them with the substantive bill of costs and there was as such no cause of action against them.

5. It was deposed that the Objectors were equally unaware of the fact that the bill of costs had been transferred from the

High Court Civil Registry for want of jurisdiction and that they learned of the transfer at the time of downloading the ruling.

6. The Property Manager of the 3rd Respondent/Objector stated that despite the service of a notice of objection to the taxation of the bill of costs upon the Deputy Registrar, no response has been received hence the current reference and that the interests of justice warrant the setting aside of the decision of the Deputy Registrar for want of jurisdiction.

7. In response, the Applicant, through Advocate Eurry S. Mabonga, swore a replying affidavit on 9th December, 2025. He deponed that the Objectors have been less than candid with the court and made false averments under oath, particularly in asserting non-service.

8. He stated that the Objectors actively participated in the taxation proceedings by filing a memorandum of appearance, a replying affidavit to the bill of costs, and written submissions before the taxing officer wherein they suggested an alternative amount and that in paragraph 2 of the replying affidavit, the deponent expressly stated that she had “read and understood the Applicant’s Advocate-Client bill of costs” and wished to respond thereto. As such the claim that they were never served with the substantive bill of costs is untrue.

9. He urged that where a party participates in proceedings, the party will ordinarily be taken to have waived a defect of

service in any form (which is denied in this case) and cannot later rely on non-service to defeat steps already taken.

10. On the issue of jurisdiction, he deponed that the contention that the taxing officer lacked jurisdiction to tax the bill of costs is legally untenable. He pointed out that the taxation was undertaken pursuant to the Advocates (Remuneration) Order, which expressly designates the Registrar, District Registrar, or Deputy Registrar of the High Court as the taxing officer and that the Order provides a complete mechanism for objections and references to a Judge where a party is dissatisfied with taxation.

11. In his view, the taxing officer is properly seized of jurisdiction unless and until the High Court directs otherwise or determines that the issue of retainer ought first to be tried by a Judge.

12. He deponed that the challenge to his retainer was a mere afterthought unsupported by any evidence; that he had placed sufficient material before the Deputy Registrar demonstrating the existence of a retainer and that the Deputy Registrar was satisfied on that issue.

13. Accordingly, he urged the court to dismiss the Chamber Summons in its entirety, uphold the ruling of the Deputy Registrar dated 18th September 2025, and award him the costs of both the reference and the taxation proceedings.

Submissions

14. The Objectors filed their submissions on 18th February 2025. Counsel submitted that the Deputy Registrar lacked jurisdiction to tax the bill of costs because there was a dispute as to retainer.

15. It was argued that, under paragraph 12 of the Advocates Remuneration Order, where the existence of a retainer is contested, the issue ought first to be determined by a Judge before taxation can proceed. Reliance was placed on ***Mugambi & Co. Advocates v John Okal Ogwayo & Another [2013] eKLR, Wafula Simiyu & Co. Advocates v East Land Hotel Limited [2016] eKLR,*** and ***Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] eKLR*** for the proposition that the taxing officer's jurisdiction depends on the existence of an Advocate–Client relationship.

16. Counsel further relied on ***Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*** to emphasize that jurisdiction is everything and must be determined at the earliest opportunity. Reliance was also placed on ***Mereka & Co. Advocates v Zakhem Construction (Kenya) Ltd [2014] eKLR*** and ***Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited [2007] eKLR*** for the position that, although a retainer may be oral or inferred from conduct, where there is no evidence beyond the advocate's word and the client disputes instructions, the court should treat the advocate as having acted without authority.

17. Counsel therefore submitted that the Deputy Registrar erred in proceeding with taxation without first referring the question of retainer to a Judge.

18. On service, counsel submitted that the Objectors had consistently maintained that they were never served with the bill of costs. It was argued that, although a taxation notice may have been served, the bill itself was never served upon them. Counsel pointed to the affidavit of service and the wording of the email forwarding "the attached Taxation Notice for your attention" as evidence that only the notice, and not the bill of costs, had been transmitted.

19. Counsel further argued that the Objectors could not access the bill through the e-filing portal because it had initially been filed in the Civil Registry before being transferred to the Environment and Land Court. It was submitted that the portal only reflected the bill during assessment, by which time they had already filed their response. On that basis, counsel urged the court to set aside the Deputy Registrar's decision and dismiss the bill of costs.

Analysis and Determination

20. Having considered the pleadings and submissions, the sole issue that arises for determination is whether the Taxing Officer's decision delivered on 18th September, 2025 should be set aside. The procedure for the challenge of a taxation decision is provided under **Paragraph 11** of the **Advocates (Remuneration) Order** which provides that:

"(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."

21. The legal parameters within which the court can interfere with the taxing master's decision are well settled. The Court of Appeal in ***Joreth Ltd vs Kigano & Associates Civil Appeal No. 66 of 1999 [2002] eKLR*** was categorical that a judge sitting on a reference against the taxing officer ought not to interfere with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.

22. More recently, the Apex Court in ***Non- Governmental Organizations Coordination Board v EG & 5 others (Petition (Application) 16 of 2019) [2023] KESC 102 (KLR) (Civ) (8 December 2023) (Ruling)*** noted:

"A certificate of taxation would be set aside, and a single judge could only interfere with the taxing officer's decision on taxation if: a. There was an error of principle committed by the taxing officer. b. The fee awarded was shown to be manifestly excessive or was so high as to confine access to the court to the wealthy; (and conversely, if the award was so manifestly deficient as to amount to an injustice to one party). c. The court was satisfied that the successful litigant was entitled to fair reimbursement for the costs he had incurred, (and the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party). d. The award proposed was so far as practicable, consistent with previous awards in similar cases. e. There was no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances. f. Although the taxing officer exercised unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically. g. The single judge would normally not interfere with the decision of the taxing officer merely because the judge

believed he would have awarded a different figure had he been in the taxing officer's shoes."

23. The foregoing principles will be considered in an examination of the instant Reference. The fulcrum of the reference herein is twofold. First, the Objectors contend that the Deputy Registrar lacked jurisdiction to tax the Advocate–Client bill of costs because there was a dispute as to retainer which, in their view, ought first to have been determined by a Judge.

24. Secondly, they maintain that they were never served with the substantive bill of costs and that it is only the taxation notice that was served upon them. On that basis, they argue that the entire taxation process was fundamentally defective and that the ruling of the Deputy Registrar ought to be set aside.

25. In response, the Applicant states that the Objectors had fully participated in the taxation proceedings by filing a memorandum of appearance, a replying affidavit, written submissions, and even proposing alternative figures for taxation. Such participation, he maintained, defeated any allegation of non-service.

26. He further contended that the Deputy Registrar had jurisdiction under the Advocates (Remuneration) Order to tax the bill and to determine the issue of retainer, particularly where the dispute was neither genuine nor complex. In this

case, sufficient evidence of the retainer had been placed before the Deputy Registrar.

27. Beginning with the issue of service, the court notes that the Objectors have consistently maintained that they were never served with the substantive bill of costs, and that indeed, the affidavit of service dated 1st July 2025 only refers to service of the taxation notice. However, the record further shows that on 18th July 2025, the Objectors, through the present deponent, filed a replying affidavit expressly responding to the bill of costs. In that affidavit, the deponent stated:

> *"**THAT I have read and understood the Applicant's Advocate-Client Bill of Costs and wish to respond as follows…"***

28. In light of that express acknowledgment and the Objectors' participation in the proceedings, the contention that they were unaware of, or had not been served with the bill of costs cannot be sustained. Any defect in service, if at all, was cured by their subsequent participation in the proceedings.

29. The next issue concerns the existence of an Advocate–Client relationship. Although the Objectors frame the matter as one of a disputed retainer, the real question is whether an Advocate–Client relationship existed at all. This is distinct from a situation where the existence of the relationship is admitted and the dispute only concerns the terms of engagement or the agreed fees.

30. Speaking to a similar scenario, the Court of Appeal stated as follows in ***Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] KECA 431 (KLR):***

> ***"As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/ client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction."***

31. Indeed, a taxing officer is well vested with jurisdiction to determine whether or not an Advocate -Client relationship exists for purposes of taxation. Looking at the proceedings before the taxing master, it is apparent that the Objectors disputed the existence of an Advocate - Client relationship. The ruling however does not make reference to this issue, casting doubt as to whether it was indeed considered.

32. The material on record shows that, at all material times, the Applicant served as a legal officer employed by the 2nd Respondent and was remunerated through a salary for the legal services rendered in that capacity. Indeed, he was also

receiving sitting allowances, performance bonuses and a standing monthly telephone stipend.

33. There is no separate letter of instructions, retainer agreement, or a resolution appointing him as an external advocate, fee note, or any other document demonstrating that he had been independently engaged by the Objectors outside the scope of his employment. The email correspondence referenced in this regard do no suffice.

34. Similarly, there is no evidence that the Applicant rendered any services in a private capacity distinct from his role as an employee of the 2nd Respondent. In those circumstances, the relationship disclosed by the record is one of employer and employee, rather than advocate and client for purposes of sustaining a separate Advocate–Client Bill of Costs.

35. As expressed in ***Anthony Thuo Kanai t/aThuoKanaiAdvocates vs Cannon Assurance Limited & another [2020] eKLR***:

> *"**Rule 4(ii) of the Advocates Practice Rules does not give an employed advocate a right to charge his employer legal fees for the services rendered by the advocate to his employer in the course of employment and for which he is paid a salary. It only provides exceptions to the rule against sharing of profit costs between an employed advocate and his employer where there is an***

agreement between them on the charging of fees and setting off the same against salary and expenses… I am in agreement with the applicant that the services that he rendered to the respondents which were the subject of his bills of costs were reserved for advocates under the Advocates Act. I am however not in agreement with the applicant that he was working for the 1st respondent in two capacities; one, as a legal officer and the other as an advocate of the High Court of Kenya, so that for the services he rendered as a legal officer he was earning a salary and other benefits and those rendered as an advocate of the High court of Kenya, he was charging legal fees. It was common ground that when the applicant was employed by the 1st respondent, he was already an advocate. Most of duties which he was supposed to perform according to his employment contract could only be performed by an advocate of the High Court of Kenya. I doubt if the 1st respondent would have employed the applicant as a legal offcer if he was not admitted as advocate of the High Court of Kenya."

36. Similarly, in ***Mabonga t/a Mabonga & Company Advocates vs Agricultural Development Corporation &***

2 others (Environment and Land Originating Motion E015 of 2025) [2026] KEELC 1510 (KLR) (16 March 2026) (Ruling), the court stated:

> ***"From the facts which are before me and the record in the Misc 115 of 2o25, while associating myself with the decisions cited, it is my considered view there was no retainer nor an Advocate Client relationship between the Applicant and Objectors. Insofar as the Applicant insists that even if he was a legal officer, he was entitled to fees as an Advocate, I find that the Taxing Officer indeed erred in principle when he failed to take into account that the Applicant was a legal officer of the 2nd Respondent and benefited from sitting allowances. I opine that the Applicant's professional legal claims were not based on deliberate and documented instructions with proof of engagement. In my view there was conflict of interest on the part of the Applicant."***

37. In the end, the court finds that the taxing officer fell into error in principle, first by failing to determine whether an Advocate–Client relationship existed between the parties, and secondly by proceeding to tax the Bill of Costs notwithstanding the absence of such a relationship upon which the Bill could properly be sustained.

38. Accordingly, the Chamber summons dated 14th October, 2025 is found to be merited and the decision of the Deputy Registrar delivered on 18th September 2025 is hereby set aside. Having found that there was no Client-Advocate relationship between the parties herein, the bill of costs is dismissed with no order as to costs.

39. Each party shall bear its own costs.

Dated, signed and delivered virtually in Nairobi this 30th day of April, 2026.

O. A. Angote
Judge

In the presence of;

Mr. Munene for Applicant

No appearance for Respondent

Court Assistant: Tracy