



REPUBLIC OF KENYA



**Munialo v Comity & another (Miscellaneous Reference Application  
12 of 2024) [2025] KEHC 938 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 938 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS REFERENCE APPLICATION 12 OF 2024  
SC CHIRCHIR, J  
JANUARY 30, 2025**

**BETWEEN**

**STANELY MASINDE MUNIALO ..... APPLICANT**

**AND**

**JULIANA AUMA COMITY ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. The Applicant's Chamber Summons dated 12<sup>th</sup> February 2024 seeks orders as follows;
  - a. (spent)
  - b. (spent)
  - c. That the Hon. Court be pleased to set aside the certificate of costs dated 17/1/2024 made in the said Kakamega Magistrate Court Election Petition No. E001 of 2022 assessing costs of the respondents at Kshs. 2,682,716/=
  - d. That this Hon. Court do assess the fees payable on all the 17 items contained in the respondent's bill of costs in the said Kakamega Magistrate court Election Petition No. E001 of 2022 dated 22/9/2023.
  - e. That in the alternative and without prejudice to the foregoing the Hon. Court be pleased to remit the respondent's bill of costs for fresh assessment by a different election court within Kakamega station.
  - f. That the costs of this application may be provided for.



### **The Applicant's case**

2. The Application is premised on the grounds appearing on the face of the Application and the supporting affidavit of Stanely Munialo Masinde, the Applicant.
3. The applicant states that he was the petitioner in Kakamega Chief Magistrates Election Petition No. E001 of 2022 , while the respondents herein were the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents, respectively. He further states that he lost the election and he was condemn to pay costs of the petition. The costs were assessed at ksh. 2,682,716/= by the trial court.
4. It is the Applicant's case that the costs were not made in accordance to the advocates Remuneration Order, 2014 specifically schedule 7 which governs assessment of costs on matters filed at the magistrate's courts; he believes the assessment constituted some form of punishment, rather than compensation, and has the effect of scaring off aggrieved parties from challenging flawed elections .

### **The Respondent's case**

5. It is the Respondent's case that , the Applicant did not demonstrate that the Honourable magistrate based his assessment on a wrong principle or which factors had not been taken into account and thus the court should not interfere with the discretion of the taxing officer.

### **Applicant's submissions**

6. The applicant submits that the discretion given to the court under the Advocates Remuneration order (ARO) does not permit it to increase the costs astronomically; that the assessed fee of ksh. 2,682,716 is too huge in the light of the guidelines provided in the ARO, the nature of the petition , the required security for costs in such petitions, and the guidelines provided under The Judiciary Bench Book on Electoral disputes Resolutions.
7. It is further submitted that the fee of ksh. 100,000 provided under paragraph 3 of schedule 7 as well as the requirement of a deposit of the same amount as security for costs under section 78 of the *Elections Act* 2011 ought to have informed the decisions of the court in the taxation of costs. It is also submitted that it is trite law that huge costs is an error in principle.
8. The Applicant has relied on the case of Jasbir Singh Rai & 3 others vs. Tarlochan singh Rai & 4 others (2014) eKLR to buttress his submissions to the effect that the courts has inherent power to ensure justice is met on costs.
9. On capping of the election petition costs to prevent the mischief of runaway costs, he relied in the case of Karanja Kabage vs. Joseph Kiuna Kariambegu Ng'ang'a & 2 others (2014) eKLR. He has further relied on the case of Evans Odhiambo Kidero & 4 others vs. Ferdinand Ndungu Waititu & 4 others (2014) eKLR where it was held that the capping of costs is necessary to safeguard the right of every Kenyan to challenge electoral flaws, and that financially difficulty should not be a bar to any one to file such suits.

### **Respondent's submissions**

10. It is the respondent's submissions that the lower court did not render a Ruling in respect to the contested bill of costs but the court simply took the same into consideration in assessing costs; that the assessment was within the jurisdiction of the Magistrate's court.
11. The Respondent further submits that pursuant to Rule 30 of the Election ( parliamentary and county ) Elections the trial court had jurisdiction to make orders on costs; that the costs were not itemised but



considered as a whole and that the bill of costs filed was merely a reference documents. In this regard the respondent has relied on the decision of the High court in Aden& 2 others vs Gedi ( 2023) KEHC 21742)

12. It is further submitted that the fact that the court was assessing and not taxing costs is evident from the directions given by the court when the Applicant sought for reasons of taxation.
13. The Respondent argues that Rule 30 as read with rule 34 of The Election Rules ( parliamentary and county) , shows that the only recourse that was available to the Applicant was an Appeal and not a reference; that a reference would only be relevant , if the bill had been taxed.
14. Consequently, the respondent submits, this court has no jurisdiction to entertain a reference.
15. The respondents, without prejudice on their submissions on the question of jurisdiction further submits that the costs were reasonable based on the fact that the petition was litigated on daily, and the actual award compares well with other past similar decisions.
16. It is further submitted that the Applicant has failed to demonstrate that there was error in principle and that the trial court is permitted to increase costs based on a number of varied factors.

### **Analysis and determination**

17. The Applicant herein was the petitioner in Kakamega Magistrates Election Petition No. E001 of 2022 while the respondents were the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The elections were County Assembly Elections
18. I have considered the parties submissions, the many Authorities cited and I have identified the following issues for determination:
  - a) Whether this court has jurisdiction to entertain this reference.
  - b) Whether the costs were excessive.

### **Whether this court has Jurisdiction to entertain this reference?**

19. The Respondent has argued this court has no Jurisdiction to entertain this reference. I need to point out that the issue of Jurisdiction was not raised in the Replying Affidavit and therefore the Applicant was denied chance to respond. However the issue of Jurisdiction is an issue of Law, consequently the court can on its own motion address it.
20. The Law on Jurisdiction is well – settled. A court must be possessed of Jurisdiction at he first instance; it determines whether a judge should keep holding or downing its tools; court cannot arrogate itself to it, and finally it flows only from *the constitution* or Statute.( Ref: Mikisa Biscuits manufacturing Co. Ltd vs West End distributors Ltd ( 1969) E.A 696
21. In attempting to answer the question of jurisdiction what has to be considered is whether the trial court assessed costs pursuant to the powers bestowed on it under Rule 30 of the Elections (parliamentary and County Elections) Petition Rules 2017 or this was a taxation of costs in terms of Rule 31 of the same Rules.
22. Rule 30 (1) provides that “ the election court may at the conclusion of a petition, make an order specifying: -
  - a. The total costs payable
  - b. The maximum amount of costs payable.



c .....

d ....."

23. Rule 31 on the other hand provides as follows:-

“Taxation and recovery of costs”

a. A registrar shall tax costs of a petition on the order of election court in the same manner as costs are taxed in Civil proceedings in accordance with the Advocates Act (Cap. 16)

b. ....

c. ....”

24. The Subject Election petition No. E001 of 2022 was heard by Hon. L Kassan, Chief Magistrate( as he then was) and at the conclusion of the Judgment, he ordered as follows:-

“(a) The petition is hereby dismissed.

(b) .....

(c) The Petitioner to bear the costs of the petition.”

25. There was no stated costs or capping by the trial Magistrate. The Respondent herein subsequently filed the bill of costs dated 22/9/2023. By the time it was coming up on 17/1/2024 for hearing the then presiding magistrate had left and a new magistrate took over his matters.

26. On 17/1/2024 Hon Ngarngar, Chief Magistrate as (as he then was) stated as follows. “This is a Ruling on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Bill of Costs dated 22/9/2023. Having done the assessment in the suitable scale, the bill is hereby assessed at Ksh 2,682,716.”

27. When the Applicant herein sought for reasons for the award on costs, the trial Magistrate gave “direction” and stated as follows. “ I have considered the request by the Petitioner in respect to the bill for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on giving reasons for assessment. This is pursuant to the Bill dated 22/9/2023. The reason for the assessment are as per the time-assessment was done on 17/1/2024 amounting to Ksh 2,682,716/=”

28. It is evident from the Assessment and the reasons for assessment that as far as Hon Ngarngar was concerned, he was assessing costs, as the Election court, and not taxing costs.

29. Taxation of costs is not the work of Election Court. Under Rule 31, it is the Registrar. This is equivalent to the Executive Officer, the Lower Court in terms of Rule 31(2) of the Election Rules aforesaid and is done under the supervision of the Election Court .

30. The Election court in the Petition was the Chief Magistrates Court. The same Court did not give direction on taxation of costs. The Court, differently constituted, later revisited the matter and assessed costs.

31. I am in agreement with the respondent that this was a case of assessment of costs by the Election Court pursuant to Rule 30 (1)(a) and not Rule 31 of the Elections (parliamentary and County Elections) Petition Rules 2017



32. Thus, to the extent that the costs were assessed by the election court then am in agreement with the respondent that like all the other decisions by the Elections court, is subject to Appeal to the High Court pursuant to the provisions of Rule 34 of the Elections (parliamentary and County) Petition Rules ,2017
33. On the other hand taxation of costs done by the taxing officer pursuant to Rule 31(1) is subject to the provisions of the Advocate Act. Any taxation then under Advocate Act is subject to a reference by the High Court as per the provisions of the said Act.
34. The approach to this court by way of a reference was therefore misconceived. Am of the view that the right avenue should have been an Appeal and not a reference.
35. This is therefore a case of procedural defect and not a question of jurisdiction as argued by the respondent, as this court has the jurisdiction to entertain both an Appeal or a reference from the lower court or from the decision of a taxing master.
36. Nevertheless, the Application suffers from procedural defect as aforesaid, and consequently, it is hereby struck off, with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF JANUARY, 2025.**

**S. Chirchir**

**Judge**

