



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 160 OF 2013

BETWEEN

ROSE WANGUI MAMBO.....1ST PETITIONER
MARTHA VINCENT.....2ND PETITIONER
CAROLINE WANGARI NGUGI.....3RD PETITIONER

VERSUS

LIMURU COUNTRY CLUB.....1ST RESPONDENT
YASSIN AWALE.....2ND RESPONDENT
ROBERT BARUA.....3RD RESPONDENT
PETER MUNGAI.....4TH RESPONDENT
ERICK KIMURI.....5TH RESPONDENT
KAGOCHI MUTERO.....6TH RESPONDENT
VICTOR GICHURU.....7TH RESPONDENT
ANTHONY WANGARI.....8TH RESPONDENT
TOM WAIHARO.....9TH RESPONDENT
THE ATTORNEY GENERAL.....10TH RESPONDENT
ALRED KARIUKI, FRANCIS OKWARA,
PETER WARUI (Sued on behalf of the Kenya Golf Union)..11TH TO 13TH RESPONDENT
DORCAS MBALANYA, ANASTACIA CHUBI, JOYCE WAFULA
(Sued on behalf of the Kenya Ladies Golf Union).....14TH TO 16TH RESPONDENT

AND

FEDERATION OF WOMEN LAWYERS (FIDA).....1ST INTERESTED PARTY

RULING**INTRODUCTION**

1. Before this Court are two applications; one by the Respondents dated 6th April 2019 and the Petitioners dated 29th March 2019. The advocates for both the Respondents and the Petitioners filed respective submissions in support of their rival positions.

2. The Respondents / Applicants submissions are in support of the Chamber Summons dated 6th April 2019; in which the Respondents seek the following orders:-

a) That the Honourable Court do review, vary, reduce and/or set aside the decision of the Deputy Registrar – High Court at Nairobi (Honourable C. Kithinji) dated 22nd March, 2019, when she taxed the Petitioner’s Advocates Party and Party bill of costs dated 8th July, 2014, and allowed a sum of Kshs.4,911,791/= and failed to take into consideration the Respondents objections and submissions to the Bill.

b) In the alternative, and/or in addition, the Honourable Court do review, vary, reduce and / or revoke the taxation and the certificate of costs issued hereto and do grant an order that the Petitioner, party and party Bill of Costs dated 8th July 2014, be struck out / or dismissed with costs, for inter alia, offending schedule 6(J) of the advocates Remuneration Order.

c) In the Further Alternative; to the above, the Honourable Court do revoke and/or set aside the decision on taxation and the subsequent certificate of costs issued thereto as concerns the Petitioners’ Advocates party and Party Bill of costs dated 8th July, 2014, and direct that the Bill of Costs be re-taxed by any other Deputy Registrar (taxing master) other than Ms. C. Kithinji.

d) The Honorable Court does make any further, orders, or directions as it may find necessary, to meet the interests of justice.

e) That the costs of this application be provided for.

3. The Respondents seek to rely on several grounds on the force of the application and supporting affidavit of Charles Njuru Kihara sworn on 6th April 2019.

4. The Respondents further seek to rely on Notice of Preliminary Objection against the Replying Affidavit of Rose Wangui Mambo sworn on 3rd February 2020. They further rely on a supplementary Affidavit sworn by the 2nd Respondent one Yasin Awale on 19th February 2020.

5. The 1st and 3rd Petitioners on their part have filed an application dated 29th March 2019 seeking the following orders:-

a) That the costs certified by the Honourable Deputy Registrar on 27th March 2019 be adopted as judgement of the Court.

b) That the Honourable Court do order the 2nd to 9th Respondents to pay the certified costs with interest at the rate of 14%, from 27th March, 2019, being the date the Applicant’s bill of costs was certified, until payment in full, pursuant to Section 27(2) of the Civil Procedure Act, Cap 21 of the Laws of Kenya.

c) That the costs of this application be borne by the 2nd to 9th Respondents.

6. The Application is premised on the grounds on the face of the application and supporting Affidavit by George Ouma sworn on 29th March 2019.

7. The Petition before the High Court dealt with particular issue of violation of the 1st and 3rd Respondents rights as females to equality and freedom from discrimination, as prescribed by **Article 27 of the Constitution of Kenya 2010**.

8. It was urged and contended in this Petition that the 2nd to 9th Respondent’s individual actions, created peculiar and germane circumstances and led to the costs being awarded against them individually, by three (3) Judge Bench in their judgment. In which the court addressed itself thus:-

“In the circumstances of this case, we take into account the fact that the 2nd – 9th respondents were acting in their official capacities as directors of the 1st respondent. They nevertheless individually and collectively as a Board flouted the 1st respondent’s very constitution by passing he unconstitutional by-laws despite legal opinions and other interventions advising otherwise.

Indeed, this matter would not have taken the turn that it did had it not been for their recalcitrance in insisting on fluting not only the Club’s constitution but also going against express provisions in the Constitutions of Kenya 2010. In the circumstances, we take the view that the 2nd to 9th respondents should shoulder the petitioners’ costs without recourse to the Club’s funds.”

BRIEF FACTUAL BACKGROUND

9. The Petitioners filed Bill of Costs dated 8th July 2014 in which under Item No.1 on instructions were seeking costs of Kshs.6,750,000/=.
10. The Deputy Registrar (C. Kithinji) delivered her ruling on the Petitioner's party and party Bill of Costs dated 8th July 2014; on 22nd March 2019, awarding the Petitioners' counsel the sum of Ksh.4,800,000/=. The Respondents being aggrieved by such an award of costs instructed the firm of Messers. C. N. Kihara & Company Advocates to file the instant reference through Chamber Summons dated 6th April 2019 seeking orders stated thereto.

ANALYSIS AND DETERMINATION

11. I have considered the Respondent's application dated 6th April 2019 and the 1st and 3rd Petitioners Replying Affidavits sworn on 30th February 2020 and further affidavit sworn on 10th June 2020. I have also considered the Petitioners application dated 29th March 2019, and note the Respondents did not file a response, parties rival submission and from the same the following issues arise for consideration:-

a) Whether the claim by the Respondents / Applicants that the Bill of Costs dated 8th July 2019 as taxed was excessive, unreasonable and lacks a legal basis?

b) Whether the Notice of Preliminary Objection against the Replying affidavit of Rose Wangui Mambo dated 3rd February 2020 has merits?

A. WHETHER THE CLAIM BY THE RESPONDENTS / APPLICANTS THAT THE BILL OF COSTS DATED 8TH JULY 2019 AS TAXED WAS EXCESSIVE, UNREASONABLE AND LACKS A LEGAL BASIS?

12. The provision governing taxation of costs in constitutional matters is **Schedule 6(i) (j) of the Advocates Remuneration Order 2019**, which provides that the basic instruction fees allowed is Kshs.100,000/=. The Provision provides:-

“6(i)(j) 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 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 be reasonable but not less than 100,000/=.”

13. The Respondents / Applicants avers that the above mentioned provision therefore informs that there is an obligation on the Taxing Master to first assess that the basic sum allowed for Item 1; is first and foremost at Kshs.100,000/= and therefore the Respondents contend an award of Kshs.4,800,000/= amounted to an enhancement by 48 times so high as to amount to a negation of the principles of taxation enunciated in a number of authorities where access to court in matters concerning fundamental rights is encouraged; as to do otherwise may occasion a miscarriage of justice, as it is oppressive and a penalty that negates any party's constitutional right to access justice in court by strict proof of his/her allegation including an allegation against a Respondent.

14. It is further stated by the Respondents they were, not acting at individual level, but were sued as directors of the 1st Respondent and without any particularized wrong being of one of them. However the Court made a decision on costs against them. The Respondents urge as such that comparability should be applied in the assessment of advocates instructions fees and that the taxation should avoid any proposal of unjust enrichment for any particular party or parties.

15. Its Respondents contention that in assessing costs of Kshs.4,917,791 and of the basic instruction fees of Ksh.4,800,000/= the Court offended the laid down principles, that should have guided a Taxing Master, while assessing costs in such a matter which include the following:-

i. This was a public law and to be specific a constitutional application that was heard and determined in a few days the time factor cannot be relied on;

ii. It concerned pleadings and affidavit evidence and did not go into full hearing, as no viva voce evidence was taken; this tackles the principles on responsibility, research and volume of documents.

iii. The success of the 1st and 3rd Petitioners was limited to two (2) relies, one that concerned the quashing of a private sporting clubs committee's by-laws and hence of lesser weight and importance unlike a constitutional application concerning the quashing of a statute of parliament or ministerial regulations, and so not of general application.

iv. The issue under adjudication concerned a novel issue of these being distinct male and female gold committees or not.

v. *The Respondents had already amicably settled the part of the Petition filed by the 2nd Petitioner.*

vi. *The Petitioners had largely suffered costs attributed to the numerous Respondents that they joined as parties, whereby their claims against them had failed and no order for costs had been made against them.*

vii. *Party and Party Costs are supposed to be for indemnity purposes.*

16. It is submitted on behalf of the Respondents / applicants that the Bill of Costs as taxed confers unjust enrichment to the 1st and 3rd remaining Petitioners' who refused a settlement on the terms similar to that of the 2nd Petitioner, and fails to uphold fairness as between the Petitioners and the Respondents; as the Petitioners; themselves were not condemned to pay such costs to the Respondents against whom they last to.

17. To buttress their point the Respondents/Applicants rely on the case of *Canon Insurance Co. Ltd vs. Hon. Attorney General & Anthony Thuo Kana Constitution Petition No. 433 of 2013 (Nairobi)*, where the Hon. S. Mwayuli (DR) taxed the Respondents party and Party Bill of Costs at Kshs.508,952 all inclusive.

“The basic instruction fees was taxed at Kshs.100,000/= (taxing off Kshs.417,307.26/=) and item 76 for getting up fees at Khss.30,000/= (taxing off Kshs.142,436/=). It was argued that the instruction fees wrongly taxed under Schedule VA (i) (j) of the Advocates Remuneration Order, 2009, instead of Schedule VIA (1) (b) of the Order as read with VIA (1)(a), to determine the instruction fees. It was further argued that no prerogative Orders were mentioned in the Petition and only anchored on specific Constitutional provisions, as Taxing Officers equated them to Order 53 of Civil Procedures Rules. The Petition consisted of reliefs for declarations and it had no monetary value.”

18. The Respondents further seek reliance in the case of *Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 2 Others [2015] eKLR* where the Court taxed costs as follows:-

“The Honourable Taxing Master assessment of Kshs.200,000/= as instruction fees in the Constitutional Petition was upheld together with the raising of this figure by one half in accordance with the scale for Advocate-client fees, to bring the total instruction fees to Kshs.300,000/=. The Court taxed the total bill at Khss.431,256/=. ”

The taxing masters finding that a claim for instructions fees of Kshs.1,000,000/= was high and therefore taxed to a sum of Khss.50,000/= was upheld, with the Court (Mumbi Ngugi, J) finding that this was a purely public law issue whose instruction fees fall for determination on the basis of the principles enunciated by Ojwang J (as then was) in Republic vs. Minister for Agriculture & 2 Others Ex - part– Samuel Muchiri W. Njuguna & 6 Others;”

19. The Respondents further cited several other cases which included the following decisions:-

“In Constitutional petition No. 106 of 2013 – Patrick Muguro Mwangi & Another versus Zakary Eliud Gichohi & 2 others; the amount taxed as instruction fees was Kshs.2,000,000/= and the same was reduced to Kshs.500,000/=. ”

20. In *Republic versus Commissioner of Domestic Taxes Ex-parte Ukwala Supermarket Ltd & 2 Others [2018] eKLR*; the taxed instructions fees at Kshs.5,000,000/= was set aside and substituted with the sum of Kshs.1,000,000/=, with the Court finding it excessive as it had increased the basic figure provided by 5 times.

21. In *Republic versus Sugar Arbitration Tribunal & 3 Others Ex-parte Chemelil Sugar Company Limited & Another [2017] eKLR*, the taxed instruction fee of Khss.1,478,449.52/= and Kshs.1,520,899.50 for both Ex-parte Applicants, Kibos Sugar & Chemilil Sugar was found excessive, being about 15 times the basic instruction fee, and was subsequently substituted with a sum of kshs.350,000/= for each ex-part Applicant.

22. The Petitioners are opposed to the Respondents/ Applicants application dated 6th April 2019; mainly relying on Replying sworn on 30th February 2020 and further affidavit of 10th June 2020. They also rely on numerous cited authorities.

23. The Petitioners / Respondents place reliance on the case of *First American Bank of Kenya vs. Shah & Others (2002) 1 E.A 64* where Hon. Justice A. Ringera, (as he then was) stated thus at page 69.

“...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 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.”

24. The Court dealing with a reference from the Deputy Registrar’s taxation decision is not limited at looking at the amount chargeable as

instruction fees only but the Court is obligated to consider the relevant factors which includes:-

- a) *Whether the decision by the Taxing Master was based on an error of principle,*
- b) *Whether or not, based on an error in principle, the fee awarded was so manifestly excessive as to justify an inference.*
- c) *Whether or not, in arriving at the award, the Taxing master has taken into account irrelevant factors or failed to consider relevant factors, inter alia.*
 - i) *Nature and importance of the cause or matter*
 - ii) *The amount or value of the subject matter involved,*
 - iii) *The interest of the parties*
 - iv) *The general conduct of the proceedings and any direction by the trial Judge.*

25. In dealing with a reference from taxation by the Deputy Registrar the court will not interfere with the exercise of the Taxing Master's discretion unless it appears that the Taxing Master has not exercised his/her discretion judicially but has exercised it improperly.

26. I have perused the ruling and reasons for Taxation dated 22nd March 2019, under paragraph 2, of the ruling and note that it is clear that the Taxing Master took into account the arguments of the Respondents / Applicants, and as such it is not correct to contend that the Taxing Master did not consider the Respondents / Applicants submission. It is recorded partly in the Ruling as follows:-

“The Respondents feel that the same is exaggerated while the Petitioner/applicants feel that the same is reasonable. I have carefully considered the rival arguments and proceed to tax the bill as follows:”

27. It should be noted that under ***Schedule 6(a)(i) (j) of the Advocates Remuneration Order***, tasks the Taxing Master to determine whether the matter for taxation satisfies the criteria provided, that is,: 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; and thereafter award ***such sum as may be reasonable*** but not less than 100,000/=.

28. From the above provision it is clear that the only prohibition provided to the Taxing master, is that the amount awarded shall not be less the Kshs.100,000/=; when such amount is not in reality the starting point in exercise of the discretion of the Taxing Master, but the end point.

29. The Petitioners in support of the above proposition rely on the case of ***Republic v. Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others [2006] eKLR*** where it was held that;

“fees provided for under the Remuneration Order are the minimum and that the Taxing Officer has a discretion to add to [the basic scale fees], taking into account the complexity of the issues raised by [the] pleadings, the responsibility weighing [on] the shoulders of counsel, the importance of the matter to the parties (the value of the subject-matter would come in here ...), the time and skill expended in the brief, and in a case of this nature, public policy and the novelty of the issues raised.”

30. I am alive to the fact that the reasonableness is a function of merits, circumstances, nature and importance of a matter, the complexity of the matter and the difficulty on novelty of the question raised, the amount or value of the subject matter, and the fact that each case has to be decided on its merits and circumstances.

31. The Taxing Master in her ruling in taxing the instruction fees at Kshs.4,800,000/= raised and considered the parameters set out under ***Schedule 6(a)(i)(j) of the Advocates Remuneration Order*** and noted as follows:-

“As to the issue for consideration as provided under the schedule cited herein and restated in the judicial precedent cited; this matter was of great importance to the parties. The court needed to consider the issue of jurisdiction to look into the affairs of a private entity in a matter of this nature. The issue of permissive discrimination came up for consideration. This was in my view a novel issue that cannot be taken to be simple. The Court considered the horizontal application of the enforcement of bill of rights vis a vis the usual situation of vertical application, that is, against the government. At some point submissions were taken, but rejected, that this was a purely commercial matter. All these are weighty issues that rendered the matter complex and enhanced the level of difficulty. In this regard, a three-judge bench was appointed to consider and resolve the issue raised. The judgment in this matter is precedent setting one on the Kenyan place. The pleadings and documents are voluminous. A considerable amount of work was input into dealing with the matter. In the upshot, all factors duly considered, I find the sum of Kshs.4,800,000/= is reasonable under this head. The sum of Kshs.1,950,000/= is thus taxed off.” (Emphasis mine).

32. I find that there is no doubt that in taxing the instruction fees at Kshs.4,800,000/= the Taxing master considered the parameters set out under the relevant ***Schedule 6(a)(i)(j) of the Advocates Remuneration Order***.

33. I find that it is important to consider the nature and importance of the Petition, the complexity of the matter and difficulty or novelty of the question raised in this Petition, which were all relevant factors that the Taxing Master took into consideration; and the reasonableness of

an award of taxation which must be based on the background of the complex elements. In the words of Honourable J. B. Ojwang, there are no mathematical formulae to be used by the Taxing master to arrive at the precise figure.

34. In this petition it is not easy to arrive at what level of responsibility did the canvassing of the Petition place on counsel handling the same; bearing in mind that the controversy leading to the present petition resulted from a resolution of the Board of Directors passed in a General Meeting of the Club held on Saturday 22nd December 2012. The herculean responsibility on Counsel was to bring forth the grievances of the Petitioners, and resolve the unconstitutional nature of the resolution, and attempt to reason with Nine members of the Board, who have been described by this Honourable Court as recalcitrant, Nine Members of the Board who ignored summons from various Constitutional and Statutory bodies in a bid to resolve the controversy before it escalated to Court. The nine members of the Board who despite attempts of mediation by Court appointed mediators remained recalcitrant, adamant and defiant, refusing to wake up from the slumber of gender based discrimination, and heed legal advice from their own very senior counsel, whom they promptly relieved of his duties for rendering “*unfavourable*” opinion, and thereafter appointing counsel that was agreeable to justifying the preposterous notion that “*A private member club is permitted to discriminate on the basis of race and sex. There is permissible discrimination on entry to the club and also amongst members.*”

35. The Court record reveal that inspite of all the above, the counsel for the Petitioners had to contend with application upon counter application by the Respondents, and ultimately the hearing of the petition before a 3 judge bench which was conducted for a whole day.

36. The Taxing Master considered that the Petition raised a novel issue that she described not as a simple Petition. The question therefore is what was novel element in the proceedings?

37. The Petitioner contend that the novel element brought out during the proceedings was a question of jurisdiction, that is whether the court has jurisdiction to conduct an inquiry into affairs of private members’ club; which was argued passionately against by the Respondents.

38. The matter was further novel in that the Court had to interpret and distinguish discrimination and permissible discrimination, instances of permissible discrimination, and whether Petition No.160 of 2012, fell in the category of permissible discrimination. This is well captured in the taxing master’s decision.

39. I find at any event such novelty is not in dispute, as the Respondents admit that at paragraph 3.4 (iv) at page 4 of the written submissions.

40. On the issue of how much time; how much research; how much skill was necessary for the presentation of the Petition; what volumes of documents did counsel classify, analyze; rationalize and simplify for possible adoption in the Judgment, the doctrine of *res ipsa loquito* applies. To be satisfied with this arguments, the court had to inspect the volumes Court received; attendance to court; the authorities, pleadings and submission by the Petitioners Counsel and it is evident that great amount of time, research and skill was employed in the prosecution of the Petition, and as against the submission of the Respondents’. I find that this is an appropriate situation in which the Court has no restation in agreeing that the doctrine of *res Ipsa Loquito* applies.

41. On the question of whether there was real urgency of the Petition and whether the nature of the Petition was one of public policy; I find that there is no greater urgency than in a matter where individuals have taken upon themselves, particularly in right of the current constitutional dispensation, to intentionally perpetuate gender based discrimination and adamantly refuse to accept proper counsel, as was the case herein.

42. Turning on issue of public policy, public interest and policy it was the Respondents’ argument in seeking the appointment of a 3 Judge bench. The appointment of 3 Judge Bench by the then Chief Justice Willy Mutunga; is a conclusive proof that this case raised a matter of great public interest and turned on public policy. The Petition determined the jurisdiction of the High Court in respect of private members clubs; their interaction with their members and whether they are subject to the constitution of the Republic of Kenya on one hand and the hideous notice advanced by the Respondents, that private members clubs and their management upheld or disregard the constitution at their sole discretion.

43. In addition it is contended that the conduct of the main proceedings; necessitated deployment of companionable amount of industry and was inordinately time consuming and in, conducting the numerous meetings held with the following;

a) Kenya Ladies Golf Union,

b) Kenya Gold Union,

c) The National Gender and Equality Commission,

d) The Commissioner of Sports,

e) Mediation with Mr. Mwaniki Gachoka and Dorcas Mbalanya.

44. The Honourable Court in its judgment on costs states as follows:-

“Though the 2nd – 9th Respondents were acting in their official capacities as directors of the 1st Respondent. They nevertheless individually and collectively as a Board flouted the 1st Respondent’s very constitution by passing the unconstitutional by-law despite legal opinions and other interventions advising otherwise. Indeed, this matter would not have taken the turn that it did

had it not been for their recalcitrance in insisting on flouting not only the Club's constitution but also going against express provisions in the Constitution of Kenya 2010. In the circumstances, we take the view that the 2nd to 9th Respondents should shoulder the Petitioners' costs without recourse to the Club's funds."

45. I find that in light of the novelty, difficulty, voluminous nature of the pleadings and documents; the considerable amount of work put in and the precedent setting nature of the petition, the Respondents / Applicants have not demonstrated to this court's satisfaction that the sum of Kshs.4,800,000/= is excessive or unreasonable in the circumstances or was arrived at erroneously or contrary to the relevant provision of the Advocates Remuneration Order. The Taxing Master in her ruling clearly provided the reasons for her award entitled "***Ruling and Reasons for Taxation***".

46. I have considered several authorities relied upon by the Respondents / Applicants urging there exists cases of comparable merits and circumstances pursuant to which they urge the sum awarded was excessive. The Petitioners urge the Respondents / Applicants did not present the said authorities to the Court and on analysis of the aforesaid authorities they can be distinguished on the following:-

a) Cannon Assurance Limited vs. Attorney General & another (2010) eKLR

In this suit the issues were not novel, nor complex and did not require executorial industry.

b) Butt & Another v. Safuna T/a Safuna & Co. Advocates Civil Appeal No. 45 of 2005 (2009) KLR 477.

The instruction fees was 17 times the basic instruction fees and that it is trite law that each case has to be decided on its merits and circumstances.

c) Kenyariri & Associates v. Salama Beach Hotel Limited & 2 Others [2015] eKLR.

The Respondents state that the instant petition was one of the purely public law whose instructions fees fall for determination on the basis of principles enunciated in Republic v. Minister of Agriculture ex parte Samuel Muchiri & 6 others, in an attempt to support their claim for a reduction in instruction fees awarded.

d) Salama Beach Hotel Limited & 3 others Vs. Christopher Orina Kenyariri t/a Kenyariri and Associates Advocates [2019] eKLR, Court made the following observation;

The appeal before us is a classic example of how litigants can make a mountain out of a molehill. The genesis of the dispute between the parties revolved around the determination of the legal fees due to the respondent on account of services rendered to the 1st and 2nd appellants. The rather straightforward issue was convoluted by the parties who kept on filing a plethora of applications upon applications.

e) On distinguishable in so far as the Court of Appeal found as follows:-

I have perused the record in Nairobi High Court Petition 410 of 2012. The documents involved were fairly moderate. The matter though involving several foreign parties did not at all raise complex issues as would warrant the fees charged by the applicant herein. Basically, the main issue for determination was enforcement of a debt owed.

"The applicant herein has cited complexity of the matter, the research involved and the time spent on the matter as the justification for the sum charged as instruction fees herein. The issues involved in this matter, which oscillated around the determination as to whether the Petitioner's rights were under threat of being infringed or not cannot be held to be as complex and/or novel as to warrant a sum of Kshs.1,000,000/= as instruction fees. To state the least, they were in fact straight forward issues for determination as to whether the rights were under threat of infringement or not. The court record in file number 417 of 2012 does not show that voluminous documents were involved in the matter. The applicant herein ceased from acting from the respondents before the conclusion of the case and cannot be said to have expended much time and research on the matter as to attract a figure as is being claimed on instruction fees. Having considered all these, I do arrive at the conclusion that an amount of Kshs.50,000/= (fifty thousand) would be sufficient as instruction fees herein."

47. Having considered the submission and having perused the Court record and considering the above raised thereto, I find that the instant petition was not a simple and straight forward matter as the Respondents would want this court to believe. The Honourable Court determined; inter alia; the question of constitutional rights, permissible discrimination; and the application of the Bill of Rights to private member institutions, where it is admitted discriminatory practices exists, and it was urged should not be the subject of the jurisdiction of this Honourable Court.

48. In ***Constitutional Petition No. 106 of 2013 Patrick Muguro Mwangi & Vs. Zakary Eliud Gichohi*** where the instruction fees was reduced from 2,000,000 to Kshs.500,000/= is distinguishable as the issue for determination was straight forward, and not one that was complex. The matter was decided by a single judge as apposed to present petition which was decided by a three (3) Judge bench.

49. A perusal of the instant court record in respect of the proceedings reveal that the parties prepared over 2000 pages in pleadings, in triplicate, multiplied by the number of parties. The typed proceedings in the petition at the time of judgment number 94 pages, the judgement is 67 pages, with 129 paragraphs. I find that it is improper for one to compare this petition with the cases relied upon by the Respondents or to describe the pleadings herein as "***modestly bulky and not complex***".

50. In the case of ***Republic vs. Sugar Arbitration Tribunal & 3 others ex parte Chemelil Sugar Company Ltd & another*** where the

Respondents contend the instruction fees was taxed at Kshs.1,478,449.52 and Kshs.1,520,866.50 was found to be excessive being 15 times the basic instruction fees and subsequently substituted with the sum of Kshs.250,000/= for each ex parte Applicant; is distinguishable, on the basis that, the suit was decided on the basis of application of the wrong schedule. The factor of excessive instruction fees was wholly dependent on the merits and circumstances of the case. I find that this case cannot have comparison with the instant Petition which is admitted to have been novel, obviously complex, with voluminous documentation. The trial judge in the case referred to by the Respondents did find in reducing the instruction fees as follows:-

“The application before this court was a straightforward application for orders of judicial review. I cannot say it was complex. It did not present any novel issue before the court that was not covered by any controlling authorities or precedents. Although the parties presented voluminous documents, these were primarily the documents that formed the basis of the claim before the Tribunal.”

51. The Respondents relied in the decision of *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2018]* which the respondents purpose a reduction of instruction fees. In the Martha Karua case, the costs were applied at kshs.10,000,000/= by the High Court and reduced to Kshs.2,000,000/= by the Court of Appeal. In reducing the amount the court of Appeal stated as follows:-

“We therefore think that such a huge cost as awarded here by the learned Judge would result in a miscarriage of justice as there was no basis for capping the costs at Kshs.10 million as we said earlier, in a matter that did not proceed to hearing. Having found that the learned Judge erred in law in striking out the Petition, the order made on costs as a result cannot stand.”

52. The Taxing Master in her ruling and reasons for Taxation dated 22nd March 2019 under paragraph 7 specifically stated the reasons and basis of her award in the instant Petition. She clearly laid down the reasons why the said award is reasonable and whereas I agree the same cannot be compared to the authority relied upon by the Respondents; this court notes the award is as submitted by the Respondents, thus the award of Kshs.4,800,000/= amounted to an enhancement by 48 times, which in my view is so high to amount to a negation of principles of taxation enunciated in a number of leading authorities.

53. Whereas I fully agree with the reasons and basis of the award in the instant Petition, and the fact the Respondents has not put forward comparable authorities to the instant Petition, there is no disputes, that the Petitioners did present novel issues; the Petition was complex with voluminous documentation which enhanced the level of difficulty and the matter was certified by the court to be raising substantial question of law requiring to be heard by an uneven number of Judges, being not less than three, to be assigned by the Chief Justice. That the Petition was heard by a three (3) Judge Bench. It is also noted the Petition is precedent setting as was found by the Taxing Master. No doubt the Taxing master quite correctly found there was a lot of research and industry merit into the resolution of the matter as the pleadings and documents are voluminous. Taking the factors into account the Taxing master awarded a sum of Kshs.4,800,000 which she found reasonable.

54. Having considered the respective rival submission and noting that the Taxing Master upheld the law correctly as regards the basis applied in determining the award, which is said to be excessive, being 48 times the basic instruction fees. I agree with the Respondents' Counsel submission that enhancing the award 48 times, the basic instruction fees, even where the suit presents novel issue or is complex and requires a lot of research, industry or where the documentation is voluminous, amounts to unjust enrichment as the award it is excessive and unjustified. This would call therefore for review and reduction of the award by the Deputy Register dated 22nd March 2019 in respect of the Petitioner's Advocates Party and Party Bill of Costs dated 5th July 2014; by sum of Kshs.500,000/=, on instruction fees, reducing the taxed costs from Kshs.4,911,791 by Kshs.500,000/= leaving a total sum of Kshs.4,411,791/=.

B. WHETHER THE NOTICE OF PRELIMINARY OBJECTION AGAINST THE REPLYING AFFIDAVIT OF ROSE WANGUI MAMBO DATED 3RD FEBRUARY 2020 HAS MERITS?

55. The Respondents filed a Notice of Preliminary Objection to the Replying Affidavit of Rose Wangui Mambo sworn on 16th December 2019, seeking that it be struck out and expunged from the record of these subject proceedings for the following reasons:-

a) The said Replying Affidavit offends the provisions of Order 19 Rules 3 and 6 of the Civil Procedure Rules, (2010).

b) The said Replying Affidavit is in particular scandalous, irrelevant and oppressive, by its contents contained in;

i) Paragraph 3, of the authority of the Advocate(s) acting for the 1st Respondent, a fact that is wholly irrelevant and oppressive to the Defence and legal counsel of the represented parties hereof as it comes so late in the day.

ii) Paragraph 4, is scandalous, argumentative and suppresses the information, that the Applicants, as entitled in the constitution, have invoked their right of appeal to the Supreme Court against the decision of the Court of Appeal of 22nd November, 2019, for amongst other grounds, the summary dismissal of the Appeal, without it being heard.

iii) Paragraph 5 is wholly irrelevant and intended oppressive to the Applicants as it is intended to scare and scuttle their right to seek due process of the law before they are condemned in either way or visited by an order of costs, and/or before oppressive costs are assessed quite out of any settled comparative precedent.

c) The said Replying Affidavit in paragraphs 8, 9, 10, 11, 13, 14 and 16, is argumentative and irrelevant and hence in breach of the law governing the admissibility of evidence by means of affidavit.

56. The Petitioners are opposed to the Respondents preliminary point of law and in doing so sought to rely on the case of *Mukhisa Biscuits Company vs. Westend Distributors Limited (1969) EA 696 at page 701* which case was cited by the Court of Appeal in the case of *Nitin*

Properties Limited vs. Jagjit Singh Kalsi & Another where it was held that;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop.” (Emphasis added)

57. I have considered the preliminary objection dated 3rd February 2020, and I am satisfied that the same does not raise a point of law by any interpretation, but the same raises facts which require ascertainment, on whether they are irrelevant, scandalous or argumentative and as such do not meet the test set in the *Mukisa Biscuits Company v. Westend Distributors Limited case (supra)*.

58. I find further that a preliminary objection in response to a Replying Affidavit is unknown in law. **Order 51 Rule 14 of the Civil Procedure Rules** clearly outlines the circumstances in which a notice of Preliminary Objection may be filed.

Order 51 Rule 14 of Civil Procedure Rules provides that any respondent who wishes to oppose any application may file, alone or a combination of the following documents:-

a) A notice preliminary objection and / or

b) Replying affidavit and / or

c) A statement of grounds of opposition

59. In view of the above I find that the preliminary objection as drawn and filed do not meet the criteria set out for what amounts to be a preliminary objection and the same is accordingly struck out.

APPLICATION DATED 29TH MARCH 2019.

60. The Petitioners through an application dated 29th March 2019 seek the following orders:-

a) The costs certified by the Honourable Deputy Registrar on 27th March 2019 be adopted as judgment of Court.

b) That the Honourable Court do order the 2nd to 9th Respondents to pay the certified costs with interest at the rate of 14% from 27th March, 2019, being the date the Applicant's bill of costs was certified, until payment in full, pursuant to Section 27(2) of the Civil procedure Act, Cap 21 of the Laws of Kenya.

c) That the costs of this application be borne by the 2nd to 9th Respondents.

61. The Petitioner's application is premised on the grounds on the face of the application, that the Petitioners/Applicant's Party and party costs dated 8th July 2014 and filed on 9th July 2014 was taxed by the taxing master on 22nd March 2019 at Kshs.4,911,791/= and certificate of costs issued on 27th March 2019. That the costs are due and owing to the Petitioners / Applicants.

62. The application is further supported by Supporting Affidavit of George Ouma and annexures thereto sworn on 29th March 2019.

63. The Respondents have not filed any response to the Petitioners application nor is there submission in opposition. It therefore follows the application is unopposed.

64. In view of there being no opposition to the Petitioner's application dated 29th March 2020 the same is granted to the extent of the sum reduced by this court following partial success of the Respondents application from Kshs.4,911,791/= to Kshs.4,411,791/=.

65. The upshot is that the Respondents application dated 6th April 2019 partially succeeds; whereas the Petitioners application fully succeeds. I proceed to make the following orders:-

a) On application dated 6th April 2019 the Respondents / Applicants application is granted in the following terms:-

i) The decision of the Deputy Registrar - High Court at Nairobi, Honourable C. Kithinji, dated 22nd March 2019 where she taxed the Petitioners Advocates Party and Party Bill of Costs dated 8th July 2018 and award the sum of kshs.4,911,791/= is HEREBY reviewed, varied and reduced by Kshs.500,000/= leaving a total of Kshs.4,411,791/= as taxed costs.

ii) The Petitioners Preliminary Objection against the Replaying Affidavit of Rose Wangui Mambo dated 3rd February 2020 is dismissed.

b) On Petitioners application dated 29th March 2019, is merited and is granted in the following terms:-

i) The decision of the Deputy Registrar – High Court at Nairobi; Honourable C. Kithinji dated 22nd March 2019 where she taxed the petitioners Advocate party and party Bill of Costs dated 8th July 2018, and awarded Petitioner Kshs.4,911,791/= now reduced by Kshs.500,000/= leaving a balance of Kshs.4,411,791/= as taxed costs is adopted as judgment of this Court.

ii) The 2nd – 9th Respondents to pay the certified costs of Kshs.4,911,791/= less Kshs.500,000/=, leaving Kshs.4,411,791/= with interest at Court rate from 27th March 2019 being the date the Applicants/ Petitioners Bill of Costs was certified, until payment in full.

c) Each Party to bear its own costs of the applications as both parties succeeded and failed in this application.

Dated, Signed and Delivered at Nairobi on this 12th day of November, 2020.

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J. A. MAKAU

JUDGE