



**Republic v Capital Markets Authority; National Bank of Kenya Limited
(Interested Party); Alubala (Ex parte) (Judicial Review Application 251 of 2018)
[2021] KEHC 7993 (KLR) (Judicial Review) (31 March 2021) (Ruling)**

*Republic v Capital Markets Authority Ex Parte Solomon Muyeka Alubala;
National Bank of Kenya Limited (Interested Party) [2021] eKLR*

Neutral citation: [2021] KEHC 7993 (KLR)

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

**JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION 251 OF 2018**

P NYAMWEYA, J

MARCH 31, 2021

BETWEEN

REPUBLIC APPLICANT

AND

CAPITAL MARKETS AUTHORITY RESPONDENT

AND

NATIONAL BANK OF KENYA LIMITED INTERESTED PARTY

AND

SOLOMON MUYEKA ALUBALA EX PARTE

RULING

The Application

1. This ruling is on an application by way of a Chamber Summons dated 6th July 2020 filed by the Capital Markets Authority, the Respondent herein, seeking the following outstanding orders:
 - a. A stay of execution of the Ruling Order of the Deputy Registrar given on 4th June 2020, reasons for which were issued on 22nd June 2020, pending the hearing and determination of the instant application.



- b. The Court be pleased to set aside and/or review the determination made by the Deputy Registrar of the High Court given on 4th June 2020, reasons for which were issued on 22nd June 2020.
 - c. The Court proceeds to tax items 1 & 2 (being the instruction and getting up-fees respectively) of the ex-parte Applicant's Bill of Costs dated 4th November 2019 accordingly.
 - d. In the alternative to (c) above the Bill be referred for taxation before a different taxing master/ Deputy Registrar with appropriate directions to the Registrar to reduce items 1 and tax off item 2 being the instruction and getting up-fees respectively.
 - e. The court be pleased to grant any other orders it deems fit.
2. The application is supported by an affidavit sworn on 6th July 2020 by Githendu Eric Timothy, the Respondent's Legal Officer. The Respondent avers that on 4th June 2020, the Deputy Registrar delivered a ruling to the effect that the ex-parte Applicant's Bill of Costs dated 4th November 2019 was taxed at Kshs 1,950,420.00, which amount included KSh. 1,350,000.00 and KSh. 442,000.00 as the instruction and getting up-fees respectively, and the written reasons were availed on 22nd June 2020. However, that the Deputy Registrar erred by exercising her discretion wrongly and awarding an excessive amount as instruction fees from which the getting up fees was derived namely KSh. 1,350,000.00 and KSh. 442,000.00 respectively, contrary to the guiding principles enshrined in Schedule 6(j)(ii) of the [Advocates Remuneration \(Amendment\) Order 2014](#).
 3. The Respondent in addition averred that the Deputy Registrar erred as follows:
 - a. By enhancing the basic instruction fees provided under the scale considerably by 13% (thirteen and a half) times more than the prescribed minimum i.e. from the minimum KSh. 100,000.00 to KSh. 1,350,000.00; and
 - b. By failing to provide sufficient justification for the substantial increase in the instruction and getting up fees .
 - c. By failing to appreciate and hold that fair and reasonable instructions fees under item one (1) was KSh. 1000,000 as proposed by the Respondent.
 - d. By failing to appreciate that the legal fees should not be unreasonable or excessive as to deter persons from accessing justice .
 - e. By awarding KSh. 442,000.00 as getting up fees despite the fact that judicial review proceedings do not attract getting up fees.
 4. Solomon Muyeka Alubala, the ex parte Applicant herein, filed Grounds of Opposition dated 16th July 2020 in response to the reference. He contended that this Court lacks the requisite jurisdiction hear and determine the reference application, which is incompetently filed and fatally defective for want of compliance with the mandatory requirements of rule 11(1) &(2) of the [Advocates \(Remuneration\) \(Amendment\) Order, 2014](#). Further, that the Respondent has neither filed nor raised any objection to the taxing officer's ruling dated and delivered on 4th June 2020 and the law does not envisage a waiver of filing of the notice of objection to the taxation. Lastly, that the orders sought in the reference are incapable of being issued by dint of rule 10 of the [Advocates Remuneration Order](#).
 5. It was also stated that it is trite law that this court would not to interfere with the taxing officer's decision on the question of quantum of costs except where the taxing officer has committed an error in principle which is not the case herein. In addition, that in taxing the ex parte Applicant's bill of costs,



the taxing officer exercised her discretion judiciously and applied the correct Schedule and Paragraph of the *Advocates Remuneration Order, 2014*, took into account the minimum fees allowable for an application for Constitutional and Prerogative orders of Kshs100,000/= under schedule 6A(1)(j) of the *Advocates (Remuneration) (Amendment) Order 2014* as the starting point, and other relevant factors.

6. The relevant factors listed by the ex parte Applicant were the adverse implication that the financial penalty of Kshs. 104,800,000/= and disqualification would have on the ex parte Applicant; the volume of the documents to be prepared, perused, analysed and simplified; the great amount of the advocated work involved in ensuring that the ex parte Applicant was ably represented; the number of issues raised in the proceedings which had to be addressed comprehensively to urge the ex parte Applicant's case; and the need to ensure that the counsel for the ex parte Applicant is fairly compensated for work done and time spent on the matter.
7. Therefore, that there are no sufficient grounds to warrant disturbance of the taxing master's decision herein.

The Determination

8. The instant application was canvassed by written submissions. Muma & Kanjama Advocates for the Respondent filed submissions dated 28th July 2020, while the ex parte Applicant's submissions dated 6th August 2020 were filed by Prof. Albert Mumba & Company Advocates. Arising from the pleadings and submissions filed, the main issues for determination are whether the instant reference is incompetent for want of compliance with rule 11(1) of the Advocates Remuneration Order, secondly, whether there was an error of law made in the award of Kshs 1,350,000/= as instruction fees and Kshs 450,000/= as getting up fees .

On the Competence of the Reference.

9. On the first issue, the ex parte Applicant submitted the reference herein was filed in complete breach of the mandatory provisions of rule 11(1) & (4) of the *Advocates Remuneration Order*, for reasons that the respondent did not file a notice of objection as required by rule 11(1) within fourteen days from 4th June 2020 when the taxing master delivered her decision. Further, that it was not until 12th June, 2020, 8 days later, that the respondent, through an email, first sought to be supplied with a copy of the decision of the taxing master, and even then, that the respondent did not notify the taxing master that it was objecting to taxation of Items 1 & 2 of the taxation. According to the ex parte Applicant, the email simply read as follows:-

“Please find an advance copy of our letter requesting for a typed copy of the Ruling.”

10. In addition, that the respondent has not annexed as one of its exhibits, the letter referred to in the forwarding email above. Nevertheless, that the email itself gives the indication that in the said letter, the Respondent was merely requesting for typed copy of the ruling, and the said letter was thus not a notice of objection. The ex parte applicant submitted that a similar email requesting for a copy of the ruling was again sent by the respondent to the registry on 16th June 2020.
11. Reliance was placed on the case of *Muriu Mungai & Co. Advocates vs New Kenya Co-operative Creameries Ltd* [2008] eKLR, for the submission that that the way to begin a Reference is by serving the taxing master with a notice of objection, and the decision in *Karume Investments Limited vs Kenya Shell Limited & Another* (2015) eKLR, for the holding that the Respondent did not seek leave of court under rule 11(4) to enlarge the time for serving notice under rule 11(1) of the *Advocates*



Remuneration Order. While citing the decision in Nasibwa Wakenya Moses vs University of Nairobi & Another, [2019] eKLR, the ex parte Applicant submitted that the language of rule 11(1) of the Advocates Remuneration Order is plain, unambiguous, mandatory and conclusive.

12. The respondent did not address this issue in its pleadings or submissions.
13. The procedure for challenging a taxing master's decision is provided under the rule 11 of the Advocates Remuneration Order as follows:
 - “(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 - (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - (5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”
14. From the foregoing, an objector to a decision of a taxing officer is required to give notice within 14 days thereof of the items objected to, and the reference is to be filed within 14 days of receipt of the reasons for the decision from the taxing master. In the present case, it is not in dispute that the Respondent sent a letter to the Deputy Registrar on 12th and 16th June 2020 requesting for a copy of the ruling on taxation delivered on 4th June 2020. The ex parte Applicant's contestation of the Notice of Objections does not revolve around the date of filing of the said letter, but the format of the said Notice of Objection which it states was not supposed to be in the form of a letter requesting for the ruling, but one specifying the items objected to.
15. I am however not persuaded that the letters by the Respondent requesting for the ruling without specifying the items objected to is a fatal error with respect to the procedure provided in rule 11(1) of the Advocates Remuneration Order, given that the requirement to give notice provided therein is not couched in mandatory terms. In this respect it is also notable that the mandatory nature of the timelines are with respect to the filing of the reference, upon receipt of the reasons by the taxing officer.
16. I also note that the Respondent did annex a copy of the ruling delivered by the Deputy Registrar on 4th June 2020 to its supporting affidavit to the instant application, and of correspondence showing that the said ruling was availed to it on 22nd June 2020. The omission to file a notice of objection was



therefore not fatal, as in any case the ruling containing the reasons were availed to the Respondent, and the reference was filed within the 14 days of the date of receipt of the said ruling, and contained the substance of the objections made. Lastly, the provisions of article 159(2) of the Constitution, require that substantive justice should be delivered expeditiously and should not be sacrificed at the alter of procedural technicalities.

17. I accordingly find that the Respondent's application dated 6th July 2020 and filed in Court on the same date is properly on record for the foregoing reasons. Having so found, I will proceed to consider the outstanding issue of whether there was an error made by the Deputy Registrar in the taxation of the disputed items of the subject Bill of Costs.

On Whether there was an Error in the Taxation

18. There are two disputed items of taxation in the ex parte Applicant's Party and Party Bill of Costs dated 4th November 2019. The first is the taxation of item 1 on instruction fees, and the second is the taxation of item 2 on getting up fees.
19. On item 1, the Respondent submitted that Schedule 6(G)(ii) of the Advocates Remuneration (Amendment) Order 2014 provides for instruction fees to present or oppose an application for prerogative orders such as certiorari and prohibition, and It is evident that the minimum amount to be awarded to an applicant is KSh. 100,000.00. Further, that as per jurisprudence, the Deputy Registrar has discretion to increase the said instruction fees subject to demonstrating several guidelines as applied in Republic vs Minister for Agriculture, Ex parte Samuel Muchiri W' Njuguna (2006) eKLR, Ramesh Naran Patel vs. Attorney General & another (2012) e KLR and Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd [2014] eKLR. In addition it has also been held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.
20. The Respondent's case is that the Deputy Registrar stated unequivocally and rightfully in her ruling that there were no novel issues. However, that in the same breath, she enhanced the basic instruction fees provided under the scale considerably from the minimum Kshs 100,000.00 to Kshs 1,350,000.00, 13% times more than the prescribed minimum. Further, the Respondent differed with the justifications given by the Deputy Registrar for the increase, on the grounds that the proceedings herein were neither complex nor novel, and therefore the time spent, research done and skill deployed by the ex parte Applicant's Advocate was that of an ordinary legal professional. Moreover, that the value of the subject matter namely the penalty imposed on the ex parte Applicant, which the Deputy Registrar used to arrive at the conclusion that the matter was important to the parties, is not sufficient justification to warrant the exorbitant increase of the instruction fees. Lastly, that even if the matter was indeed important to the parties, the Deputy Registrar did find that there were no novel issues raised in the proceedings.
21. The ex parte Applicant on his part submitted that firstly, while the taxing master found there were no novel issues, she also found the issues had to be comprehensively addressed because of the stakes involved for the parties. Secondly, that courts will not interfere with quantum unless the taxing master commits an error of principle as held by the Court of Appeal in Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund (2005)1 KLR 528 . In addition, that the Respondent had failed to demonstrate that the taxing master proceeded on an error of principle, or that the fee awarded is manifestly excessive as to justify an inference that it was based on an error of principle as held in Republic vs Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W'Njuguna (2006) eKLR; and Republic vs Commissioner of Domestic Taxes ex-parte Ukwala Supermarket Ltd & 2 others (2018) eKLR.



22. The ex parte Applicant's case is that on the contrary, in reaching her decision the taxing master took into account all the relevant factors in her ruling, which the ex parte Applicant reiterated in his submissions. Further, that the taxing master also considered key cases on the question of assessment of instruction fees, such as *Joreth Ltd vs Kigano & Another* (2007) E.A.; *Premchand Raichand Ltd vs Quarry Services of East Africa Ltd (No.3)* 1972 162; *Republic vs Minister for Agriculture Exparte Samuel Muchiri W'Njuguna & 6 Others* (2006) eKLR; *Republic vs Kenya medical Supplies Authority; Medox Pharmaceuticals Ltd (Interested Party); Exparte Nairobi Enterprises Ltd* [2019] eKLR; *Nyangito & Co. Advocates vs Doinyo Lessos Creameries Ltd and National oil Corporation Ltd vs Real Energy Ltd & Another* (2016) eKLR.
23. Therefore, that the award of Kshs 1,350,000/= as instruction fees and Kshs 450,000/= as getting up fees was not excessive, and the taxing master exercised her discretion judiciously and explained the various factors that led to her conclusions on these awards.
24. On the item on getting up fees, the Respondent's arguments were that Paragraph 2 of Schedule 6 of the *Advocates Remuneration (Amendment) Order 2014* provides for getting up fees, and that this fee contemplates involvement by an Advocate in the preparation of witnesses, witness statements and determination of the matter by viva voce evidence. In the present case, being a miscellaneous judicial review application, all the evidence was contained in affidavits and as such getting up fees should not be allowed.
25. The ex parte Applicant in rejoinder submitted that the legal position which has been upheld by the courts is that getting up fees is applicable in judicial review proceedings like any other proceedings, and reliance was placed on the decisions in *Republic vs Senate Students Disciplinary Committee Kenyatta University & Another*, (2008) eKLR, and *Ngatia & Associates Advocates vs Interactive Gaming & Lotteries Limited* (2017) eKLR and that the Taxing Officer did not err in taxing the getting up fees.
26. I have considered the arguments made by the parties on the taxation of the disputed items of the subject Bill of Costs. It is notable that the parties do not dispute that the taxation of the ex parte Applicant's Party and Party Bill of Costs dated 4th November 2019 is regulated by Schedule 6A of the *Advocates (Remuneration) Order 2014*. Paragraph 1(j) of the said Schedule provides as follows as regards instruction fees in 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) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
- (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) to present or oppose application for setting aside arbitral award- 50,000.”
27. In addition, the applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer's decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify



interference. These legal parameters were laid down in *First American Bank of Kenya vs Shah and Others* [2002] 1 E.A. 64 at 69 by Ringera J. (as he then was) who delivered himself thus;

“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”.

28. These principles reiterate the position of the Court of Appeal in *Joreth Ltd vs Kigano & Associates* (2002) 1 EA 92, wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

29. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in *Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’Njuguna & 6 others*, (2006) e KLR :

- “1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;
3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
4. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;
5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
7. where responsibility borne by advocates is taken into account, its nature is to be specified;
8. where novelty is taken into account, its nature is to be clarified;
9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”

30. These guidelines were also applied by Odunga J. in *Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd*, [2014] eKLR, and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

31. I have perused the ruling by the Taxing Officer dated 4th June 2020, and note that she correctly applied Schedule 6A1(j) of the Advocates Remuneration Order, and noted that the basic instruction fee was



Kshs 100,000/=. While taxing on the item on instruction fees, the Taxing Officer after considering the applicable law, judicial authorities and principles guiding the exercise of her discretion, found as follows:

- “ 13. The disqualification and penalty imposed demonstrates that the judicial review proceedings were of immense importance to parties. The disqualification was a hefty issue. These would have had huge adverse implication on the life of the applicant in many ways hence the stakes in the proceedings. The documents to be prepared, perused, analysed and simplified are voluminous and a great amount of the advocated work was involved in ensuring that the client was ably represented. A number of issues were raised in the proceedings and had to be addressed comprehensively to urge the client’s case. There is need for adequate compensation to the counsel for work done and time spent on the matters.
 14. The foregoing considerations further demonstrate the enhance responsibility on the counsel in view of the circumstances .
 15. There were no novel issues as the issues raised revolved around ordinary judicial review proceedings questioning jurisdiction and powers of the decision making authority , the fairness of the same and merited reliefs.
 16. The foregoing considerations clearly justify the exercise of my discretion to enhance the basic instruction fees provided under scale considerably...”
32. I note that the Deputy Registrar did take into account relevant considerations in taxation of the instruction fees, and took into account factors specifically provided for in Schedule 6A to increase the instruction fees as illustrated in the foregoing. Furthermore, the Deputy Registrar gave the reasons why she exercised her discretion to tax off the item on instruction fees from Kshs 1,772,000/= to Kshs 1,350, 000/= after taxing off Kshs. 442 000/-.
33. I therefore find that the decision of the taxing master in awarding instruction fees of Kshs. 1,350,000/= was not based on any error of principle, neither were the said fees as awarded excessive to justify interference by this Court.
34. As regards the taxation of item 2 on getting up fees, paragraph 2 of Schedule 6A of the [Advocates \(Remuneration\) Order 2014](#), provides as follows:
- “In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:
- Provided that—
- (i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
 - (ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;



(iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.”

35. Paragraph 2 only requires denial of liability in a case, for getting up fees to payable. In addition, a close reading of the paragraph shows that the matter need not proceed to full hearing, and it is sufficient that it is ready for and has been confirmed for hearing. In this respect the Taxing Officer correctly noted, and it is not disputed by the parties that the present application was contested and proceeded to full hearing. It is also on record that the parties filed submissions and attended Court on various dates for hearing, which items were not contested by the Respondent.

36. The findings of the Taxing Officer in this respect were as follows:

“ 18. Getting up fees

The scale provides for getting up at 1/3 of the Instructions fees where there is a denial of liability filed and/or where the matter proceeds for hearing. There was a replying affidavit to the application and parties filed submissions. A trial needs not be only by way of viva-voce evidence and a trial is conducted pursuant to the directions of the court, including by way of affidavit evidence and submissions, which is allowed in judicial review applications.

19. The Respondent participated in the proceedings. The judicial review matter was defended, there was a denial of liability, it proceeded to hearing and was concluded by way of full judgment of the court. Getting up fees are due. Getting up fees are thus taxed at Kshs.450 000/-. Kshs. 140 667/ is taxed off from this item”

37. Under the applicable provisions of paragraph 2 of Schedule 6A of the *Advocates (Remuneration) Order 2014*, the allowable minimum of getting up fees is one-third of the instruction fees. In this case the Deputy Registrar awarded instruction fees of Kshs 1,350,000/= and one-third of the said sum is Kshs 450,000/=. The taxation of the item on getting up fees at this amount was thus not in error.

The Disposition

38. The orders sought in the Respondent’s Chamber Summons application dated 6th July 2020 are therefore not merited for the foregoing reasons, and the said application is hereby dismissed. The Respondent shall pay the ex parte Applicant the costs of the said application of Kshs 20,000/=.

39. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MARCH 2021

P. NYAMWEYA

JUDGE

Further Orders on the mode of delivery of this Ruling

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the ex parte Applicant’s and Respondent’s counsels email addresses.

P. NYAMWEYA



JUDGE

