



REPUBLIC OF KENYA



**Kibe & 5 others v Attorney General & 2 others (Miscellaneous Application
860 of 2001) [2022] KEHC 12634 (KLR) (Civ) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION 860 OF 2001

CW MEOLI, J

AUGUST 4, 2022

BETWEEN

J.G KIBE 1ST APPLICANT
SAMUEL KAMAU MACHARIA 2ND APPLICANT
SCENERIES LIMITED 3RD APPLICANT
GEORGE KANG'ETHE WARUHIU 4TH APPLICANT
GRACE GITHU 5TH APPLICANT
SOLOMON KARANJA 6TH APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT
NGENGI MUIGAI 2ND RESPONDENT
CITY MERCHANT AUCTIONEERS 3RD RESPONDENT

RULING

1. This ruling relates to two applications. The earliest filed is a taxation reference by J.G Kibe, Samuel Kamau Macharia (hereinafter the 2nd Applicant), Sceneries Ltd, George Kang'ethe Waruhiu, Grace Githu and Solomon Karanja dated 4th June 2020. The second is the motion by Ngenji Muigai (hereinafter the 2nd Respondent) dated 29th March 2021. The reference, presented by way of a chamber summons, is expressed to be brought under Paragraph 11(1) - (4) of the *Advocates (Regulations) Remuneration Order*, sections 1A, 1B and 3A of the *Civil Procedure Act*. The live prayer therein seeks that the court be pleased to vary or set aside the decision of the taxing master delivered on 8th May, 2020 concerning the 2nd Respondent's bill of costs dated 30th August 2016.



2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the 2nd Applicant who asserts due authority of his co-Applicants to swear the affidavit on their behalf. The gist of the affidavit is that the Applicant's Originating Motion instituting this cause was dismissed with costs by the judgment delivered on 19th February, 2016 and that thereafter the 2nd Respondent proceeded to file a Party and Party Bill of costs; that the Bill was canvassed before the taxing master and ruling delivered on 8th May, 2020. He deposes that the Applicants are aggrieved by the ruling and have filed a reference pursuant to paragraph 11 of the *Advocates Remuneration Order*.
3. The deponent enumerates various grounds in support of the reference, key among them being that the taxing master failed to apply the correct principles and erroneously based the instruction fees on the arbitral award of Kshs. 150 million rather than the appropriate provision in the *Advocates Remuneration Order*, 1997 providing for a minimum of Kshs. 20,000/- for the item in question; that the costs awarded are so high as to evidence error; that the suit was not determined on the merits but dismissed purely on the grounds that the court lacked jurisdiction; that the award offends the rule in *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd* [1972] EA 162 because the work done by the 2nd Respondent's advocate did not warrant the award of Kshs. 6,450,394/-; that the instruction fees were awarded twice for items 1 and 2 in the bill of costs and is therefore manifestly excessive; and finally, that the award in respect of getting up fees as based on an excessive instruction fee was not only excessive, but also unjustified in that the suit never proceeded to hearing.
4. The reference is opposed through the replying affidavit of the Harun Muturi Njoroge, counsel for the 2nd Respondent. To the effect that the reference is not merited as the taxing officer properly exercised her discretion and did not consider any irrelevant factors in taxing the bill of costs; that the amount of Kshs. 4,690,000/- allowed as instruction fees is moderate and not excessive, for several reasons including the fact that the matter was of great importance and urgency since the Applicants were facing the imminent threat of execution in satisfaction of a decree of Kshs. 150 million being the value of the subject matter, the matter involved voluminous documents and was complex as it raised fundamental constitutional issues, which required extended time, research, and skills and that the suit was pending in court for 15 years from inception to the final judgment. In conclusion counsel defended the taxing master's decision stating that awards therein compared well with awards in similar matters, one of which involved the same parties and subject matter.
5. The 2nd Respondent's motion dated 29th March, 2021 is expressed to be brought under Section 51(2) of the *Advocates Act* and Rule 7 of the *Advocates Remuneration Order*. It seeks that judgment be entered for the 2nd respondent in respect of the certificate of taxation dated 14th January, 2021 against on the 1st, 2nd, 3rd, 4th, and 6th Applicants for the sum of Kshs. 6,540,394/- with interest at the rate of 14% per annum from the date of service of the bill of costs until payment in full. The grounds on the face of the motion are augmented in the supporting affidavit deposed by the Mbuthi Gathenji, counsel for the 2nd Respondent. To the effect the 2nd Respondent Party and Party Bill of cost dated 30th August, 2016 has since been taxed to the tune of Kshs. 6,450,394/- *vide* the ruling of the taxing master delivered on 8th May, 2020 and a certificate of taxation issued on 14th January, 2021 and that the 1st, 2nd, 3rd, 4th, and 6th Applicants have not made any payments towards settling the taxed costs, hence, it is just that judgment be entered as prayed.
6. The 2nd Respondent's motion is opposed through the replying affidavit deposed by the 2nd Applicant, on his own behalf and on behalf of his co-Applicants. He reiterates the contents of his affidavit in support of the reference and asserts that the reference dated 4th June, 2020 constitutes a competent objection to the certificate of costs sought to be adopted as a judgment of the court and the should be determined before the 2nd Respondent's motion dated 29th March, 2021.



7. The court directed that the two applications be heard simultaneously by way of written submissions that were followed by oral highlighting. The 2nd Applicant's counsel in submitting on the reference raised an objection under the provisions of Order 19 Rule 3 of the Civil Procedure Rules (CPR) and Rule 9 of the *Advocates Practice Rules*. Relying on several authorities including *East Africa Foundry Works (K) Ltd v Kenya Commercial Bank Ltd* [2002] eKLR, *R v Nairobi City County Government Ex Parte Mike Sonko Mbuvi* [2015] eKLR, and *Oyugi v Law Society of Kenya & Another* [2005] 1 KLR 463 counsel argued that the replying affidavit sworn by Harun Njoroge Muturi dated 3rd June, 2021 was fatally defective because it contains contentious matters which should be deposed to by the 2nd Respondent rather than by counsel and that affidavits ought to be confined to such facts as a deponent is able of his own knowledge to prove. Citing the contents of paragraph 5, 9, 10, 11, 16 and 17 of the affidavit which he asserted to raise evidentiary issues counsel contended that such depositions to have been made by the 2nd Respondent himself. He urged the court to strike out the replying affidavit and allow the reference as unopposed.
8. On the substance of the reference, counsel called to his aid the decision in *Devshi Dhanji v Kanji Naran Patel* (1978) KLR 243 and *United India Insurance Company Limited & Kenindia Insurance Company Limited v East Africa Underwriters Kenya Limited & Others* (1982-1988) KLR, 639 to submit that in a reference a judge sits on appeal as regards the taxation process and has the discretion to either set aside an award and order that fresh taxation be done afresh before another taxing officer or to tax the bill herself; that where a taxing master acts on wrong principles or fails to take into account relevant considerations or takes into account wrong or irrelevant considerations, the court will interfere with such exercise of discretion, and not merely for the reason that it given different weight to various factors in the case.
9. Concerning instruction fees, counsel while citing *Joreth Ltd v Kigano and Associates* [2002] 1 EA, *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd* [1972] EA 162 at 165 and *Vijay Kumar Mandal v Rajinder Kumar Mandal* HCCC No. 337 of 2002 counsel submitted that the value of the subject matter is to be gleaned where possible from pleadings, judgment or settlement if ascertainable, failing which the taxing officer may use his discretion to assess such instruction fees as he considers just, taking into account the nature, importance of the matter, interest of the parties and general conduct of proceedings *inter alia*; that the question of valuation has to be viewed against the object of taxation which is to determine the fees which counsel is to be paid in a given case through the application of both the principles of taxation and the discretion the taxing officer has.
10. Further citing the decisions in *National Oil Corporation Limited v Real Energy Limited and Another* [2016] eKLR, *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64, *Buston Travel Services and Others v Kenya Airways* [2006] eKLR and *Republic v Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W' Njuguna & 6 Others* [2006] eKLR counsel argued that the taxing officer failed to consider the provisions of Schedule VI of the *Advocates Remuneration Order* which provides that where the suit is determined in a summary manner whatsoever without going to full trial, the fees shall be 75% of the fees chargeable, which factor was not taken into account in this case leading to an excessive award.
11. He contended that consequently the 2nd Respondent was not entitled to getting up fees in this instance. Other applicable overarching principles of taxation cited by counsel were that taxation awards should not be so excessive as to hinder the overriding objective in civil litigation or impinge upon the constitutional right to access to justice. Authorities cited in support of the proposition included the case of *Rodgers Mwema Nzioka v The Attorney genral & 9 others*, High Court Misc. Civil Application No. 613 of 2006 and *Rogan Kamper v Grosvenor* (1989) KLR 362.



12. In submitting on the motion dated 29th March, 2021 counsel for the 2nd Applicant asserted that if the reference is allowed the motion will be rendered moot and cited the decisions in *Harry Gakinya t/a Harry Gakinya & Co. Advocates v Rift Valley Agricultural Contractors Limited (RVACL)* [2020] eKLR and *Njuguna Matiri & Company Advocates v National Bank of Kenya Ltd* [2016] eKLR.
13. On part of the 2nd Respondent, it was submitted concerning the objection to the replying affidavit to the reference that the said affidavit is confined to matters the deponent advocate can prove of his own knowledge. He asserted that and that the affidavit contains non-contentious facts most of which are on record and citing the decision in *County Government of Narok v British Pharmaceutical Limited* [2021] eKLR stated that there is no bar to an advocate deposing to such matters or on a pure legal positions.
14. Concerning the merits of the reference and especially regarding instruction fees, counsel submitted on the authority of Premchand Raichand's case (*supra*) that the appellate court will only interfere with the decision of the taxing officer when it is satisfied that the taxing committed an error of principle or when the fee awarded was so manifestly excessive as to represent an error of principle. Relying on the case of *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd* [2014] he defined an error of principle to comprise the taking into account irrelevant factors or failing to consider relevant factors and that the threshold for setting aside of the taxing master's decision is a demonstration that the decision was clearly wrong and not merely wrong, as stated in *KANU National Elections Board & 2 Others v Salah Yakub Farah* [2018] eKLR.
15. It was further submitted that the taxing officer proceeded under the provisions of Schedule VI 1(j) *Advocates Remuneration Order* 1997, (ARO) the parties having agreed that it was the applicable provision in the assessment of instruction fees; that the provision provides the minimum instruction fees which the taxing officer had discretion to increase. That in exercise of her discretion the officer opted, rather than pluck a figure from the air, to consider the value of the subject matter as revealed on the record and properly justified the increase of the fees on relevant considerations such as the complexity of the matter, the industry by counsel, the duration of the dispute and sums in dispute.
16. Counsel submitted that in view of the said factors and importance and urgency of the matter and complexity of the constitutional issues raised and orders sought in the Originating Motion, initially certified as complex and a bench of three judges appointed to hear it, and voluminous documents involved the award on instruction fees was modest. That the award aligned with the principle of comparability, as compared with the award of Shs. 5,000,000/- being instruction fees taxed under Schedule VI 1 (j) (ARO) in Misc. Constitutional Application No. 1 of 2016 *Sceneries Limited vs National Land Commission, Ngengi Muigai and Kenya Reinsurance Corporation Limited* which case related to the same subject matter herein, was determined after full hearing by one judge after a year.
17. Counsel refuted assertions that this matter was summarily determined and complaint that instruction fees were awarded twice, by reiterating firstly, that judgment was given after a full hearing therefore attracting full instruction fees, and secondly that, while instruction fees were sought in items 1 & 2 of the bill of costs, only item 1 was allowed. He therefore distinguished the facts of the instant matter from those in the case of National Oil Corporation Limited cited by the Applicants.
18. In conclusion counsel asserted that the 2nd Applicant had not satisfied the principles governing the variation or setting aside of taxing officer's decision. He urged the court to dismiss the reference and to proceed to enter judgment terms of the prayers in the motion dated 29th March 2021 and to award costs for both the reference and the motion for judgment by the 2nd Respondent.



19. The Court has considered the grounds of the reference, responses thereto as well as rival submissions thereon. Equally the court has considered the material canvassed in respect of the motion and perused the record herein. As a preliminary issue, the court was called upon to determine whether the replying affidavit in opposition to the reference is defective for the reasons given by the Applicant's advocate. Namely, that the affidavit contains contentious matters which ought to be deposed to by the party himself rather than his advocate Harun Muturi Njoroge.

20. Rule 8 of the *Advocate (Practice) Rules* states:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

21. Whereas the ideal would be for parties to suits to swear their own affidavits, there is nothing to bar counsel from swearing to routine uncontested matters that are within his knowledge in his capacity as counsel seized with the conduct of the case on behalf of his client. So long as the affidavits comply with the requirement in Order 19 Rule 3(1) of the *Civil Procedure Rules* that they should “be confined to such facts as the deponent is able of his own knowledge to prove”. That said, it is incumbent upon advocates to refrain from making depositions of a contentious nature. The rationale behind the Rules is to insulate the advocate as an officer of the court from entering the fray between his client and adverse parties.

22. The Court of Appeal in *Hakika Transporters Services Ltd v Albert Chulab Wamimitaire* [2016] eKLR citing its decision in *Salama Beach Ltd v Mario Rossi*, CA. No. 10 of 2015, expressed the principle as follows:

“As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deposed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v. Ali & 2 Others*, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the *Advocates (Practice) Rules* however permits an advocate to swear an affidavit on formal or non-contentious matters.”

See also *Nyamogo & Nyamogo Advocates v Kogo* (2001) EA 174; *Simon Isaac Ngugi v Overseas Courier Services (K) Ltd* (1998) eKLR; and *East Africa Foundry Works Limited v Kenya Commercial Bank* (2002) KLR 443.

23. Undeniably in this case, counsel instructed by the 2nd Respondent has personal knowledge of the of the matters deposed to in his affidavit, and in particular matters contained in paragraphs 5,9,10,11, 16 and 17 to which the objection was raised. Equally, these are really matters can be discerned from the pleadings and the record herein. In my considered view, only the depositions in paragraphs 5, 9, and 10 qualify as having a semblance of being contentious, but they are peripheral to the matter at hand. As for the contents of paragraphs 11,16 and 17 these substantially relate to matters of law to which



the advocate is well competent to depose to. In the circumstances, the court found no merit in the objection to the replying affidavit sworn in opposition to the reference.

24. Moving on to the substance of the reference, there is no dispute that the Originating Motion herein emanated from arbitral proceedings giving rise, rightly or wrongly, to the entry of a judgment in favour of the 2nd Respondent, in the High Court litigation between the parties in HCCC No.4232 of 1991 as consolidated with HCCC No. 6542 of 1991, for the sum of Kshs. 150,000,000/- pursuant to which a decree issued, and execution proceedings commenced against the Applicants. Evidently, the key object of the 53 prayers in Originating Motion was to have the arbitral proceedings and proceedings and judgment of the High Court and consequent decree and warrants of attachment declared unconstitutional, null and void and unenforceable.
25. Although there were several grounds raised in the reference, I understood the gravamen of Applicants' reference as canvassed in submissions to be that the taxing master erred in basing the value of the subject matter on the sum of Kshs. 150,000,000/-, being the decretal sum in the warrants of attachment against the Applicants that were the subject of the Originating Motion, and therefore made a manifestly excessive award on instruction fees; that the taxing master erroneously awarded instruction fees twice in item 1 and 2 of the bill of costs; and that the award in respect of getting up fees was not only erroneous but also excessive, pegged as it was, upon the amount of the contested instruction fees and the Court therefore ought to interfere by varying or setting aside the decision of the taxing master. The question for determination is whether there is justification shown for such interference with the taxing officer's award.
26. In the oft-quoted passage from the case of *Premchand Raichand Ltd & Another v. Quarry Services of East Africa Ltd & Another* [*supra*] Spry, V-P. stated at p.164 that:
- “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, and 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.”
27. The Court of Appeal in that case proceeded to lay down some principles to undergird the exercise by taxing officers of their discretion in the assessment of costs as follows:
- (a) that costs be not allowed to rise to such a level as to limit access to the courts to the wealthy only;
 - (b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;
 - (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and
 - (d) that so far as practicable there should be consistency in the awards made.”
- See also *Rodgers Mwema Nzioka v The Attorney General & 9 Others* (2007) eKLR and *Rogan Kamper v Grosvenor* (1978) eKLR.
28. The foregoing counsel was reiterated in submissions and affirmed by Ojwang J (as he then was) in *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others* [2006]



eKLR. Also cited was the decision of Ringera, J (as he then was) in *First American Bank of Kenya v. Shah & Others* [2002] 1 E.A. 64 at p.69 to the effect that:

“First, I find that on the authorities, 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, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.... Of course it would be an error of principle to take into account relevant factors or to omit to consider relevant factors. And according to the *Advocates (Remuneration) Order* itself, some of the relevant factors to take into account include the nature and 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. Needless to state 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. 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.”

29. For his part Ojwang J (as he then was) in part delivered himself in the following words in *Ex parte Samuel Muchiri W’Njuguna* :

“Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated, and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs... Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that ends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.”

30. With these considerations in mind, the Court has reviewed the grounds argued before it. First, the complaint relating to the alleged double award of instruction fees in items 1 and 2 of the bill of costs has no foundation. The calculations in the decision of the taxing officer show that only instruction fees claimed in item 1 were allowed but doubled. As concerns the element of the complaint that getting-up fees could not be awarded as the matter was determined in a summary manner, it is clear from the proceedings and judgment of the Court that the parties had prior to the judgment canvassed the Originating Motion fully as directed by the Court. However, in its judgment, the Court declined



to assume jurisdiction and consequently dismissed the entire case. In other words, the Originating Motion proceeded to full hearing before the determination by way of a judgment. Having disposed of these matters, the Court will proceed to consider the ground relating to the award of instruction fees together with the ground regarding the quantum of the getting up fees as the determination of the former will invariably have a bearing on the latter.

31. Before the taxing master and this Court, the parties were agreed that the provisions of Schedule VI 1(j) of the *ARO* 1997 applied to the assessment of instruction fees. While the 2nd Respondent had urged a sum of Shs.10,000,000/- based on the value of warrants of attachment and orders sought to be impugned in the suit, the Applicants asserted a sum of Shs.50,000/- representing an increase of 2.5% of fee in Schedule VI1(j) to be adequate.
32. The Applicants, while agreeing in principle that in assessing instruction fees the value of the subject matter ought to be drawn from the pleadings, judgment or settlement as provided in the *ARO*, were of the view that value of the subject matter herein could not be ascertained from the pleadings. There was no dispute on the applicable considerations and principles. In brief, that costs are awarded, having regard to several factors including, the difficulty and complexity of the issues or dispute; the length of the trial; value of the subject matter and such other factors relevant to arriving at a fair award of costs. The taxing master is required to take these principles into account.
33. In her ruling, the taxing officer restated the above principles and factors as articulated in the case of *Ex parte* Samuel Muchiri W’Njuguna before concluding as follows:

“Both parties are in agreement that the matter was placed before a three judge bench due to its complexity .I have also had a chance to go through the proceedings and do find that the respondents (read present Applicants) did indeed acknowledge in their affidavit on the complexity of the matter ...this is a case that took a long time before it was finally determined in 2016 . From the proceedings, it is clear that the applicants sought to stay the execution of the arbitral award and not appeal it. The amount to be used as the subject matter will be 150,000,000/- as that was the award by the arbitration, and they were staying the execution of the same. I agree with the position of the applicant (read 2nd Respondent herein) that this matter was time consuming, and counsel deployed a considerate amount of industry while representing their clients and will use my discretion to double the instruction fees. The instruction fee item 1& 2 is therefore calculated as herein under...” (*sic*).
34. From the foregoing, it is clear that the taxing officer was alive to the applicable principles and relevant factors to be considered as well as her own discretion under Schedule VI 1 of the *ARO*. There is no doubt that the dispute had been certified complex and a three-judge bench appointed by the then Chief Justice to hear it. The Originating Motion sought 53 orders and was in court for over 15 years during which many applications were made, before the final determination. The Originating Motion raised complex constitutional and jurisdictional issues in relation to the orders and proceedings challenged therein. Having perused the proceedings herein, this Court agrees with the taxing master’s views in that regard. Moreover, it cannot be gainsaid that the interest of the parties was heightened by the sheer sums at stake; the value of the subject matter which the taxing master found to be the amounts awarded at arbitration.



35. The sticking point on this reference was whether the taxing master was entitled to base instruction fees on the said sums. In *Nanyuki Easo Services v Touring and Sports Club* (1972) E.A 500 the Court of Appeal stated that:
- “In deciding whether a claim falls under any particular head, one must look at the substance of the claim and not the way it is expressed, but if a claim, or any part of it, clearly does not fall under any particular head, it must be treated under one of the residuary heads.”
36. Although the Applicant’s pleadings in relation to the Originating Motion and judgment did not expressly set out any liquidated amounts, it is clear from a careful reading of the Originating Motion, the affidavits, and annexures of the parties that the object of the proceedings was to quash or nullify the arbitration proceedings in which the award of Shs. 150,000,000/- was made, the proceedings and judgment of the High Court in respect of the arbitral sum and consequent decree and warrants of attachment issued against them.
37. In *Joreth Limited v Kigano and Associates* (*supra*) the Court of Appeal stated that:
- “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.”
38. The court is not persuaded by the Applicants’ argument that the value of the subject matter herein could not be ascertained; it could. And in my view, the taxing officer was justified to use the sum of the arbitral award, judgment thereon, decree and warrants arising therefrom as the value of the subject matter. And although her decision did not explain her final step, while persuaded that Schedule VI 1(j) of the *ARO* applied to the matter, she appears to have proceeded to calculate instruction fees under Schedule VI 1(b) *ARO* rather than merely increasing the fee in Schedule VI 1(j) (*ARO*) in an arbitrary manner. In that regard, the taxing officer ought to have set out her reasoning in more detail and with clarity, but as stated in *Premchand Raichand’s* case, the taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience.
39. The Applicants themselves did not object in principle to the increase of instruction fees given the undisputed factors attaching to the matter but to the fact that the taxing master based her assessment on the amount she determined to be the value of the subject matter. The Applicants did not demonstrate any other error of principle beyond the contention that the use of the value of the subject matter by the taxing officer was wrong, or otherwise demonstrate the claim that the award was manifestly excessive.
40. The Court’s considered view is that the taxing master did not err in so determining. There being no sound justification made for setting aside the assessment of the instruction fees, the court declines to disturb that award and consequently the award on getting up fees. As earlier indicated, the canvassing of the reference was confined to these two items. The court finds that the reference is without merit and is accordingly dismissed with costs.
41. In view of the above findings, the 2nd Respondent’s motion dated 29th March 2021 is hereby allowed with costs.



**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF
AUGUST 2022**

C.MEOLI

JUDGE

In the presence of:

Mr. Munyori for the Applicants

Mr.Muturi for the 2nd Respondent

C/A: Carol

