REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Warsame, SCJ in Chambers)

PETITION NO. 31 OF 2018

–BETWEEN–

MOHAMMED MAHAMUD ALI..................................... APPLICANT

–AND–

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION................................ 1ST RESPONDENT

AISHA ABUBAKAR-CHANGAMWE

CONSTITUENCY RETURNING OFFICER............ 2ND RESPONDENT

OMAR MWINYI SHIMBWA...................................3RD RESPONDENT

(Being a Taxation Reference seeking to vary the decision of Hon. A. Mukenga, Deputy Registrar, dated and delivered on 13th March 2026)

Representation:

Gikandi & Company Advocates for the Applicant
Kioko, Munyithya, Ngugi & Company Advocates for the 1st & 2nd Respondents
No appearance for the 3rd respondent

RULING OF THE COURT

[1] RECALLING that the applicant filed an Application dated 23rd March 2026 under Rule 62 of the Supreme Court Rules, 2020, seeking to review the decision of the Deputy Registrar dated 13th March 2026 on a Party and Party Bill of Costs filed by the 1st and 2nd respondents dated 17th December 2025 in the sum of Ksh. 7,150,430/=, and prayed for orders that:

i.) *The Bill of Costs dated 17th December 2025 be struck out in its entirety;*

ii.) *In the event it is not struck out, the Deputy Registrar's decision awarding Ksh. 2,000,000 as instruction fees be set aside and/or varied; or*

iii.) *The matter be remitted back to the Deputy Registrar for re-taxation with proper directions; or*

iv.) *The Court be pleased to exercise its inherent jurisdiction and re-tax the instruction fees afresh.*

[2] BEARING IN MIND that this matter arises from an Election Petition concerning the 2017 parliamentary election for Changamwe Constituency, Mombasa County, in which the applicant was unsuccessful. The applicant challenged the election of the 3rd respondent as Member of Parliament. Following the dismissal of the Petition by the High Court, the applicant appealed to the Court of Appeal, which, by a judgment dated 26th July 2018, affirmed the decision of the High Court. The applicant appealed to this Court and by Judgment delivered on 6th February 2019, this Court dismissed the appeal with costs to the 1st and 2nd respondents; and

[3] FURTHER BEARING IN MIND that pursuant to the Judgment of this Court awarding costs to the 1st and 2nd respondents, the respondents filed a Party and Party Bill of Costs dated 17th December 2025. This Bill comprised 41 items claiming a cumulative sum of Ksh. 7,150,430/=; and

[4] NOTING that the applicant raised a Preliminary Objection dated 29th January 2026 on the ground that the Bill of Costs was time-barred under Section 4(1) of the Limitation of Actions Act, Cap 22. The applicant contended that instruction fees, being earnings of an advocate arising from the advocate-client retainer, which is contractual in nature, are subject to the six (6) year limitation period under Section

4(1)(a) of the Limitation of Actions Act, and that the Bill of Costs, being filed 6 years and 10 months after Judgment, was therefore statute-barred; and

[5] CONSIDERING THAT upon hearing the parties, the learned Deputy Registrar, by ruling dated 13th March 2026, dismissed the Preliminary Objection and found that the applicable provision was Section 4(4) of the Limitation of Actions Act, which provides that "*an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered*", and that the Party and Party Bill of Costs was therefore not time-barred. The Deputy Registrar proceeded to tax the Bill of Costs, assessing the instruction fees at Ksh. 2,000,000/= and awarding a cumulative sum of Ksh. 2,036,030/=; and

[6] HAVING CONSIDERED the applicant's written submissions filed on 24th March 2026, the applicant relies upon further case law including ***Kibuchi & Company Advocates Vs Kenindia Assurance Company Limited*** *[2023] KEHC 3469 (KLR)* ***and P.M. Wamae & Company Advocates Vs Ntoitha M'mithiaru*** *[2016] KEHC 1346 (KLR)*, both of which establish that Bills of Costs are time-barred when filed after six (6) years from completion of work. The applicant has further submitted that the Deputy Registrar committed a fundamental procedural defect by failing to provide reasons for the award of instruction fees and failing to set out the basic instruction fee before considering any adjustment thereof. The applicant submits that the award is disproportionately high when compared to ***Milly Glass Works Limited Vs Kenya Railways Corporation*** *(Supreme Court Petition No. E041 of 2024) [2025] KESC 26 (KLR)*, where instruction fees were assessed at only Ksh. 500,000/= in a commercial suit with the subject matter valued at Ksh. 127,464,047/=, and argues that the present Election Petition, not involving a comparable monetary claim, should not warrant instruction fees of Ksh. 2,000,000/=. The applicant further invokes constitutional principles of access to justice and contends that excessive costs impede access to the courts; and

[7] TAKING INTO ACCOUNT the 1st and 2nd respondents' Replying Affidavit dated 17th April 2026, and their Written Submissions dated 17th April 2026 in opposition to the applicant's reference, wherein they contend that a Party and Party Bill of Costs does not constitute a fresh or independent cause of action but rather a procedural mechanism invoked to give effect to a court's judgment on costs, and that once the Court awards costs, the liability crystallises, and the Bill merely particularises and quantifies the sums payable pursuant to that judgment. The respondents further contend that the applicable provision is Section 4(4) of the Limitation of Actions Act, which provides a twelve (12) year enforcement period for costs awarded by judgment, rather than Section 4(1)(a) which applies only to contractual claims. On the question of excessiveness, the respondents rely upon ***Joreth Ltd Vs Kigano & Associates*** *[2002] KECA 153 (KLR),* wherein it was held that where the value of the subject matter cannot be readily ascertained, the taxing officer is entitled to exercise discretion and arrive at a reasonable figure, taking into account the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances. The respondents submit that the Deputy Registrar correctly appreciated this legal position and applied the law accordingly; and

[8] GUIDED by Rule 60 of the Supreme Court Rules, 2020, the Registrar, and by extension the Deputy Registrars, have the power to tax costs arising out of proceedings before this Court, adhering to the scale set out in the Third Schedule, and in particular Paragraph 9 on quantum, while Rule 62 confers jurisdiction on a single Judge to entertain a reference by a party dissatisfied with the Registrar's decision on taxation; and

[9] IN VIEW OF THE FOREGOING, I now opine as follows:

i.) This application turns on two issues: first, whether the Party and Party Bill of Costs filed on 17th December 2025 is statute-barred under Section 4(1)(a) of the Limitation of Actions Act; and second, whether the instruction fees of Ksh. 2,000,000/= are manifestly excessive.

ii.) The Judgment in this matter was delivered on 6th February 2019. The Bill of Costs was filed on 17th December 2025. The time that lapsed between these dates is six (6) years and ten (10) months. The applicant contends that instruction fees, being contractual in nature and arising from the advocate-client relationship, are subject to Section 4(1)(a) of the Limitation of Actions Act and must therefore be brought within six (6) years. In support of this contention, the applicant relies on ***Kibuchi & Company Advocates v Kenindia Assurance Company Limited*** *[2023] KEHC 3469 (KLR)*, ***P.M. Wamae & Company Advocates Vs Ntoitha M'mithiaru*** *[2016] KEHC 1346 (KLR)*, ***and Otieno Ragot & Co Advocates Vs National Bank of Kenya & Another*** *[2020] KECA 894 (KLR)*. However, each of these cases involved Bills of Costs arising from an Advocate-Client relationship. They are therefore distinguishable from the present matter, which concerns a Party and Party Bill of Costs awarded by this Court as part of its judgment.

iii.) A Party and Party Bill of Costs is fundamentally different in nature and origin from an Advocate-Client Bill of Costs. When this Court awards costs to a successful party, such costs are awarded as part of the judgment and arise from the Court's power to make orders as to costs. They do not arise from any contractual relationship between an advocate and their client. The right to recover such costs is therefore not grounded in contract but in the judgment itself. Section 4(4) of the Limitation of Actions Act accordingly applies. The Deputy Registrar correctly applied this principle in dismissing the Preliminary Objection on limitation and the Deputy Registrar's decision to proceed with taxation was proper.

iv.) The question now is whether the Deputy Registrar erred in principle in awarding instruction fees at Ksh. 2,000,000/=. In **Nairobi Bottlers Limited v Ndungu & another** *[2024] KESC 73 (KLR)*, this Court, citing **Fredrick Otieno Outa v Jared Otieno Odoto & 3 Others,** *SC Petition No. 6 of 2014; [2023] KESC 75 (KLR)*, reiterated that a single

Judge can only interfere with a taxing officer's decision where there is an error of principle, or where the fee awarded is manifestly excessive or so manifestly deficient as to amount to an injustice; that although the taxing officer exercises unfettered judicial discretion, that discretion must be exercised judicially, not whimsically; and that the single Judge "*will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes*." In that matter, the applicant contended that the Taxing Officer had failed to consider all the key factors outlined in Paragraph 9(2) of the Third Schedule. The Court declined to interfere, finding that "*it is evident the Taxing Officer ... took into account Paragraph 9(1) of the Third Schedule of the Supreme Court Rules, 2020 alongside the relevant principles of taxation*." The question, therefore, is not whether a taxing officer expressly recited every relevant principle or factor, but whether, on a fair reading of the ruling as a whole, the discretion was exercised judicially. In the present matter, the Deputy Registrar engaged with the arguments before her, considered the authorities cited by the respondents and found that the claimed instruction fees of Ksh. 5,000,000/= were "on the higher side" and determined that Ksh. 2,000,000/= was "fair and reasonable." This constitutes a reasoned exercise of discretion. I therefore cannot conclude that the Deputy Registrar was not alive to relevant principles merely because such principles were not expressly reproduced in the ruling.

v.) In addition, the Deputy Registrar explicitly identified the basic prescribed fee as Ksh. 1,500/= under the Scale of Costs in the Third Schedule of the Supreme Court Rules, 2020, and stated this was subject to Paragraph 9(2), which permits the taxing officer to award higher amounts based on the circumstances of the case. She assessed the instruction fees at Ksh. 2,000,000/= having regard to the constitutional significance of the proceedings, the complexity of the matter, the volume of documentation and record, and all other relevant circumstances. The applicant has not demonstrated that these instruction fees are manifestly excessive or disproportionate to justify this Court's interference. It is not enough that the applicant believes a lower sum would have been more appropriate; the instruction fees must be assessed in the context of an Election Petition that proceeded through the High Court, the Court of Appeal, and this Court. The applicant's comparison to the **Milly Glass Works Limited** case, involving a commercial dispute with a significantly different nature and scope, does not establish manifest excessiveness. The applicant has therefore failed to demonstrate that the instruction fees warrant judicial interference.

[10] CONSEQUENTLY, the Deputy Registrar correctly dismissed the Preliminary Objection on the ground of limitation and properly exercised her discretion in taxing the instruction fees at Ksh. 2,000,000/=. I am persuaded therefore, that in the circumstances, the instant application lacks merit.

[11] ACCORDINGLY,

1. ***The Notice of Motion dated 23rd March 2026 is hereby dismissed;***
2. ***The applicant shall bear the costs of this application***.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **25th** day of **September**, 2026.

....

M. WARSAME

JUSTICE OF THE SUPREME COURT