



**Republic v Capital Markets Authority; Ahmed (Ex parte) (Judicial Review Application 269 of 2018) [2021] KEHC 13076 (KLR) (Judicial Review) (21 June 2021) (Ruling)**

*Republic v Capital Markets Authority Ex parte Sheikh Munir Ahmed [2021] eKLR*

Neutral citation: [2021] KEHC 13076 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION 269 OF 2018**

**J NGAAH, J**

**JUNE 21, 2021**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CAPITAL MARKETS AUTHORITY ..... RESPONDENT**

**AND**

**SHEIKH MUNIR AHMED ..... EX PARTE**

**RULING**

1. The application before court is a reference by Capital Markets Authority, which I will henceforth refer to as simply 'the respondent', disputing the taxing master's taxation of the applicant's party and party bill of costs dated 7 October 2019. The reference is dated 2 October 2020 and is brought under sections IA, 1B and 3A of the [Civil Procedure Act](#) cap. 21; rule 11 (1), (2)& (4) of the [Advocates Remuneration Order 2009](#), Schedule 6(j)(ii) of the [Advocates Remuneration \(Amendment\) Order 2014](#). It is supported by the affidavit of Githendu Erick Timothy, a legal officer at the respondent company. The prayers sought in the application have been framed as follows:

1. That the present Application be certified urgent and heard ex-parte in the first instance.
2. That the Honourable Court be pleased to enlarge the time for filing the instant application.



3. That the Honourable Court be pleased to issue a stay of execution of the Ruling and/or Order of the Deputy Registrar dated 11<sup>th</sup> August 2020 pending the hearing and determination of the instant application.
  4. That the Honourable Court be pleased to set aside and/or review the determination of the Deputy Registrar on 11<sup>th</sup> August 2020 being the award of KSh 2,298,650.00 to the Applicant on items I & 2 which amount included KSh. 1,500,000/= and KSh. 500,000.00 as the instruction and getting up-fees respectively.
  5. That the Honourable 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 8<sup>th</sup> October 2019 accordingly.
  6. That further and in alternative to (4) above the Bill be referred for taxation before a different taxing master with appropriate directions to the Registrar to reduce items 1 and tax off item 2 being the instruction and getting up-fees respectively.
  7. That the Honourable court be pleased to grant any other orders it deems fit, just and expedient.
  8. That the costs of this Reference be borne by the Applicant”
2. The basis of the reference is that on 12 August 2020, the deputy registrar delivered a ruling dated 11 August 2020 taxing the costs in issue at Kshs 2,298,650/=, an amount that included Kshs. 1,500,000/= on account of instruction fees and getting up fees of Kshs. 500,000/=. The learned deputy registrar gave her reasons for taxing the bill in the manner she did in her ruling.
  3. The respondent admits that it did not file the reference within the prescribed time and so has asked for enlargement of time for the reasons that the respondent's representative was not available to give instructions and swear the affidavit in support of the application before court and, even after getting the instructions, “there was a delay in linking the file so as to enable the Respondent access the judiciary e-filing portal.”
  4. To mitigate the delay, the respondent served a 3-day notice on the ex-parte applicant informing him of the intention to institute the instant application in accordance with rule 11 (4) of the Advocates Remuneration Order. But again the reference could not be filed within the three-day notice for want of instructions from the respondent hence occasioning a further delay in filing it.
  5. Turning back to the bill, the applicant has impeached it on the grounds that the instruction fees and getting up fees awarded to the applicant are inordinately high and, in any event, contrary to Schedule 6(j) (ii) of the *Advocates Remuneration (Amendment) Order, 2014*. In particular, the learned deputy registrar is alleged to have wrongly enhanced the instruction fees by fifteen times from Kshs. 100, 000/= to Kshs. 1,500,000/=.
  6. In the submissions filed on behalf of the respondent, the learned counsel for the respondent urged that only two issues called for this Honourable Court's determination; these are, firstly, whether the amounts awarded as instruction and getting up fees were excessive and, secondly, whether judicial review proceedings attract getting up fees.
  7. On the first question, counsel invoked Schedule 6 of the *Advocates Remuneration (Amendment) Order 2014* and urged that while the taxing officer is entitled to exercise discretion in the assessment of the



instruction fees, the discretion must be exercised judicially, taking into account factors such as the nature and importance of the case, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all relevant circumstances. Counsel relied on the case of *Kyalo & Associates Advocates v Jacob Juma* (2015) eKLR where the question of exercise of the taxing officer's discretion was discussed and the holding in *Joreth Limited v Kigano & Associates* 120021 eKLR was cited with approval; in this latter case, it was held that in exercising discretion, the taxing officer must consider such factors as first, the care and labour required by the advocate; second, the number and length of the papers to be perused which must also be specified; third, the nature and importance of the matter; fourth, the value (where ascertainable) of the subject matter; fifth, the interest of the parties and sixth, the novelty of the matter. The importance of these factors in exercising discretion was also considered in *Republic Vs. National Environmental Tribunal Ex Parte Silverste N. Enterprises Limited* (2010) eKLR.

8. It was urged that the taxing officer did not demonstrate how each of the factors influenced her decision and therefore she did not exercise her discretion judicially.
9. On what fair value for work done and the responsibility in the matter entailed, the learned counsel for the respondent relied on the decision in *Republic v Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Limited & 2 others* (2018) eKLR where it was held that while the taxing master was right to give the costs within his discretion, the amount allowed being ten times the sum provided for, was not reasonable and was excessive. Again, the taxing officer in that case never gave any reasons for exercising his discretion except to say that he simply exercised his discretion.
10. As far as the question of whether a judicial review application would attract getting up fees, counsel urged that according to Schedule VI paragraph 2 of the *Advocates Remuneration (Amendment) Order, 2014*, this fees is only payable where a trial is conducted by way of calling viva voce evidence and not in such a case where the matter was determined on the affidavit evidence alone. In this regard, counsel relied on *Mits Electrical Company Limited V National Industrial Credit Bank Limited* [2005] eKLR where the Court is said to have held that getting up fees contemplates a situation where counsel is involved in preparation of witnesses and witnesses' statements. It was urged that it was similarly held in *Kenya Agricultural & Livestock Research Organisation (Formerly Kenya Agricultural Research Institute versus Mama Limited* [2017] eKLR.

#### **The applicant opposed the application.**

11. In a replying affidavit sworn by Agwata Kwamboka Yvonne, an advocate of this Honourable Court appearing for the applicant, it was deposed that it is true the deputy registrar rendered her ruling on the ex parte applicant's party and party bill of costs on 11 August 2020 though the same was transmitted to parties through their respective email addresses on 12 August 2020.
12. On 31 August 2020 the respondent served upon the ex-parte applicant a notice dated 28 August 2020 for extension of time. The application was not filed or served within the notice period.
13. The reference before court was filed approximately two (2) months from the date when the ruling was delivered, way beyond the prescribed time of fourteen (14) days within which the reference ought to have been filed. According to the applicant, no sufficient reason has been given for the delay. No evidence has been given that any instructions were sought from the respondent.
14. Most of what was deposed in the rest of the affidavit constituted matters of law which are, in any event, covered in the submissions filed on the ex parte applicant's behalf.



15. Like the respondent, the applicant asked the court to determine the issue whether judicial review proceedings attract getting up fees and, secondly, whether the court should interfere with the taxation of the deputy registrar. But unlike the respondent, the applicant urged this Honourable Court to determine also whether there was any basis for enlargement of time for the respondent to file its reference. It is this last question that the applicant begun his submissions on.
16. It was urged that according to rule 11 (1) of the *Advocates Remuneration Order, 2014*, objection to decision of the taxing officer, must be made within fourteen days after the decision, specifying the items in the bill to which one objects.
17. Since that the Respondent did not object to the decision of the taxing Officer within the prescribed time, there can be no basis of filing a reference against any of the taxed items. To this end, counsel for the respondent invoked the decision *in the Matter of Nzama Kuu Cement Company Limited (In Liquidation)* (2020) eKLR where Okwany, J. held that a reference filed out of time without leave of the court was invalid, null and void. Also cited for the same position is the case of *Al Yusra Restaurant Limited v Kenya Conference of Catholic Bishops & Another* (2020) eKLR; *Muchiri wa Gathoni & Co. Advocates vs. Richard Mithamo Mugambi* (2020) eKLR and *Ahmednasir Abdikadir & Company Advocates vs National Bank of Kenya Ltd.*
18. Turning to the question whether the taxation of instruction fees should be disturbed the learned counsel for the respondent submitted that the taxing officer's taxation can only be interfered with if taxing officer has committed a serious error of principle and that was not case with the taxation of the applicant's bill of costs. To the contrary, the taxing officer exercised her discretion judiciously in enhancing the instruction fees. On this account, the decision in *Republic vs. Capital Markets Authority Ex Parte Solomon Muveka Alubala; National Bank of Kenya Limited (Interested Party)* (2021) eKLR was relied upon.
19. On whether getting up fees in judicial review proceedings was due, it was urged for the respondent that, contrary to the respondent's suggestion, it is not mandatory for a case to be heard viva voce in order to attract getting up fees.
20. According to the learned counsel for the respondent, under paragraph 2 of Schedule VI of the *Advocates Remuneration Order*, getting up fees is payable whenever a matter has been contested irrespective of the manner of the trial.
21. Counsel relied on the case of *Nguruman Limited v Kenya Civil Aviation Authority & 3 others* (2014) eKLR where Lenaola, J. held the fees was payable where a petition had been contested and determined on the basis of written submissions. It was also held so by Aburili, J in *Ngatia & Associates Advocates vs. Interactive Gaming & Lotteries Limited* (2017) eKLR.
22. After considering the submissions by the learned counsel for the respective parties, the immediate question for determination and whose answer may very well determine the fate of the respondent's reference is whether, on the respondents own admission that the reference has been filed out of time, there is a reference or any competent reference before court. A straight answer to this question would be in the negative in light of Rule 11 (1) of the *Advocates Remuneration Order, 2014*. No doubt, the respondent appreciates the import of this rule and it is obviously for this reason that it has sought for, inter alia, extension of time for filing of the present reference.
23. An ideal situation would have been for the respondent to first apply for extension of time and, assuming its application is successful, only file the reference once leave has been granted and on such terms as the court may impose on granting such leave. The mixture, in the same application, of both the prayer for extension of time and the reference against the deputy registrar's decision presents a somewhat



untidy application. It is an untidy application because until time has been extended or leave has been granted to file the reference out of time, the purported reference remains inconsequential and would not deserve any attention should the court find that no sufficient reason has been proffered for the delay in the filing of the reference.

Rule 11 (1) of the *Advocates Remuneration Order, 2014* states:

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

24. The respondent filed its reference almost two months after the decision. The reasons given for the delay appear to me to be more of empty excuses for the respondent's failure to comply with law. I say so because there is no evidence that either the respondent's advocates sought instructions from the respondent with respect to filing of a reference against the taxation of the bill of costs or the respondent itself intimated its desire to dispute the bill immediately the deputy registrar delivered her ruling or soon thereafter.
25. Secondly, the allegation that there was a systems failure, on the part of the judiciary, in particular the Judicial Review division of this honourable Court, as a result of which the respondent could not file its reference within the prescribed time or at all is not supported by any material evidence or at all; if there was such a failure, there would certainly be evidence to that effect. In the absence of the necessary evidence, I am entitled to assume that failure by the respondent to file its reference within the prescribed timelines had nothing to do with the judiciary's e-filing system's failure.
26. While the court has the discretion to extend time within which the respondent could have filed its reference, I am not persuaded that there is any material before court upon which this honourable Court can exercise its discretion in favour of the respondent.
27. But even if the bill was filed timeously, there is nothing in the Advocates Remuneration Order that suggests that the instruction fees is exaggerated or that getting up fees is not available to judicial review proceedings. In short, I would not find any basis to fault the manner in which the applicant's party and party bill of costs was taxed.
28. For the reasons I have given, I do not find any merit in the respondent's application dated 2 October 2020. It is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED ON 21<sup>ST</sup> JUNE 2021**

**NGAAH JAIRUS**

**JUDGE**

