



**Abdinur v Governor Mander County & 3 others (Petition 436 of 2015)
[2023] KEHC 24016 (KLR) (Constitutional and Human Rights) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24016 (KLR)

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

PETITION 436 OF 2015

LN MUGAMBI, J

OCTOBER 26, 2023

BETWEEN

ADIRAHMAN ABDINUR PETITIONER

AND

ALI ROBA, GOVERNOR MANDERA COUNTY 1ST RESPONDENT

COUNTY GOVERNMENT OF MANDERA 2ND RESPONDENT

MANDERA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. This is a ruling in respect of the Chamber Summons application dated 30th November 2020 where the petitioner has filed a reference against the Taxing Officer, Hon. Njeri Thuku's ruling dated 17th November, 2020 pertaining to the petitioner's Bill of Costs dated 16th July 2020.
2. In the application, the petitioner seeks the following reliefs against the 2nd respondent:
 - i. That the decision of the Taxing Officer on the petitioner's Bill of Costs dated 17th November, 2020 at Kenya Shillings Two Hundred and Ninety-Five Thousand One Hundred and Thirty-One (Kshs. 295,131) be reviewed and/or set aside.
 - ii. That the costs of this Reference be provided for.



Petitioner's Case

3. It is supported by the grounds on the face of that application which are amplified in the affidavit of Hassan Nunow Lakicha of Hassan N. Lakicha & Company Advocates of even date.
4. The affidavit discloses that the Petitioner herein succeeded in this Petition and got judgment in his favour on 8th February, 2017. He was represented by the aforesaid Firm of Advocates who subsequently filed the Bill of Costs on 16th July, 2020 against the 2nd Respondent seeking Kshs. 23,703,167.40/-
5. The gravamen of the Petition had been violation of the right to access information under article 35 of the Constitution.
6. The Taxing officer in her ruling awarded Ksh.100,000 on the item on Instructions Fees, that is, Item No. 3. The total Bill of Costs was taxed at Ksh.295,131.
7. According to Counsel for the Petitioner, the Taxing Officer erred in law and principle in taxing the Instructions Fees at Kshs.100,000 for assuming that the subject matter of the petition was Kshs. 100,000 thus misdirecting herself on the principles of the law applicable. As a result of this error, the Instructions Fees was pegged on unreasonably low sum and it is for this reason he seeks to have the Ruling varied or set aside.
8. Counsel as well avers that the Taxing Officer taxed off Items 1, 2, 10, 11, 17, 18, 20, 22, 23, 24, 29, 37, 41, 42, 43, 44, 45, 47, 48, 50, 52, 54 and 55 without providing sufficient reasons. Similarly, that Items 3, 7, 9, 12, 19, 26, 27, 31, 38 and 40 were taxed down without any sufficient reasons being provided.

2nd Respondent's Case

9. The 2nd respondent opposed the petitioner's reference and filed the replying affidavit dated 15th December 2020, sworn by its legal officer, Adan Kulow.
10. He deposes that the petitioner's allegation that nearly all the Items on the Bill of Costs being taxed in error is unmerited as the Taxing Officer exercised her discretion in awarding the sum total of Ksh.295,131/-.
11. Contrary to the petitioner's allegation that reasons were not stated for the findings in the impugned Items, he asserts that the same were well stipulated in the Ruling. He notes likewise that the Taxing Officer made her Ruling after analyzing the written submissions and as guided by the law and facts of the matter. In view of this, Counsel asserts that the application should be dismissed with costs.

Petitioner's Submissions

12. The Firm of Hassan Lakicha and Company Advocates filed written submissions and a list of authorities dated 3rd May, 2021.
13. Counsel acknowledged that Courts' do not interfere with the Taxing Officer's decision unless it is shown to be wrong. He cited the case of Visser v Gubb [1981] (3) SA 753 (C) 754H – 755C where this principle was restated thus:

“ ... The Court will not interfere with the exercise of [the] discretion [of the taxing master] 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 has 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 opinion that the Taxing Master was clearly wrong but it 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.”

14. Counsel argued that the Taxing Officer should, in making a decision, take into account the time taken, the complexity of the matter, the nature of the matter, the nature of the subject matter in dispute, the amount of the subject matter and any other factors she considers relevant.
15. Counsel submitted that Schedule 6 Paragraph 1(j) of the [Advocates Remuneration Order](#), 2014 provides the minimum amount of Instruction Fees chargeable by an Advocate in constitutional petitions. Counsel submitted that the instant petition involved a complex matter touching on the right to information under Article 35 of the [Constitution](#) pertaining to how the allocated budget of the County Government of Mandera was being managed in regard to special groups, minorities and marginalized communities. This amount as per the Auditor’s report was Ksh.857,948,483.65. In view of this, Counsel submitted that the Taxing Officer ought to have considered the complexity of the matter as the Firm had to comb through the Auditor General’s report for a period spanning a two-year period from January 2013 to June 2014.
16. Counsel contended that the petitioner’s advocates read and researched widely and analyzed the relevant Statutes on the matter.
17. He relied on the case of [Joreth Limited v Kigano & Associates](#) [2002] eKLR where it was held thus:

“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 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.”
18. He equally relied on the cases of [Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and others \(No. 3\)](#) [1972] 1 EA 162 and [President of the Republic of South Africa and others v Gauteng Lions Rugby Union and another](#) [2000] (1) SA 1 (CC) and [Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company Limited and 8 others](#) [2015] eKLR.
19. In conclusion Counsel submitted that the Taxing Officer had not exercised her discretion reasonably in taxing the Instructions Fees at Ksh.100,000 as it was not commensurate with the work done and the value of the subject matter in the petition. He urged the Court to allow the application.

2nd Respondent’s Submissions

20. The 2nd respondent through Yunis Mohammed and Associate Advocates filed written submissions and a list of authorities dated 16th June 2023.
21. Counsel vehemently opposed the petitioner’s Instruction Fees under Item 3 of Bill of Costs charged at Ksh. 15,000,000 as being way beyond what is prescribed in the Advocates Remuneration Order whereby under Schedule 6(i) (j) of the [Advocates Remuneration Order](#), the basic Instruction Fees allowed is Kshs.100,000 incase where the Petition is opposed. Counsel insisted the Instruction Fees that the Petitioner is seeking is manifestly excessive, unjust and unreasonable and against the principles laid down by the Supreme Court in the case of [Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others](#) [2014] eKLR where it was held that costs should not be used to unjustly enrich a party.



22. Counsel reiterated the principles set out in the case of Premchand Raichand Ltd(supra) where it was held that:
- “(a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy.
 - (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.
 - (c) That the general level of remuneration of Advocates must be such as to attract recruits to the profession.
 - (d) So far as practicable there should be consistency in the award made and
 - (e) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”
23. Relying on the factors that should guide the determination of instruction fees discussed in Joreth Limited (supra) such as the importance of the matter, the general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties; Counsel argued that the petitioner in the petition herein sought declaratory reliefs and a mandamus order against the 2nd respondent for neglecting to furnish him with information that he requested for vide a letter dated 4th August, 2015 of which there were no voluminous documents that the advocates was required to peruse before instituting the matter. That the petition did not present a complex matter or any novel issue and there was no monetary value of the subject matter identifiable from the pleadings that could enable the Taxing Officer ascertain the value in taxing the Bill of Costs.
24. Consequently, Counsel contended that the Instruction Fees that the Petitioner was urging is not justified and was only meant to enrich unjustly which was the petitioner’s advocates unjustly, a practice that the court frowned upon in the case of *Moronge & Co. Advocates v Kenya Airports Authority* [2014] eKLR where the Court stated:
- “The advocate’s pay however must be commensurate to his work otherwise it shall be what is termed as ‘unjust enrichment... The same must be reasonable compensation for professional work done.”
25. To buttress this submission, Counsel also cited the case of *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others* (2006) eKLR.
26. The respondent advocate asserted that taxing officer’s discretion in taxation can only be interfered with if it is shown that the Taxing Officer applied a wrong principle of law or took into account irrelevant matters or failed to take into account relevant ones and arriving at a wrong decision as held in the case of *First American Bank Ltd v Shah & another* [2002] 1 EA 64 which was not the case here.
27. Further that the petitioner was under the obligation to provide all the documents he was relying on for the Taxing Officer to examine as the Taxing Officer taxed off items 1, 2, 10, 11, 17, 18, 20, 22, 23, 24, 29, 37, 41, 42, 43, 44, 45, 47, 48, 50, 52, 54 and 55 for lack of supporting documentation to assist her in making the assessment those charges were incurred. In support of this submission, Counsel relied



on the case of *Desai Sarvia & Pallan Advocates v Jambo Biscuits Kenya* (2014) eKLR where it was held thus:

“..... taxation of a bill of costs like all other aspect of litigation is based largely on evidence. It is also an adversarial process. As the bill was contested, it behooved the applicant to present to the taxing master all documents and materials in support of his claim. Having shirked that responsibility in the litigation, the applicant cannot shift the blame to the umpire. In all circumstances, the applicant was the author of his own misfortune”.

28. Counsel urged this Court to dismiss the application with costs.

Issues for determination

- a. Whether the Taxing Officer rightly considered all relevant factors in exercising her discretion to determine the petitioner’s Instruction Fees in the Bill of Costs.
 - b. Whether the Taxing Officer taxing off Items 1, 2, 10, 11, 17, 18, 20, 22, 23, 24, 29, 37, 41, 42, 43, 44, 45, 47, 48, 50, 52, 54 and 55 and taxing down Items 3, 7, 9, 12, 19, 26, 27, 31, 38 and 40 provided the reasons.
29. Rule 10 and Rule 16 of the *Advocates Remuneration Order*, 2009 the mandate given to the Taxing Officer to tax the Bills of Costs provided for in the following terms:

Rule 10: The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

Rule 16 : Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.’

30. A Judge will scarcely interfere with the Taxing Officer’s discretion except in clearest of the cases where it is manifest that it was not exercised properly. The principles that guide the Court in considering the applicable circumstances are now well settled. In *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR the Court said:

“... The circumstances under which a Judge of the High Court interferes with the taxing officer’s exercise of discretion are now well known. These principles are,

- (1) that 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;
- (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration



Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

- (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
- (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
- (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;
- (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
- (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

These principles were stated in the case of *First American Bank of Kenya v. Shah and Others* [2002] 1 EA 64.

20 Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic



conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.”

31. The case of *Premchand Raichand Ltd v Quarry Services of East Africa Ltd*(*supra*) emphasized the following principles:

- “(a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy.
- (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession.
- (d) so far as practicable there should be consistency in the award made and
- (e) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”

32. Furthermore, in assessing whether the Taxing Officer exercised her discretion properly, the Court of Appeal in the case of *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR citing the case of *Joreth Ltd v Kigano & Associates* [2002] 1 EA 92 with approval observed as follows:

“The beginning point is whether the taxing officer properly exercised her discretion to determine the Advocate and client bill of costs.

“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.”

33. More importantly however, the Taxing Master in taxing a Bill of Costs must have regard to the relevant Schedule of the *Advocates (Remuneration) Order*. The Court of Appeal of Uganda in *Makula International v. Cardinal Nsubuga & Another* [1982] HCB 11 as cited with approval in the case of *Truth Justice & Reconciliation Commission v Chief Justice of the Republic of Kenya & another* [2014] eKLR held:

“The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that



the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

34. In the case of *Republic v Minister of Agriculture & 2 others ex parte Samuel Muchiri W’njuguna (supra)*, the Court stated as follows on the question of instruction fees that was in contention before it:

“(ii) the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;

(iii) the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;

(iv) so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees...”

35. The Taxing Officer chose to be guided by the Supreme Court case of *Royal Media Services v Telkom Kenya Limited and 13 others* (2010) eKLR which upheld the principles articulated in *Premchand Raichand Ltd (supra)* on taxation of Bills of Costs. She formed the view, that the Petition was only based on violation of Access to Information under Article 35 of the *Constitution* which was not a complex constitutional question to warrant a claim of Kshs. 23, 703, 167. 40 as instruction fees and on Item 3 (Instruction Fees) she went by the amount prescribed by the scale under The *Advocates (Remuneration) (Amendment) Order, 2014* under Schedule 6 (1)(j) (ii) which provides thus:

Constitutional petitions and prerogative orders

“To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

i.

ii. where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000

iii.’

36. Consequently, on the item of instruction fees, the Taxing Master went by the fees as prescribed by the scale.

37. Further, she found that supporting documents or evidence was missing to support the claim in Items 1, 10, 17, 20, 22, 23, 24, 29, 37,41, 42, 43, 44, 45, 47, 50, 52, 54 and 55. Service of the pleadings in Mandera also claimed by the Applicant had not been substantiated in items 10, 11, 17,18, 22, 23, 42 and 43. She reasoned that service of process by the Court Process Server could not be awarded because Court Process Servers are Judiciary employees who are salaried.

38. A reading of the Judgment of this Court delivered on dated 28th February 2017 reveals that the Petitioner instituted the Petition after the 2nd Respondent failed to furnish the information the



Petitioner wanted pursuant to the letter dated 4th August 2015. The Court found for the Petitioner and decreed that:

- i. There shall issue a declaration that the petitioner's right of access to information as enshrined in Article 35 of the *Constitution* has been violated in so far as the respondents have declined and continued to decline to allow the petitioner access to information sought by the petitioner through the petitioner's advocates on 4th August 2015.
- ii. The 1st, 2nd and 3rd respondents are hereby ordered by way of mandamus to forthwith grant access to the petitioner of and to the public documents and records in the possession of the respondents as requested by the petitioner's advocates' letter of 4th August 2015. Any copying charges are to be met by the petitioner.
- iii. The costs of the petition shall be borne by the 2nd respondent.

39. I am entirely concur with the finding of the Taxing Officer that this was a fairly open and shut case. There was nothing novel or complex about it. The Taxing Officer was well versed with the provisions of the Advocates Remuneration Order and demonstrated clear understanding of the principles which she applied correctly in making the assessment and I find no reasons whatsoever to tamper with that determination.

40. The upshot of the foregoing is that this reference lacks merit and is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 26TH DAY OF OCTOBER, 2023

L. N. MUGAMBI

JUDGE

