

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELCL MISC. CIVIL APPLICATION NO. E012 OF 2025

IN THE MATTER OF: THE ADVOCATE ACT

AND

**IN THE MATTER OF: THE ADVOCATES REMUNERATION
ORDER**

AND

**IN THE MATTER OF: TAXATION OF ADVOCATE/ CLIENT BILL
OF COSTS**

BETWEEN

**NGONZE & NGONZE ADVOCATESADVOCATE/
APPLICANT**

- VERSUS -

**NAKUMATT HOLDINGS LIMITED.....
.....RESPONDENT**

(Under Administration)

ARISING FROM

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELCL MISC. CIVIL APPLICATION NO. E006 OF 2024

IN THE MATTER OF: THE ADVOCATE ACT

AND

IN THE MATTER OF: THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF: TAXATION OF ADVOCATE/ CLIENT BILL OF COSTS

BETWEEN

**NGONZE & NGONZE ADVOCATESADVOCATE/
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- VERSUS -

**NAKUMATT HOLDINGS LIMITED.....
.....RESPONDENT**

(Under Administration)

RULING

I. Introduction

1. This Honourable Court is called upon to determine the Chamber Summons Application dated 24th June, 2025 instituted by the Law firm of *Messrs. Ngonze & Ngonze Advocates*, the Advocate/Applicant herein. It was brought under the provisions of Rule 11(2) of the Advocates Remuneration Order, Section 3A

of the Civil Procedure Act, Cap. 21, of the Laws of Kenya and all other enabling provisions of the law.

2. The Application sought to set aside the decision of the Taxation Master, Hon. R.K. Ogolla, Deputy Registrar, delivered on 11th June 2025 in respect of the Advocate/Client Bill of Costs dated 10th June 2024.
3. Upon service of the Application, the Client/Respondent, Nakumatt Holdings Limited (Under Administration), filed written submissions opposing the Reference, contending that the Taxation Master Officer acted within her discretion and that no error of principle had been demonstrated.

II. The Applicant's Case

4. The Applicant sought for the following orders:-
 - a. That this Honourable Court be pleased to SET ASIDE in its ENTIRETY the decision of the Taxing Officer delivered on 11th June, 2025 in respect of the Advocate/Client Bill Of Costs dated 10th June, 2024, and the Reasoning thereon.***
 - b. That this Honourable Court be Pleased to RE - TAX the said Advocate/Client Bill of Costs dated 10th June, 2024.***
 - c. That in the alternative to Prayer (2) above, this Honourable Court be pleased to REMIT the Advocate/Client Bill of Costs dated 10th June, 2024 for RE-TAXATION before a different Taxing Officer other than the Hon. R. K. OGOLLA, DR.***
 - d. That the Taxing Officer, other than Hon. R. K. OGOLLA, DR do Assess the Advocate/Client Bill of Costs dated 10th June, 2024 on its merits, with particular regard to Instruction Fees based***

on the Value of the Subject Matter of the Suit to be ascertained from the Pleadings and Documents filed in the Suit itself.

e. That the Taxing Officer, other than Hon. R. K. OGOLLA, DR do Assess the Advocate/Client Bill of Costs dated 10th June, 2024 on its merits, with particular regard to Instructions and Getting Up Fees as Contemplated by Schedule 6 of the Advocates (Remuneration) (Amendment) Order 2014.

f. That the Costs of this Application be provided for.

5. The Application was supported by a an Affidavit sworn by DANIEL M. NGONZE, an Advocate of the High Court of Kenya, practicing in the Name and Style of Messrs. Ngonze & Ngonze Advocates, having Personal Conduct of this Matter on behalf of the Advocate/Applicant herein sworn on the same day as the Chamber Summons Application. The Applicant averred as follows that: -

a) The Advocate/Applicant herein objected to the whole of the Ruling delivered by Hon. R. K. Ogolla, Deputy Registrar, in this matter on 11th June, 2025, and referred the objection to this Honourable Court for determination under the provision of Rule 11(2) of the Advocates (Remuneration) Order.

b) The Taxing Master misdirected herself in law, in fact and in principle by rendering a decision to the effect that the Bill of Costs dated 10th June, 2024 was incapable of being

taxed on the basis of the amounts pleaded therein, as **“the value of the subject matter of the dispute was not determinable and/or discernible from the Plaint in the primary suit, as the said figures were not ultimately interrogated and confirmed in judgment of the Court.”**

- c) The Taxing Master misdirected herself in law, in fact and in principle by failing to render an assessment of the entire Advocate/Client Bill of Costs dated 10th June, 2024 on its merits against the backdrop of the pleadings presented by the Respondent herein (Plaintiff in the subject suit).
- d) The Taxing Master misdirected herself in law, in fact and in principle by rendering a decision summarily taxing the Advocate/Client Bill of Costs dated 10th June, 2024 whimsically and without proper and/or strict adherence to trite law and pragmatic principles on taxation of Bills of Costs.
- e) The Taxing Master misapplied her discretion by failing to clearly articulate cogent, plausible reasons for arriving at her decision.
- f) At the Court attendance on 11th June, 2025, the Taxing Master indicated that the Ruling on the subject Bill of Costs would be posted on the Judiciary Case Tracking System

(CTS), and that her reasons for the said decision were contained in the Ruling itself, thereby overriding the Advocate/Applicant's intimation of its intention to refer its objection, if any, to this Honourable Court and/or requesting the Deputy Registrar to supply copies of the Ruling giving such reasons for the decision.

g) Annexed hereto and marked as "Appendix 1" was a bundle of copies of the entire Court record aforementioned, indicative of all the foregoing.

h) In the circumstances, unless the Honourable Court considered the subject Motion and granted the orders sought therein, namely:

i). Setting aside of the Ruling delivered and orders given in the proceedings subject hereof on 22nd August, 2024;

ii). Re - taxation and/or remittance for re - taxation of the Advocate/Client Bill of Costs dated 10th June, 2024 on its merits before a different Taxation Master;

i) the Respondent herein would, in all likelihood, disregard the Advocate/Applicant's wholly-merited legal fees subject

hereof, and/or deal with the same in a manner adverse to the interests of the Advocate/Applicant, thereby:

- a) Rendering the wholly-meritorious proceedings subject hereof nugatory and/or merely academic;
- b) Stifling the Advocate/Applicant's rights and avenue of redress on account of the Respondent's failure to remit wholly-merited legal fees due and owing to the Advocate/Applicant;
- c) which occurrences would be to the Advocate/Applicant's grave, obvious, unjustified and unjustifiable prejudice and detriment, the net resultant loss, injury and damage whereof would be too onerous to be compensable in any way, manner or form.
- j) He swore the Affidavit in support of the instant Motion, purely in evidence of the merit inherent therein, and urged the Honourable Court to grant the orders sought in their entirety.
- k) Whatever was deponed to therein was true to the best of his knowledge, information and belief, sources and grounds whereof were duly disclosed.

III. Submissions

6. On 18th December, 2025 while the Applicant and the Respondent were present in Court, the Court directed to have the Chamber Summons Application dated 24th June, 2025 be disposed of by written submissions and all the parties complied.
7. Pursuant to that, the Court proceeded to render its Ruling as scheduled on 5th May, 2026 accordingly.

A. The Written Submissions by the Advocate/Applicant

8. The Advocate/Applicant through the Law firm of Messrs. Ngonze & Ngonze Advocates filed the written submissions dated 18th December, 2025. Mr. Ngonze Advocate commenced the submissions by stating that before the court for its determination was a Chamber Summons application dated 24th June, 2025 (Reference from the decision (Ruling) of the Taxing Officer delivered on 11th June, 2025 in respect of the Advocate/Client Bill of Costs dated 10th June, 2024) subject hereof seeking the afore stated Orders.
9. On the preliminary note, the Learned Counsel submitted that it was imperative to note that:-

- i. As at the point of lodging these Submissions, the Chamber Summons Applications subject hereof remained UNOPPOSED in any way, manner or form;
- ii. The Ruling subject hereof ought to be summarily disturbed for the very reason that in the impugned Ruling subject hereof, the Taxing Master indicated that the value of the subject matter in the Primary Suit subject of these Proceedings could not be ascertained whereas the Plaintiff in the suit (**MOMBASA ELCC 171/2018-Transferred to KWALE ELC as KWALE ELCC 235/2021**) expressly indicated the Plaintiff's (Client/Respondent herein) claim as:
 - a) Loss of Fixtures, Fittings, Furniture and Equipment
Kshs.120,000,000.00;
 - b) Loss of Stock - Kshs 69,355,848.00;
 - c) Staff Release Cost - Kshs. 12,500,000.00;
 - d) Lost Income from Use of the Suit Property w.e.f. 17th November, 2017 until termination of the Lease on 6th May, 2019 calculated at the rate of Kshs. 8,804,349.47 per month - Kshs.149,673,940.99;
 - e) Lost Income from Use of the Fixtures, Fittings, Furniture and Equipment w.e.f. 17th November, 2017

to the date of filing Suit - Kshs. 70,434,795.76, and onwards at the rate of Kshs.8,804,349.47 until payment in full;

- f) An Order do issue directing the Defendant to hand over to the Plaintiff, within Twenty-Four (24) Hours of such Order, all Fixtures, Fittings and Machinery in the Suit Property, and, in default the Plaintiff be at Liberty to break in and enter upon the Suit Property and remove all Fixtures, Fittings and Machinery therein;
- g) An Order do issue directing the OCS, Diani Police Station, to supervise the Execution of this Order, provide security, ensure no public disturbance ensues, and maintain Law and Order throughout and after the Execution of this Order;
- h) General Damages for Illegal/Unlawful Eviction;
- i) General Damages for Lost Business/Income;
- j) Mesne Profits derived from the Defendant's use of the Plaintiff's Fixtures, Fittings, Furniture and Equipment calculated at the rate of Kshs. 8,804,349.47 per month, w.e.f. 17th November, 2017 until hand over of the said items;

- k) General Damages for Irreparable Injury/Damage to the Plaintiff's Business Model valued at Kshs. 7 (SEVEN) Billion as at 17th November, 2017;
- l) Interest on (a), (b), (c), (d), (e) and (i) above at the Current Commercial Rate w.e.f. 17th November, 2017 until payment in full;
- m) Costs of this Suit;
- n) Any other/further relief the Honourable Court may deem fit and just to award, in the circumstances.

10. According to the Learned Counsel, despite the Plaintiff therein (Client/Respondent herein) expressly pleading a Liquidated amount of over Kshs. 421,964,584.75, the Taxing Master had unprocedurally attempted to ventilate the Respondent's case on her behalf, citing that the value of the subject matter in the said suit was "indeterminable from the Pleadings", despite uncontested Evidence to the Pleading aforementioned. Without much ado, the Reference ought to be upheld in its entirety as prayed in the aforementioned Chamber Summons Application. Nevertheless, the Reference is addressed as hereunder.

11. On the background, the Learned Counsel recounted to Court that vide Plaintiff filed in the Primary Suit subject hereof on 25th

July, 2018, the Client/Respondent herein (Plaintiff therein) sued M/s. Southcoast Holdings Limited expressly seeking, *inter alia*:

- a) Loss of Fixtures, Fittings, Furniture and Equipment Kshs.120,000,000.00;**
- b) Loss of Stock - Kshs 69,355,848.00;**
- c) Staff Release Cost - Kshs. 12,500,000.00;**
- d) Lost Income from Use of the Suit Property w.e.f. 17/11/2017 until termination of the Lease on 6/05/2019 calculated at the rate of Kshs. 8,804,349.47 per month - Kshs.149,673,940.99;**
- e) Lost Income from Use of the Fixtures, Fittings, Furniture and Equipment w.e.f. 17/11/2017 to the date of filing Suit - Kshs. 70,434,795.76, and onwards at the rate of Kshs.8,804,349.47 until payment in full;**
- f) AN ORDER do issue directing the Defendant to hand over to the Plaintiff, within Twenty-Four (24) Hours of such Order, all Fixtures, Fittings and Machinery in the Suit Property, and, in default the Plaintiff be at Liberty to break in and enter upon the Suit Property and remove all Fixtures, Fittings and Machinery therein;**
- g) AN ORDER do issue directing the OCS, Diani Police Station, to supervise the Execution of this Order, provide security, ensure no public disturbance ensues, and maintain Law and Order throughout and after the Execution of this Order;**
- h) General Damages for Illegal/Unlawful Eviction;**
- i) General Damages for Lost Business/Income;**
- j) Mesne Profits derived from the Defendant's use of the Plaintiff's Fixtures, Fittings, Furniture and Equipment calculated at the rate of Kshs. 8,804,349.47 per month, w.e.f. 17/11/2017 until hand over of the said items;**
- k) General Damages for Irreparable Injury/Damage to the Plaintiff's Business Model valued at Kshs. 7 (SEVEN)Billion as at 17/11/2017;**

l) Interest on (a), (b), (c), (d), (e) and (i) above at the Current Commercial Rate w.e.f. 17/11/2017 until payment in full;

m) Costs of this Suit;

n) Any other/further relief the Honourable Court may deem fit and just to award, in the circumstances

12. With reference to the Court record, the Learned Counsel submitted that the Defendant therein entered appearance and filed defence, thereby rendering the matter a “Defended cause”. The Advocate/ Applicant herein was the Counsel on record for the Client/ Respondent in the said proceedings as well as well as three (3) interlocutory appeals arising therefrom. The value of the subject matter involved in the said suit was a direct amount of over a sum of Kenya Shillings Four Twenty One Million, Nine Sixty Four Thousand Five Eighty Five Hundred (Kshs. 421,964,585.00/=) as at 25th July, 2018. The parties herein fell out in the court of the said proceedings and three interlocutory appeals arising therefrom, prompting the Advocate/Applicant herein to Cease from Acting therein for the Client/Respondent.

13. According to the Learned Counsel, the Parties herein thereafter rendered a Remuneration Agreement dated 7th June, 2023, in respect of settlement of the Advocate/Applicant's Legal Fees arising from, inter alia, the Primary Proceedings subject hereof.

The Client/Respondent failed, refused and/or neglected her obligations contained in the subject Agreement, and did not remit the funds mutually agreed upon, consequent whereunto the Advocate/Applicant exercised the remedies available to him through Rescinding/Vitiating/Voiding the subject Agreement as provided by Law, i.e.:

- a. Issuance of express Notices to comply (pages 37, 38, 39,40) Advocate/Applicant's Supplementary Schedule Of Documents;
- b. Declaration of Rescission/Vitiation/Voidance of the subject Agreement (Pages 41 and 42 Advocate/Applicant's Supplementary Schedule of Documents;

14. The Learned Counsel averred that Rescission/Vitiation/Voidance of the subject Agreement, the Advocate/Applicant lodged the Advocate/Client Bill of Costs subject hereof dated 10th June, 2024. Although the Client/Respondent attempted to mislead the Taxing Officer as regards the "validity" of the subject "Agreement", vide Ruling delivered on 2nd October, 2024, the Honourable Court dismissed the subject assertions. Suffice it to

note that the said decision has never been challenged by any Party hereto in any way, manner or form.

15. Significantly, throughout the Proceedings before the Taxing Master, the Client/Respondent presented no documentary evidence controverting any portion of the Advocate/Applicant's Claims as presented in the subject Bill of Costs. Nevertheless, Ruling on the issue Bill Of Costs dated 10th June, 2024 was delivered on 11th June, 2025 by which Ruling the Taxing Master summarily determined the Bill as hereunder:

".....7. The Advocates Clients Bill of Cost for my consideration is drawn at Kshs. 20,000,000 only.

8. The applicant filed submissions dated 23rd August, 2024 and the Respondent filed submissions dated 11th February, 2025, both of which I have read and taken into consideration in this ruling. 9. I note the Respondent asked court to consider the legal status of the Respondent company herein and the goodwill. I wish to state that the same is considered. The Respondent shall thus pay the applicant the amounts this court will tax less what it has paid...

a) Instructions Fees

14. The applicant seeks Kshs. 10,000,000 under this limb. The amount as sought has not been explained by the applicant or backed save for the fact that it should be awarded based on the prayers in the plaint in the mother file being Mombasa ELC no.171 of 2018

15. This court resonates with the principles that support any costs awarded to an advocate for services rendered ought to be commensurate to the work done. Thus, no advocate should

be allowed to unjustly enrich himself or herself for work not done as was stated in the case of Moronge & Company Advocates - Versus -Kenya Airports Authority [2014] eKLR in this sense;

.....The Advocate's pay however must be commensurate to his work otherwise shall be what is termed as 'unjust enrichment'. The same must be a reasonable compensation for professional work done. The court shall interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances..."

220. As guided by Hon. Lady Justice A.E. Dena, this court finds the value of the subject matter herein cannot be ascertained and gas such I shall apply discretion in ascertaining instructions fees as guided by her ruling and the case of Joreth Limited above cited. I apply my discretion noting the nature, importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and all other relevant circumstances and award Kshs. 700,000 as instructions costs to the applicant since it is reasonable and commensurate the work they have done.

b) Getting up Fees

24. This court thus allows getting up fees of Kshs. 233,333.33 being 1/3 instructions fees and tax off Kshs. 700,000....

c) On other Items

25. The applicant has stated the items B to J have been settled hence the court shall not consider the same.

d) VAT

26. I note that the applicant has not sought VAT, however, the same is awardable since services was rendered by them to the respondent and that is undisputed.

27. VAT is always awarded at 16% of the instruction's fees. Thus, VAT is 16% of 700,000 awarded herein shall be Kshs. 112,000.

28. In advocate and client bill of costs the schedule provides that the amount awarded shall be the fees increased by 50% as the case may be. The increase to include all proper attendances on the client and all necessary correspondence. Therefore, the instructions cost of Kshs. 700,000 plus getting up of Kshs. 233,333.33 and VAT of Kshs. 112,000 is Kshs. 1,045,333.33 which is increased by 50% is Kshs. 1,567,999.99.

29. More than 1/6 has been disallowed and hence the Applicant shall bear their own costs of this bill.

30. 30 days stay granted to aggrieved party.

Dated, signed, read and delivered in open court at Kwale Law Courts on 11th day of June, 2025...."

16. Being aggrieved by the entirety of the subject decision, the Advocate/ Applicant lodged the instant reference seeking the orders hereinabove.

17. The Learned Counsel relied on the following agreed issues before the Court: -

- a. The Advocate/ Applicant was engaged by the Client/ Respondent as Counsel on record in MOMBASA ELCC 171/2018 (Transferred to KWALE ELC as KWALE ELCC 235/2021) as well as three (3) Interlocutory appeals arising therefrom;**
- b. The Advocate/ Applicant lodged the Advocate/ Client Bill of costs dated 10th June, 2024;**
- c. In the Schedule of Documents in Support Of Advocate/Client Bill Of Costs Dated 10/06/2024 annexed to the subject Bill Of Costs, the Advocate/Applicant indicated that the Documents in support of the subject Bill Of Costs was the 'Entire Court File in MOMBASA ELCC NO. 171/2018;**

(TRANSFERRED TO KWALE ELC and cited as KWALE ELCC NO. 235/2021): NAKUMATT HOLDINGS LIMITED (UNDER ADMINISTRATION) - Versus - SOUTH COAST HOLDINGS LIMITED’;

- d. The Plaintiff in the subject Primary Suit expressly pleaded a Liquidated Amount of over Kshs. 421,964,585.00;**
- e. The subject Primary Suit proceeded as a ‘Defended Cause’;**
- f. The subject suit was lodged in the Year 2018, in the Environment and Land Court of Kenya (initially at Mombasa, then transferred to Kwale);**
- g. The applicable Remuneration Order and Schedule in respect of the issue Bill of Costs is the Advocates Remuneration Order, 2014, Laws of Kenya, and Schedule 6, respectively;**
- h. The Client/Respondent has never lodged any documentary evidence in response to any portion of the Advocate/Applicant's Claim;**

18. The Learned Counsel relied on the issue arising in the reference being whether the decision rendered by the Honourable Court was justified or not. The Learned Counsel urged the Court to be guided by the following excerpts. On the duty of the 1st Appellate Court, the Learned Counsel submitted that this being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw

its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See **“Selle and Another - Versus - Associated Motor Boat Company Limited and others [1968] EA 123”** and **“Williamson Diamonds Limited - Versus - Brown [1970] E.A.L”**.

19. According to the Learned Counsel as per Al Nassir Visram, F. Sichale, J. Mohammed, J,J,A, in **“Gitobu Imanyara and Others - Versus - Attorney General [2016] eKLR”**,

ii. This being a first Appeal, we are reminded of our primary role as a first appellate court namely, to re - evaluate, re - assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority - Versus - Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that: -

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

20. Further, the Learned Counsel relied on the case of:- **“Abok James Odera T/A A.J. Odra & Associates - Versus - John Patrick**

Machira T/A Machira & Co. Advocates [2013] eKLR” as per E.M. Githinji, R.N.Nambuye, M.K. Koome, J.J.A, as well and submitted that the duty of this Honourable Court on Appeal (Reference) as a First Appeal Court is as elucidated above.

21. On the analysis of matters arising before the taxing officer, the Learned Counsel submitted that the Advocate/Applicant reiterated the entire contents of:

- i) The Advocate/Client Bill of Costs dated 10th June, 2024;
- ii) The Schedule of Documents in Support of The Advocate/Client Bill Of Costs Dated 10th June, 2024;
- iii) The Advocate/Applicant’s Submissions in Respect of Advocate/Client Bill of Costs Dated 10th June, 2024;
- iv) Trite Law on:
 - a. Matters to be taken into consideration by a Taxing Officer during Taxation;
 - b. Taxation of Instruction Fees, viz:

THAT the Taxing Officer misdirected herself in Law in Fact and in Principle by rendering a Decision to the effect that the Bill Of Costs dated 10th June, 2024 was incapable of being Taxed on the basis of the amounts pleaded therein as “(the value of the subject matter of the dispute was not determinable and or discernible from the Plaint (in the Primary Suit)... as the said

figures were not ultimately interrogated and confirmed in judgement of the court”.

THAT the Taxing Officer misdirected herself in Law, in Fact and in Principle by failing to render an Assessment of the entire Advocate/Client Bill of Costs dated 10/06/2024 on its merits against the backdrop of the Pleadings presented by the Respondent herein (Plaintiff in the subject suit).

THAT the Taxing Officer misdirected herself in Law, in Fact and in Principle by rendering a Decision summarily taxing the Advocate/Client Bill Of Costs dated 10/06/2024, whimsically and without proper and/or strict adherence to Trite Law and Pragmatic Principles on Taxation of Bills Of Costs.

22. The Learned Counsel relied on the following excerpts of Statute, with particular regard to the value of the Subject Matter expressly pleaded in the Primary Suit subject of these Proceedings, and reproduced hereinabove, viz:

a) The provision of Section 107, Evidence Act, Cap. 80, Laws of Kenya; Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

b) Section 109, Evidence Act (Supra).

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

c) Section 119, Evidence Act (Supra)

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

d) Section 120, Evidence Act (Supra)

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

23. The Learned Counsel further relied on the following excerpts of Statute, with particular regard to Taxation of Instruction Fees based on the value of the Subject Matter expressly pleaded in

the Primary Suit subject of these Proceedings, and reproduced hereinabove, viz:

a) Schedule 6, Advocates Remuneration Order, 2014, Laws of Kenya: -

i) Instruction Fees

Subject as hereinafter provided, the Fees for Instruction shall be as follows:

.....

(b) To sue or Defend in a Suit in which the Suit is determined in a summary manner in any manner whatsoever without going to full Trial the Fee shall be 75% of the Fees Chargeable under item 1 (b);

....

The Fees for Instructions in Suits shall be as follows, unless the Taxing Officer in his discretion shall increase or (unless otherwise provided) reduce it:

.....

b) To sue in any Proceedings described in Paragraph (a) where a Defense or other denial of Liability is filed; or to have an issue determined arising out of inter-pleader or other Proceedings before or after Suit; or to present or oppose an Appeal WHERE THE VALUE OF THE SUBJECT MATTER CAN BE DETERMINED FROM THE PLEADINGS, JUDGMENT OR SETTLEMENT BETWEEN THE PARTIES and-

| <i>That value exceeds</i> | <i>But does not exceed</i> | |
|----------------------------------|---|--|
| <i>Kshs.</i> | <i>Kshs.</i> | <i>Kshs.</i> |
| | <i>500,000.00</i> | <i>75,000.00</i> |
| <i>500,000.00</i> | <i>750,000.00</i> | <i>90,000.00</i> |
| <i>750,000.00</i> | <i>1,000,000.00</i> | <i>120,000.00</i> |
| <i>1,000,000.00</i> | <i>20,000,000.00</i> | <i>Fees as for Kshs.</i> |
| | | <i>1,000,000.00 plus an additional 2%</i> |
| <i>Over 20,000,000.00</i> | <i>Fees as for 20,000,000.00 plus an</i> | |
| | <i>additional 1.5%</i> | |

c) On the statute guided tabulation of instruction fees due herein at the point of instruction:-

ii. Value between Kshs. 1,000,000.00 - 20,000,000.00 = Kshs. 120,000.00 + (28 x 19,000,000.00) = Ksh 500,000.00

iii. Value over Kshs. 20,000,000.00 = Kshs. 500,000.00 + (1.5% x 401,964,585.00) = Kshs. 6,029,468.77

v. Getting Up Fees - 1/3 (shs.7149.468.77)/7.149.468.77
Kshs 2,383,156.25

vi. To Advocate/Client Scale =(iv++vabove)-x1.5=Kshs. 14,298,937.54

vii. Add VAT @168

24. On the judicial precedence, the Learned Counsel made reference to a myriad of findings of the Superior Courts as stated in the following authorities. These were:

a). In the case of ***“Joreth Limited - Versus - Kigano and Associates (2002) 1 EA 92”***, the Court held:

“...We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of Costs ought to be determined from the Pleadings, Judgment or Settlement (if such be the case)

By the first ground therefore ... Instruction Fee is an independent and static term, is charged once only and is not affected or determined by the stage the suit has reached..”
(underlining: theirs)

- b). While in the case of:- ***“Kamunyori & Company Advocates - Versus - Development Bank of Kenya Limited (2015) eKLR”***, the Honourable Court held that:-

“.....Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle....”***(underlining: theirs)***

- c). Additionally, in the case of:- ***“Kipkorir Titoo & Kiara Advocates - Versus - Deposit Protection Fund Board [2005] eKLR”***, the Court held that:-

“.....We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of Schedule VIA, (1) that would be an error in principle. And if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer.”

d). In the case of ***“First American Bank of Kenya - Versus - Shah & Others [2002] LLR”***, the Court held that:

“...where however, the complaint is about an error of principle, however, and it is established that such an error did occur, then the judge would be entitled, indeed, obligated to interfere as a matter of law..”

e). Further, in the case of ***“Lucy Waithira & 2 Others - Versus - Edwin Njagi T/A E.K. Njagi & Company Advocates (2017) eKLR”***, where the Court held that: -

“.....A Taxing Officer's decision is not exercised judiciously where a relevant consideration has not been taken into account...”

f). In the case of: ***“Republic - Versus - Kenyatta University & Another Ex Parte Wellington Kihato Wamburu”***, the Court held:-

“.....It is an equally settled principle of Law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved...”

g). Further, in the case of:- ***“Republic - Versus - Ministry of Agriculture & 2 Others Ex - Parte Muchiri W’ Njuguna & 6 Others (2006) eKLR”***, the Honourable Court held that: -

“...Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.....”

h). In the case of:- ***“Matatu Welfare Association - Versus - Invesco Assurance Co. Limited & 5 Others (2018) eKLR”***, the Court held that:-

“...when asked to give reasons for a Taxation, the reasons given must enable the parties understand how the Decision was reached. While I am not prepared, and cannot prescribe the extent of detail of the reasons to be given, they must be sufficient as to reveal whether the Taxing Officer acted judiciously. To simply restate the consideration set out in the Rules without relating them to the Bill is unhelpful. There is no knowing what informed the Decision of the Taxing Officer and this Court cannot say that she acted judiciously. The remedy is to set aside the Taxation...”

i). In the case of:- ***“Victoria De Meo - Versus - Abdullahi H. Khalil & Another [1994] eKLR) (PER J.M. GACHUHI, M.G MULI, P.K TUNOI, JJA)”***, the Court held that: -

“.....For the benefit of Mr. Kariuki and many others who will venture to practice in this branch of the law, we would recall the well-settled law that for this Court to interfere with the quantum of damages awarded by the trial court, the Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount awarded is so inordinately low or high that it must be a wholly erroneous estimate of damages - see Kemfro Africa Limited - Versus - Lubia and another [1982-1988] 1 KAR 727. Kneller JA, as he then was, at p 730 said-

“The principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum

of damages awarded by a Trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. This Court follows the same principles.”

- k). In the case of: **“Omega Enterprises (Kenya) Limited - Versus - Kenya Tourist Development Corporation Limited & 2 Others [1998] eKLR (PER G.S. PALL, J)”**, the Court held that: -

“...In MACFOY - Versus - UNITED AFRICA LTD (1961) 3 A11 F.R. 1169 Lord Denning said at p. 1172: ‘If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

As the proceedings of 15th January, 1993 were in pursuance of the order of 18th December, 1992, they were also of no legal effect and a nullity in law. It is immaterial for the purposes of this appeal whether or not the order of 18th December, 1992 had been set aside. In any event it was not addressed to Omega. Also, there is no doubt that the learned Judge could not have declared the sale of the suit property illegal or void without first giving Omega an opportunity of being heard which is a breach of one of the fundamental rules of natural

justice. For these reasons I would allow the appeal with costs and set aside the said order of 15th January, 1993”.

- L). In the case of:- **“Kenya Ports Authority - Versus - Munyao & 4 Others (Petition E008 OF 2023) [2023] KESC 112 (KLR) (CIV) (28 December 2023) (Judgment)”**, the Court held: -

“...51. In Ken freight (EA) Limited v Benson K Nguti SC Pet No 37 of 2018 [2019] eKLR this court explained the applicability of the provisions of section 49 as hereunder;”....What then should be the correct award on damages be based on? Having keenly perused the provisions of section 49 of the Employment Act, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a court of law, and where a court found the same to be unfair or wrongful, section 49 applies...”

- m). Similarly, the Learned Counsel relied on **“Osapil - Versus - Kaddu (2001) EA 193”**, the Court held that: -

“...By Section 27 of the Civil Procedure Act, Costs are in the discretion of the Court provided that Costs shall follow the event unless the Court shall for good reason order otherwise...”

- o). In the case of ***“Cecilia Karuru Ngayu - Versus - Barclays Bank of Kenya & Another (2016) eKLR”***, the Court held: -

“...It would have been more prudent to determine the Proceedings one way or the other so that the Order on Costs does not remain hanging in the air...”

25. In conclusion on issue arising in the reference, the Learned Counsel submitted in light of the foregoing, the issues under Reference highlighted above ought to be decided as hereunder:

- a. THAT the Taxing Officer misdirected herself in law, in fact and in principle by rendering a Decision to the effect that the Bill Of Costs dated 10/06/2024 was incapable of being Taxed on the basis of the amounts pleaded therein as “(the value of the) subject matter of the dispute was not determinable and or discernible from the Plaintiff (in the Primary Suit).. as the said figures were not ultimately interrogated and confirmed in judgement of the court”, whereas in the Plaintiff in the Primary Suit subject hereof, the Client/Respondent herein (Plaintiff therein) expressly pleaded a Liquidated Amount of over kshs. 421,964,584.75.***
- b. THAT the Taxing Officer misdirected herself in law, in fact and in principle by failing to render an assessment of the entire advocate/client bill of Costs dated 10/06/2024 on its merits against the backdrop of the Pleadings presented by the Client/Respondent herein (Plaintiff in the subject Primary suit).***
- c. THAT the Taxing Officer misdirected herself in law, in fact and in principle by rendering a decision summarily taxing the advocate/client bill of costs dated 10/06/2024, whimsically and without proper and/or strict adherence to***

Trite Law and Pragmatic Principles on Taxation of Bills Of Costs.

- d. The Advocate/Applicant is therefore FULLY entitled to ALL of the Prayers sought in the instant Chamber Summons Application, uncharacteristically disregarded in the Ruling subject hereof.***
- e. The totality of the Decision, in the circumstances is wholly inadequate and unjustified, and grounded upon undeniably Wrong Principles of Law;***
- f. The Ruling "As Is" is one that ought to be Disturbed in its entirety;***
- g. The instant Reference is therefore Wholly Merited and ought to be Upheld as prayed in the Chamber Summons Application dated 24/06/2025.***

26. In conclusion the Learned Counsel submitted that: -

- a) The Advocate/Applicant has sufficiently made out a prima facie case on the merits to warrant grant of all prayers sought in the instant chamber summons Application dated 24/06/2025;***
- b) The Decision (Ruling) delivered by the Taxing Officer on 11/06/2025 therefore ought to be Disturbed as proposed hereinabove:***
- c) This Reference is wholly eligible for Upholding with Costs both at the Primary and Reference Levels;***
- d) There being No Logical Contest to the Advocate/Applicant's Advocate/Client Bill of Costs dated 10/06/2024, this Honourable Court therefore ought to Tax the Bill as Drawn, having been drawn exclusively within the parameters prescribed in Schedule 6, Advocates Remuneration Order, 2014.***

B. The Written Submissions by the Client/Respondent

27. The Client/Respondent through the Law firm of Messrs. Ruguru Wairange & Co. Advocates, filed their undated submissions. M/s. Wairange Advocate submitted that these submissions were filed on behalf of the Client/Respondent - ***Nakumatt Holdings Limited*** (*Under Administration*) in opposition to the Reference dated 24th June 2025 brought under Rule II of the Advocates Remuneration Order seeking to set aside the decision of the Taxation Master delivered on 11th June 2025.

28. According to the Learned Counsel, the Reference was misconceived, discloses no error of principle and improperly invited this Honourable Court to substitute its discretion for that of the Taxing Master.

29. The Learned Counsel relied on the following three (3) issues for determination: -

a. Whether the Taxing Officer committed any error of principle warranting interference under Rule II of the Advocates Remuneration Order:

b. Whether the value of the subject matter was ascertainable for purposes of instruction fees;

c. Whether the Court should interfere with a lawful exercise of discretion in the context of an insolvent company under administration.

30. According to the Learned Counsel, the law on references from taxation was settled. To support her legal position, she cited the

case of:- **“Premchand Raichand Limited & Another - Versus - Quarry Services of East Africa Limited & Another (1972) EA 162”**. the Court held that it will not interfere with the discretion of a Taxing Master unless there was an error of principle or the award was manifestly excessive or manifestly low. This position was affirmed in the case of:- **“First American Bank of Kenya Limited (Supra)”**, what the Court emphasized that a Judge hearing a reference does not sit on appeal over the Taxing Master.

31. Similarly, in the case of:- **“Kipkorir, Titoo & Kiara Advocates (Supra)”**, the Court held that mere dissatisfaction with the amount taxed does not justify interference. The Learned Counsel submitted the Advocate/Applicant had failed to meet this threshold.

32. On the issue of no error principle had been demonstrated. The Learned Counsel submitted that although the Advocate/Applicant alleged misdirection by the Taxing Master but failed to demonstrate any deniable error of principle. The Taxing Master considered the pleadings, the nature of the suit and the stage at which it concluded, and rendered a reasoned decision. The Applicant merely disagreed with the outcome.

33. To buttress on this issue, the Learned Counsel cited the case of:- **“Republic - Versus - Minister for Agriculture & 2 Others Ex - Parte Samuel Muchiri W’Njuguna (Supra)”**, the Court held that once a Taxing Master gave reasons that were legally sound, the Court should not substitute its discretion merely because it would have arrived at a different figure. The present Reference was therefore an impermissible appeal disguised as a reference.

34. On the value of the subject matter not being ascertainable. The Learned Counsel submitted that the Taxing Master correctly found that the value of the subject matter was not ascertainable. The primary suit did not proceed to hearing, did not result in Judgment and did not culminate in a settlement adopting or interrogating the pleaded figures. Pleadings alone, without adoption by the Court, could not determine instruction fees. In the case of:- **“Joreth Limited - Versus - Kigano & Associates (Supra)”**, the Court held that where the value of the subject matter could not be ascertained from the Judgment, settlement, or pleadings as adopted by the Court the Taxing Master was entitled to exercise discretion. This position was reinforced in the case of:- **“Machira & Co. Advocates - Versus -**

Arthur K. Magugu & Another [2012] eKLR", where the Court cautioned against pegging instruction fees on speculative or untested claims. According to the Learned Counsel, the Taxing Master therefore exercised her discretion lawfully and judiciously.

35. On the issue of insolvency context and prejudice to creditors. The Learned Counsel submitted that Nakumatt Holdings Limited was an insolvent entity under Court - appointed administration. The Administrator owed fiduciary duties to creditors as a class and must act in accordance with the Insolvency Act. Court had consistently exercised restraint in sanctioning claims against insolvent companies where such claims would undermine the objectives of administration. In the case of:- **"Re Ukwala Supermarket Limited (Under Administration) (2020)eKLR"**, the Court emphasized that claims against an insolvent company must be approached cautiously to avoid prejudicing creditors or defeating the purpose of administration. Granting the orders sought would sanction speculative legal fees and occasion grave prejudice to creditors.

36. In conclusion, the Learned Counsel submitted the Advocate/Applicant had failed to demonstrate any error of principle on

the part of the Taxing Master. The Reference merely challenges the quantum of costs and seeks substitution of discretion, which was impermissible. In the case of:- ***“Otieno. Ragot & Company Advocates - Versus - National Bank of Kenya Ltd (2020) eKLR”***, the Court held that a reference that contests quantum without demonstrating an error of principle is an abuse of the court process and should be dismissed.

37. On the prayers, the Learned Counsel submitted that the Client/ Respondent prayed that: -

- a. The chamber summons dated 24th June, 2025 be dismissed in its entirety;
- b. The decision of the Taxing officer delivered on 11th June, 2025 be upheld;
- c. Costs of the Reference be awarded to the Client/ Respondent.

IV. Analysis and Determination

38. I have considered the filed pleadings on record, the Court proceedings, the written submissions, myriad authorities cited

by the parties, the relevant provisions of the Constitution of Kenya, 2010, the law relied upon in drafting the Chamber Summons application and the trial Court records.

a) In order to arrive at an informed, fair and just decision on the matter, the Honourable Court has framed the following three (3) issues for determination. These are:-

a) Whether the Applicant has met the threshold for setting aside the Taxing Master's ruling delivered on 11th June 2025.

b) Whether this Court should independently assess the instruction fees and getting-up fees.

c) Who should bear the costs of this Reference?

ISSUE No. a). Whether the Applicant has met the threshold for setting aside the Taxing Master's ruling delivered on 11th June 2025

39. Under this sub - title I proceed to examine whether the Applicant has met the threshold for setting aside of the Ruling delivered on 11th June, 2025 the Taxing Master. It is settled law that any grievance emanating from a Ruling on Taxation can only be ventilated through Paragraph 11 of the Advocates Remuneration Order. The law further is settled that a Judge will not ordinarily interfere with the discretion of a Taxing Master unless it is demonstrated that the Taxing Master acted on a

wrong principle of law, misapprehended the applicable schedule, or arrived at an award that is manifestly excessive or so low as to amount to an injustice. This principle was articulated in numerous High Court decisions and the Court will not need to re - invent the wheel here. Indeed, this Honourable Court is extremely grateful and indebted to the Learned Counsel for the Advocate/Applicant for expansively bringing Court to the attention of myriad of precedents over this subject matter. For instance, in the now celebrated case of:- **“First American Bank of Kenya Limited (Supra)”**, where Ringera J. (as he then was) held that interference is only warranted where the decision is based on an error of principle or the award is manifestly wrong. Additionally, in the case of:- **“Machira & Co. Advocates - Versus - Magugu (Supra)”**, Ringera J (as he then was) held as follows:-

“As I understand the practice relating to Taxation of Bills of Costs, any complaint about any decision of the Taxing officer whether it relates to a point of law taken with regard to Taxation or to a grievance about the Taxation of any item in the Bill of Costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

40. Similarly, in the case of:- ***“Gacau Kariuki & Co. Advocates - Versus - Allan Mbugua Ng’ang’a [2012] eKLR”*** it was held thus: -

“I am also of the same school of thought as the learned judges’ as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing master has misdirected himself on a matter of principle. If the same is found to have been the case the usual course is to remit the matter back to the taxing master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the client herein was to come by way of a reference.” [emphasis added]

41. Paragraph 11 of the Advocates Remuneration Order provides for the procedure an aggrieved party must follow in challenging taxation or assessment of costs. It provides that:

“11 (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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such Judge under sub - section (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

42. The procedure contemplated above is that:

- a. The aggrieved party issues a notice within 14 days on the items objected
- b. The Taxing Master shall forthwith give reasons for his decision
- c. Upon receipt of the reason, the objector shall within 14 days' file an application to the High Court setting out grounds for objection
- d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.

43. It is clear from the above provision that the only avenue available to a party who wishes to object to a decision following a Taxation would be to approach the Court under Paragraph 11 of the Advocates Remuneration Order. The Applicant is seeking an order that the ruling delivered on 11th June, 2025.

44. The Applicant submits that the Taxing Master misdirected herself in law and fact by holding that the value of the subject matter was indeterminable, despite the Plaintiff expressly pleading liquidated sums exceeding Kenya Shillings Four Twenty One Million Nine Sixty Four Thousand Five Eighty Four Hundred and Seventy Five Cents (Kshs. 421,964,584.75/=). The Learned Counsel argues that the Taxing Master failed to assess the Bill of Costs on its merits and summarily taxed the Bill whimsically, without adherence to trite law and principles of taxation. Whereas the Respondent, on the other hand, submits that the Reference is misconceived, discloses no error of principle, and improperly invites this Court to substitute its discretion for that of the Taxing Master. It is argued that pleaded figures alone, without adoption in judgment or settlement, cannot determine instruction fees. Reliance is placed in the case of:- "**Joreth Limited - Versus - Kigano &**

Associates (Supra)”, where the Court held that where the value of the subject matter cannot be ascertained from Judgment or settlement, the Taxing Master is entitled to exercise discretion.

45. The principles of setting aside the decisions of Taxing Master were well established in the cases of:-“**Premchand Raichand Limited & Another - Versus - Quarry Services of East Africa Limited and Another [1972] E.A 162**”, “**First American Bank of Kenya - Versus - Shah and Others (2002) EA 64**” and “**Joreth Ltd - Versus - Kigano and Associates (2002) 1 EA 92**”.

46. The Principles discussed in the authorities above included:-

- i. That there was an error of principle
- ii. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
- iii. The successful litigant ought to be fairly reimbursed for the costs he has incurred
- iv. That so far as practicable there should be consistency in the award.

47. Further in the case of “**Republic - Versus - Ministry of Agriculture & 20 Others Ex - Parte Muchiri W’ Njuguna [Supra]**”, Ojwang J. (Retired) stated as follows:-

“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, particularly where he is an officer of great experience, merely because it thinks the award somewhat 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...The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle.”

48. In the South African Case of ***“Visser - Versus - Gubb 1981 (3) SA 753 (C) 754H - 755C”***; The court stated as follows:

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

49. In the present case, the Taxing Master disregarded pleaded liquidated sums which were specific and quantifiable. While it is true that Judgment had not been entered, the Plaintiff contained express claims for fixtures, stock, staff release costs, and lost income, cumulatively exceeding a sum of Kenya Shillings Four Twenty One Million (Kshs. 421, 000.00/=). These were not speculative figures but liquidated claims. The failure to consider them amounted to a misdirection in principle.

50. The next question for consideration is whether sufficient grounds have been laid out to warrant the setting aside of the decision of the Taxing Master. In view of the foregoing, therefore, I find it reasonable and logical to proceed to set it aside the item the Applicant is opposed to for further re-examination by a different Taxation Master.

ISSUE No. b). Whether the court should independently assess the instruction fees

51. Under this sub title the Honourable Court shall examine whether the now objected items were properly assessed and awarded to the Applicant. The Applicant submits that the Taxing Master erred in awarding a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/=) as instruction fees, which was

manifestly low given the complexity and quantum of the matter. Counsel argues that Schedule 6 of the Advocates Remuneration Order requires instruction fees to be pegged on the value of the subject matter, and where unascertainable, discretion must be exercised judiciously. The Respondent counters that the Taxing Officer exercised her discretion lawfully and judiciously, considering the pleadings, the nature of the suit, and the insolvency context of the Respondent company. It is argued that granting speculative legal fees would prejudice creditors, citing the case of:- ***“Re Ukwala Supermarkets Limited (Under Administration) (Supra)”***.

52. Under the provision of Paragraph 11 of the Advocates Remuneration Order:

“11(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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2)

may, with the leave of the judge but not otherwise, appeal to the Court of Appeal....”

53. Courts have taken the position that they will not interfere with the Taxing Master’s discretion in taxing bills. In the case of:- **“Rachier & Amollo Advocates LLP - Versus - National Hospital Insurance Fund Board of Management [2019] eKLR”**, that:

“The principle to be applied when assessing instruction fee in a suit are well settled. The Court of Appeal in the case of Joreth Limited - Versus - Kigano & Associates [2002] eKLR outlined the principle as follows:

“We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances”

54. Similarly, in the case of:- **“Kanu National Elections Board & 2 others - Versus - Salah Yakub Farah [2018] eKLR”**, it was held that:

“The general principles governing interference with the exercise of the taxing master’s discretion were authoritatively stated by the South African court in the case of Visser - Versus - Gubb 1981 (3) SA 753 (C) 754H - 755C as follows:-

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

55. Once judgment is entered, the adjudged value prevails.

Similarly, in the case of:- ***“Kamunyori & Co. Advocates - Versus - Development Bank of Kenya Limited (Supra)”***, the Court held that failure to ascertain the correct subject matter constitutes an error of principle.

56. Based on the above cited cases and the principles governing review/setting aside of rulings on taxation, I find that the rationale behind the principle is to avoid unnecessary contests on taxation given that the Taxing Master has discretion in determining the award due to an Applicant under the Bill of Costs. The advocate disputes the amount the taxing master

based her decision as the value of the subject matter for the purpose of calculating instruction fees.

57. From the record, the Taxing Master's decision on instruction fees was that the Applicant's request for a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) was not supported or explained, and therefore could not be allowed. Instead, the Taxing Master exercised discretion and awarded of a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/=) as instruction fees, stating that this amount was reasonable and commensurate with the work done. The ruling expressly noted:

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“The applicant seeks Kshs. 10,000,000 under this limb. The amount as sought has not been explained by the applicant or backed save for the fact that it should be awarded based on the prayers in the plaint in the mother file being Mombasa ELC No. 171 of 2018... I apply my discretion noting the nature, importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and all other relevant circumstances and award Kshs. 700,000 as instructions costs to the applicant since it is reasonable and commensurate to the work they have done.”

58. Thus, the Taxing Master rejected the higher figure sought and fixed instruction fees at a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000.00/=). The approach in determining the value of the subject matter for purposes of

determining instruction fees was clearly outlined by the Court of Appeal in the case of: ***“Peter Muthoka & another - Versus - Ochieng & 3 others [2019] eKLR”***, thus: -

“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgement, it is the pleadings that form the basis for determining subject value. Once judgement has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgement does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.”

59. The approach to be adopted in taxing instruction fees lies in the principles in the case of ***“Jorerth Limited - Versus - Kigano Advocates (Supra)”*** where the court held inter alia that: -

“The instructions fee is an independent and static item it is charged once only and it is not affected or determined by the stage the suit has reached.”

60. In the instant case, the Taxing Master awarded a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/=) as instruction fees, plus a sum of Kenya Shillings Two Thirty Three Thousand Three Thirty Three Hundred and Thirty Three Cents (Kshs. 233,333.33/=) getting-up fees, and a sum of Kenya Shillings One Twelve Thousand (Kshs. 112,000.00/=) VAT. Given the pleaded sums and the complexity of the matter, this award

was manifestly low and not commensurate with the professional work undertaken. The Taxing Master's failure to consider pleaded liquidated sums amounted to an error of principle.

61. Principles for Taxation are well settled. In assessing instruction fees, the Taxing Master ought to consider the value of the subject matter as the basis of her award for instruction fees. The value of the subject matter may be ascertained from the Pleadings, Judgment or Settlement by the parties. Where the material before the Taxing Master is not sufficient to show the value of the subject matter, the Taxing Master will then apply his or her discretion in arriving at the instruction fees. Where the value of the subject matter is unascertainable, the Taxing Master should use his or her discretion to assess instruction fees. In this regard, the discretion of the Taxing Master ought to be exercised judiciously by considering among other matters, the nature and importance of the suit, parties' interest and other relevant matters.

62. In the case of ***"Joreth Limited - Versus - Kigano & Associates (Supra)"***, the court held as follows: -

"We would at this stage point out that the value of the subject matter of a suit for the purposes of Taxation of a Bill of Costs ought to be determined from the Pleadings, Judgment or Settlement (if such be the case), but if the same

is not so ascertainable, the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances.”

63. Taxation of Costs is within the competence and judicial discretion of the Taxing Master and therefore this court will not ordinarily or lightly interfere with the exercise of that discretion unless it is demonstrated clearly that the Taxing Master erred in principle and failed to properly exercise his or her discretion. In the case of ***“Kamunyori & Company Advocates - Versus - Development Bank of Kenya Limited (2015) eKLR”***, the court held as follows: -

“Failure to ascertain the correct subject matter in a suit for the purpose of Taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on Taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on Taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instruction fee is arrived at on the wrong principles, it will be set aside.”

64. In the present case, from the record the value of the suit property was expressly pleaded at a sum of Kenya Shillings Four Twenty One Million Nine Sixty Four Thousand Five Eighty

Five Hundred (Kshs. 421,964,585/=) in the Plaint filed in Mombasa ELC No. 171 of 2018 (later transferred to Kwale ELC No. 235 of 2021). The Applicant relied on this pleaded figure to argue that the Taxing Master erred in principle by holding that the value of the subject matter was “indeterminable.” The Applicant’s position was that the pleaded sums provided a clear and liquidated basis for assessing instruction fees under Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014. The Respondent, however, submitted that pleaded figures alone, without adoption in a judgment or settlement, cannot determine instruction fees. They relied on **“Joreth Limited - Versus - Kigano & Associates (Supra)”**, where the Court held that subject matter value must be drawn from pleadings, judgment, or settlement, and if not ascertainable, the Taxing Master may exercise discretion. Thus, while the pleadings quantified the claim at over a sum of Kenya Shillings Four Twenty One Million (Kshs. 421, 000, 000.00/=), the Taxing Master disregarded this and awarded a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000.00/=) as instruction fees, prompting the Applicant’s reference to this Court.

65. Schedule VI Part B of the Advocates Remuneration Order requires, in mandatory terms, that Advocate-Client instruction fees be increased by one-half. The computation is therefore a matter of arithmetic, not discretion. The Taxing Master's award of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/-) ignored this statutory requirement and amounted to an error of principle.

66. I will proceed to be guided by the provision of Para 1(b)(ii) of Schedule 6 of the 2014 Advocates Remuneration Orders being that the matter was instituted in the year 2021 which I calculate as follows: -

| | |
|---|---------------------------------|
| 1 st Kshs 1,000,000.00 | Kshs. 120,000.00 |
| 2 nd Kshs 19,000,000.00 * 2% | Kshs. 380,000.00 |
| Bal 401,964,585.00 *1.5% | Kshs. 6,029,468.77 |
| Total | <u>Kshs 6,529,468.77</u> |

67. The Applicant argued that the Taxing Master misdirected herself by disregarding pleaded liquidated sums in the Plaint, which expressly quantified losses and claims amounting to over a sum of Kenya Shillings Four Twenty One Million (Kshs. 421, 000, 000.00/=). The Counsel submitted that the Taxing Master's award of a sum of Kenya Shillings Seven Hundred Thousand

(Kshs. 700,000.00/=) was manifestly low and not commensurate with the nature, importance, and complexity of the matter. Reliance was placed on **“Premchand Raichand Ltd (Supra)”** and **“Kamunyori & Co. Advocates (Supra)”**, which emphasize that failure to ascribe the correct value to the subject matter constitutes an error of principle.

68. The Respondent contended that the value of the subject matter was not ascertainable since the primary suit did not proceed to judgment or settlement. They argued that pleaded figures alone cannot determine instruction fees, citing **“Joreth Ltd - Versus - Kigano & Associates (Supra)”** and **“Machira & Co. Advocates v Arthur Magugu (Supra)”**. The Respondent further submitted that Nakumatt Holdings Limited is under administration, and speculative legal fees would prejudice creditors, relying on **“Re Ukwala Supermarkets Limited (Under Administration) (Supra)”**.

69. While it is true that judgment was not entered, the Plaint contained specific liquidated claims which provided a reasonable basis for taxation. These were not speculative figures but quantified losses. The Taxing Master’s disregard of these sums amounted to a misdirection in principle. The award of Kenya Shillings Seven Hundred Thousand (Kshs.

700,000.00/=) was manifestly low compared to the statutory computation of a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6, 500, 000.00/=). The Taxing Officer erred in principle by failing to consider the pleaded value of a sum of Kenya Shillings Four Twenty One Million Nine Sixty Four Thousand Five Eighty Hundred (Kshs. 421,964,585/=). Instruction fees should have been assessed at a sum of Kenya Shillings Six Million Five Twenty Nine Thousand Four Sixty Eight Hundred and Seventy Seven Cents (Kshs. 6,529,468.77/=) and not Kenya Shillings Seven Hundred Thousand (Kshs. 700,000.00/=).

70. From the record, the Taxing Master's decision on getting-up fees and VAT was as follows, the Taxing Master applied Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014, which provides that getting-up fees are one-third of the instruction fees. Since she had awarded Kenya Shillings Seven Hundred Thousand (Kshs. 700,000.00/=) as instruction fees, she allowed getting-up fees of Kenya Shillings Two Thirty Three Thousand Three Thirty Three Hundred and Thirty Three Cents (Kshs. 233,333.33/=) (i.e., 1/3 of 700,000).

71. The Taxing Master noted that although the Applicant had not expressly sought VAT, it was nonetheless awardable because services had been rendered. VAT is always awarded at 16% of the instruction fees. Accordingly, she awarded of a sum of Kenya Shillings One Twelve Thousand (Kshs. 112,000.00/=) as VAT (16% of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000.00/=).

72. Having determined that the proper instruction fees should be a sum of Kenya Shillings Six Million Five Twenty Nine Thousand Four Sixty Eight hundred and Seventy Seven cents (Kshs. 6,529,468.77/=), the Court must also address the consequential items of getting-up fees and VAT. Under Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014, getting-up fees are pegged at one-third of the instruction fees, while VAT is awarded at 16% of the instruction fees.

73. Consequently, applying the statutory formula:

- **Getting-Up Fees: $1/3$ of Kshs. 6,529,468.77 = Kshs. 2,176,489.59**
- **VAT: 16% of Kshs. 6,529,468.77 = Kshs. 1,044,715.00**

74. Therefore, the total award due to the Advocate/Applicant under the corrected computation amounts to a sum of Kenya Shillings Nine Million Seven Fifty thousand Six Seventy Three Hundred

and Thirty Six cents (Kshs. 9,750,673.36/=) (Instruction Fees + Getting-Up Fees + VAT).

75. In light of the foregoing, and for the reasons and computation above done by this Court, I find that the grounds upon which the Reference herein has been filed are merited. Accordingly, I proceed to set aside the ruling of Hon. R.K. Ogolla delivered on 11th June 2025 and remit the Advocate/Client Bill of Costs dated 10th June 2024 for re - taxation before a different Taxing Master, with directions to apply the correct statutory formula under Schedule 6 and the amounts herein calculated.

ISSUE C. Who meets the costs of this Application/ Reference?

76. On the issue of costs, the principle is that costs follow the event unless the Court directs otherwise. In this Reference, the Advocate/Applicant has succeeded in demonstrating that the Taxing Officer erred in principle by disregarding the pleaded liquidated sums and awarding instruction fees that were manifestly low.

77. Accordingly, the Court finds that the costs of this Application/Reference shall be borne by the Client/Respondent, Nakumatt Holdings Limited (Under Administration). While the Respondent is under administration, insolvency does not

extinguish the Advocate's right to fair remuneration or the entitlement to costs where the Reference succeeds. Thus, the Court awards costs of the Reference to the Advocate/Applicant.

V. Conclusion and Disposition

78. Ultimately, in view of the foregoing detailed and expansive analysis of the Chamber Summons Application dated 24th June, 2025, and having considered the pleadings, affidavits, submissions, authorities cited, and the applicable statutory provisions, this Court arrives at the following decision and makes the orders below:

a) THAT the Chamber Summons Application dated 24th June, 2025 be and hereby found to have merit thus allowed in its entirety in the following terms: -

- i. the ruling of the Taxing Master, Hon. R.K. Ogolla, delivered on 11th June, 2025 in respect of the Advocate/Client Bill of Costs dated 10th June, 2024, be and is hereby set aside in its entirety.**
- ii. the Advocate/Client Bill of Costs dated 10th June 2024 be and is hereby remitted for re-taxation before a different Taxing Master other than Hon. R.K. Ogolla, DR.**
- iii. the new Taxing Masterr shall assess the Advocate/Client Bill of Costs dated 10th June, 2024 on its merits, with particular regard to:**

- a. Instruction fees based on the pleaded value of the subject matter of a sum of Kenya Shillings Four Twenty One Million Nine Sixty Four Thousand Five Eighty Five Hundred (Kshs. 421,964,585.00/=), which this Court has computed to yield instruction fees of a sum of Kenya Shillings Six Million Five Twenty Nine Thousand Four Sixty Eight Hundred and Seventy Seven Cents (Kshs. 6,529,468.77.00/).
- b. Getting-up fees at one-third of the instruction fees, amounting to a sum of Kenya Shillings Two Million One Seventy Six Thousand Four Eighty Nine Hundred and Fifty Nine Hundred (Kshs. 2,176,489.59.00/=)
- c. VAT at 16% of the instruction fees, amounting to a sum of Kenya Shillings One Million Four Fourty Four Thousand Seven Fifteen Hundred (Kshs. 1,044,715.00.00/=)
- d. THAT the total sum due under the corrected computation is a sum of Kenya Shillings Nine Million Seven Fifteen Thousand Six Seventy Three Hundred and Thirty Six cents (Kshs. 9,750,673.36.00/=), subject to any further adjustments on other items of the Bill of Costs.

b) **THAT** the costs of this Reference be and is hereby awarded to the Advocate/Applicant to be borne by the Client/Respondent.

IT IS SO ORDERED ACCORDINGLY.

**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL,
SIGNED AND DATED AT KWALE THIS5THDAY OF
MAY.....2026.**

.....
**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
KWALE**

Ruling delivered in the presence of:

- a) Mr. Daniel Disii, the Court Assistant.
- b) Mr. Ngonze Advocate for the Advocate/Applicant.
- c) No appearance for the Client/Respondent.