



**Kimani v Liberty Afrika Technologies Limited & another (Constitutional Petition 147 of 2019)
[2023] KEHC 21832 (KLR) (Constitutional and Human Rights) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 147 OF 2019**

HI ONG'UDI, J

AUGUST 15, 2023

BETWEEN

PHILIP NJOROGE KIMANI PETITIONER

AND

LIBERTY AFRIKA TECHNOLOGIES LIMITED 1ST RESPONDENT

SAFARICOM LIMITED 2ND RESPONDENT

RULING

1. The 1st Respondent/Applicant filed the Reference herein vide the chamber summons dated 22nd June 2022, challenging the Taxing Officer's (Deputy Registrar) decision in respect of its bill of costs dated 29th October 2021. The Ruling being challenged was delivered on 24th May 2022. The Applicant therefore seeks the following orders:
 - i. That the decision of the Taxing officer the Hon. Njeri Thuku made on 24th May 2022 on item 1 of the 1st Respondent's Bill of Costs dated 29th October 2021 be reviewed, quashed and/or set aside.
 - ii. That the decision of the Taxing Officer issued on 24th May 2022 be substituted with the decision of this Honourable Court or in the alternative, the bill of costs dated 29th October 2021 be remitted back to another taxing officer for re-assessment and re taxation.
 - iii. That costs of this application be provided for.
2. The application is supported by the grounds on its face. The main ground is that the Deputy Registrar did not give any reason for capping the instruction fees at Kshs.100,000/= which is the minimum. The



Applicant claims that the petition was very novel as it related to protection of constitutional rights. That a lot of time was expended on it by counsel, yet it was not considered.

3. It's also asserted that the Deputy Registrar did not consider the authorities provided by his counsel on account of them relating to a Judicial review matter. All in all it's claimed that the Deputy Registrar wrongly exercised her discretion and failed to give reasons for taxing the item on instruction fee at such a low figure.
4. The petitioner/respondent filed grounds of opposition dated 8th February 2023 by Lumumba & Lumumba advocates. He opposed the application as it was not supported by an affidavit. Secondly that taxation of instruction fees where the value of the subject matter cannot be ascertained from the pleadings, judgment or settlement the taxing officer is entitled to exercise discretion, by taking into account a number of things. Thirdly that the judicious exercise of discretion can be ascertained from the reasons given by the Taxing Officer. That there was nothing to show that the decision was based on an error of principles. The petitioner/respondent did not find any novel issue raised and handled in the petition to warrant a higher amount of the instruction fees.
5. The 2nd respondent did not participate in this reference.

The 1st Respondent/Applicant's submissions

6. The same are dated 13th February 2023 and filed by their advocates Kiingati Ndirangu & Associates. On whether the Deputy Registrar's taxing decision should be reviewed, quashed and/or set aside counsel answered in the affirmative. He submitted while relying on the case of *Lalji Melji Pate & Company limited v. PCEA Foundation & another* [2020] eKLR and with authority cited the High Court case *First American Bank Limited v. Shah & another* [2002] 1 E.A 64 where Ringera J (as he then was) stated:

“This 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. ...it would be an error of principle to take into account irrelevant facts or to omit to take into account relevant factors.... Some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge....not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him....”

7. On principles to be applied when assessing instruction fees counsel cited two cases in support namely:
 - i. *Joreth Limited v. Kigano & Associates* [2002] eKLR
 - ii. *Vipul Premchand Haria v. Kilonzo & Co. Advocates* [2020] eKLR

He thus submitted that the Deputy Registrar had failed to consider salient points in the petition in assessing the instruction fees at the minimum of Kshs.100,000/= e.g. novelty of the Petition, the difficulty of the matter and the amount of time spent by counsel in preparing and defending the petition. Further that a lot of research was undertaken by counsel yet it was not considered.

8. It was counsel's prayer that the Deputy Registrar's decision be substituted by a decision of this court, or in the alternative the bill of costs be remitted back for re-assessment by another Taxing Officer.



9. Counsel submitted while relying on the case of *Commission of Kenya & 4 others v. Royal media Services Limited & 7 others* [2014] eKLR that having shown that the Taxing Officer had erred, the Applicant is entitled to costs.
10. Counsel filed supplementary submissions dated 8th March 2023 in which he argued that a Reference application need not be accompanied by a supporting affidavit. Relying on Rule 11 (2) of the *Advocates Remuneration Order* he submitted that a supporting affidavit is not necessary. Reference was made to decisions on the subject in;
 - i. *Kamunyari & company Advocates v. Dev. Bank of Kenya* [2005] eKLR (High Court)
 - ii. *Ahmednassir, Abdikadir & Company Advocates v. National Bank of Kenya Limited* [2006] eKLR

Counsel submitted that the above case law shows that the only mandatory requirements to be met while filing a Reference are those outlined in Rule 11(2) of the *Advocates Remuneration Order*.

11. He stressed that this was a novelty petition as it dealt with the interpretation of Article 35(1)(b) of the *Constitution* on access to information from a private entity as opposed to access to information from a public body. He submitted that this issue had not been dealt with before and so he had to do a lot of research. He cited the case of *Nairobi v. Kenya Electricity Generating Company & 2 others* [2013] eKLR where it was held:

“Article 35(1) (b) states that ‘Every citizen has the right of access to- (b) information held by another person and required for the exercise or protection of any fundamental right or freedom....Our courts have not yet had occasion to interpret the phrase ‘for the exercise or protection of another right’.”

The Petitioner/Respondent’s submissions

12. These are dated 7th March 2023 and are filed by Lumumba & Lumumba Advocates. Counsel submitted that the Reference /application is fatally defective for want of a supporting affidavit. He has argued that by nature all applications are supported by grounds and a supporting affidavit which introduces to the court the evidence to be tendered.
13. Secondly counsel submitted that the petitioner in the petition sought among others a compulsory order compelling the 1st & 2nd respondents to release to him certain documents and grant him access to given information as per the pleadings. Further the orders sought were prerogatory and not based on any value. Therefore the Taxing Officer had discretion to assess the payable instruction fees; Such discretion can only be interfered with if its shown that the Taxing Officer fell into an error of principle or took into account irrelevant factors or failed to consider relevant factors.
14. On the issue of the novelty of the petition counsel referred to the case of *Republic v. Minister for Agriculture & 2 others Ex parte Samuel Muchiri W’Njuguna & 6 others* [2006] eKLR where J. B. Ojwang J (as he then was) stated:

“The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings



necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiate by counsel must be specifically indicated – part, of course, form the need to show if such works have not already been provided for under a different head of costs.”

15. Counsel submitted that it was the Applicant’s duty to prove the grounds it was to rely on to claim for the costs. It had to place the necessary evidence before the court. This position was also expounded on in *University of Nairobi and another v. Nabiswa Wakenya Moses* [2022] eKLR. It was thus the duty of the applicant to adduce the necessary evidence to show the amount of time its advocates took to prepare for the case by the number of documents filed.
16. He contended that the documents filed and the time taken to highlight the submissions was very normal. The period it took to finalize the matter was affected by the Covid 19 pandemic when operations were greatly scaled down. Further that the claim for Kshs.500,000/= was unreasonably high. On payment of costs counsel submitted that costs follow the event unless for good reasons to be recorded, the court orders otherwise referred to the Court of Appeal case of *Farad Awad Gullet v. CMC Motors Group Limited* [2018] eKLR (Civil Appeal No. 206 of 2015)

Analysis and Determination

17. I have carefully considered the application, responses and submissions, cited case law and the law and find the issue falling for determination to be whether this court should interfere with the decision by the Deputy Registrar on taxation dated 22nd June 2022 should be interfered with by this court.
18. Counsel for the petitioner/respondent submitted that the Reference was fatally defective because it was not supported by an affidavit, as is required of applications. References are provided for and filed under the *Advocates Remuneration Order* under Rule 11 which states that a party making a reference should do so by way of a chamber summons application setting out the grounds for his objection. The Rule does not specify if a party must support the application with an affidavit. Had an affidavit been required just as is done under the Civil Procedure Rules, the same would have been indicated. Secondly the material required for the court to deal with the Reference is clearly on record so the grounds for the objection are sufficient. I do not find anything amiss for the failure to file a supporting affidavit.
19. It is the 1st Respondent/Applicant’s argument that the Deputy Registrar in taxing the instruction fees and getting up fees failed to consider the novelty of the petition, time spent by the advocate in preparing to prosecute the matter plus the complexity of the matter. The bill of costs by the Applicant dated 20th October 2021 has 34 distinct items. Counsel’s issue is only in respect of items No. 1 & 2 which deal with the Instruction fees and getting up fees.
20. Upon perusal of the petition herein I note that the petitioner/respondent sought for declaratory orders, compulsory orders plus an order for assessment of damages and compensation. There is no value attached to any of these prayers.
21. In the case of *Joreth Limited v. Kigano & Associates* [2002] 1 E.A 92 the Court of Appeal stated thus:-

“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, amount 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.”

22. Also see *Peter Muthoka & another v. Ochieng & 3 others* [2019] eKLR. Going by the above decisions and in the absence of any stated value the Deputy Registrar had to exercise her discretion as per the Rules in making a determination. In exercise of this discretion a number of factors ought to be taken into account by the taxing officer.
23. I wish to reiterate the provision of paragraph 11(1) (2) of the *Advocates Remuneration Order* which imposes a duty to give reasons on the Taxing Master. This was the position held in the case of *Mwangi Njenga T/a Mwangi Njenga & Company Advocates v. The County Government of Mombasa* [2020] eKLR.
24. In the impugned Ruling at paragraph 7 the Deputy Registrar simply stated that the instruction fee of Kshs.500,000/= is excessive. And in paragraph 9 she states that in reaching the decision she was guided by Lady Justice Koome (as she then was) in the cited case of *Royal Media Services v. Telkom Kenya Limited & 13 others* [2010] eKLR.
25. By providing no reasons for her action, the Taxing Officer erred in principle thereby giving what appears to be an unsupported figure. Had the reason/reasons been given, this Court would have been in a better position to evaluate them. The requirement for reasons to be given by the Taxing Officer for the decision he/she arrives at is not to be taken lightly.
26. From the foregoing reasons the chamber summons dated 22nd June 2022 succeeds and the following orders are issued:
 1. That the decision of the Taxing Officer, Hon. Njeri Thuku on 24th May 2022 is hereby set aside.
 2. The Bill of costs dated 29th October 2021 be and is hereby remitted for fresh taxation before another Taxing Officer besides Hon. Njeri Thuku.
 3. Costs herein to be in the cause.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15TH DAY OF AUGUST 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE

