



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO. 292 OF 2017**

**IN THE MATTER OF THE ADVOCATES ACT**

**AND**

**THE MATTER OF THE ADVOCATES REMUNERATION ORDER**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CABINET SECRETARY, INTERNAL SECURITY.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, EAST AFRICA COMMUNITY**

**LABOUR AND SOCIAL PROTECTION.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**FEDERATION OF KENYA EMPLOYERS.....1<sup>ST</sup> INTERESTED PARTY**

**CENTRAL ORGANIZATION OF**

**TRADE UNION.....2<sup>ND</sup> INTERESTED PARTY**

**EX PARTE:**

**GRAGORY ORIARO NYAUCHI**

**RULING**

**Background**

1. The ruling herein is on an application made by the Ministry of Interior and Co-ordination , the 3<sup>rd</sup> Respondent herein, by way of a Chamber Summons dated and filed on 28<sup>th</sup> November 2018. The 3<sup>rd</sup> Respondent has objected to a ruling delivered on 14<sup>th</sup> November 2018 by the Taxing Officer, and is seeking the following orders in the said application:

- a) That the Court be pleased to set aside the decision of the Taxing Officer awarding instruction fees of Kshs 1,000,000/= on item one of the bill of costs.
- b) That this Court be pleased to set aside the decision of the Taxing Officer to award as getting up fees Kshs 333,333/=
- c) That this Court be pleased to remit the matter back for taxation before a Taxing Officer.

**d) That the costs of this reference be provided for.**

2. The impugned ruling by the Taxing Officer was made pursuant to a Party and Party Bill of Costs dated 11<sup>th</sup> September 2018 and filed by the Gragory Oriaro Nyauchi, the ex parte Applicant herein, on 25<sup>th</sup> September 2018. The Bill of Costs was in relation to Judicial Review Application No. 292 of 2017 which was filed by the ex parte Applicant seeking *inter alia*, an order of Mandamus directing the 1<sup>st</sup> Respondent to treat the 10<sup>th</sup> day of October as a public holiday. Judgement therein was rendered in favour of the ex parte Applicant on 6<sup>th</sup> November, 2017. The Taxing Officer taxed the Bill of Costs at a total of Kshs. 1,368,923/= from the total sum sought by the ex parte Applicant of Kshs. 2,702,257/=.

3. The application was supported by the grounds on its face and a supporting affidavit sworn on 23<sup>rd</sup> February 2018 by Ericsson Obura, a State Counsel in the Ministry of Interior and Co-ordination. In summary, the 3<sup>rd</sup> Respondent's grounds for the application are that the amounts assessed as instructions fees and getting up fees were based on errors in principle that merits interference by this Court in that whereas the Taxing Officer properly apprised herself of the principles on assessment of instruction fees, she did not apply the same resulting in a manifestly excessive assessment of the fees. According to the 3<sup>rd</sup> Respondent, the matter was a judicial review application therefore the applicable law was Schedule 6 (1) (j) of the Remuneration order 2014, which provides that instruction fees where a matter was found to be complex, opposed, important, raising difficult questions the instruction fees are set at a minimum of kshs 100,000/=.

4. That the Taxing Officer found that the matter could not be deemed to be overly complex, and found that the application revolved around interpretation and observance of the provisions of the Public Holidays Act which is an ordinary piece of legislation the interpretation of which is an ordinary undertaking by both counsel and courts. Therefore, that the matter did not raise any novel question of law. That she also found that the prayers sought were declaratory and prerogative orders thus not monetary, and that the hearing of the matter was expeditious, there were no voluminous documentation involved that required counsel to synthesize and prepare for hearing.

5. The 3<sup>rd</sup> Respondent contended that whereas the ex parte Applicant is an advocate, the application for declaratory orders was made by in person and he was not represented by an advocate therefore not entitled to instruction fees. That the Taxing Officer therefore erred in principle by assessing costs that could not be said to be reasonable compensation. Further, that the Taxing Officer did not lay a basis for increase of instruction fees ten times the prescribed basic fees complex and contested matters and misdirected herself in principle by awarding getting up fees on the basis of the assessed instruction fees, without considering whether and what preparations were needed for trial in light of the matters in issue.

6. Lastly, that the Taxing Officer erred in principle by not considering the nature of the application as a public interest litigation undertaken in the public interest. Further, that she did not give due consideration to the values of sustainable development and rights to access to justice which are applicable in the assessment of legal costs particularly in public law claims.

7. The ex parte Applicant filed a replying affidavit sworn on 21<sup>st</sup> March 2019, in response to the application. He averred that the Taxing Officer's decision on taxation was not based on any error of principle or other error of whatever nature. That in arriving at her decision, the Taxing Officer properly directed herself on the law as well as the pertinent facts and attendant circumstances of the matter, and thereafter proceeded to elucidate the same in her Ruling which clearly set out her considered reasons.

8. Further, that the Taxing Officer took into account relevant factors including of the nature and importance of the matter; the amount or value of the subject matter involved; the interests of the parties; the general conduct of the proceedings and directions by the trial judge. On this basis and having fully apprised herself of these and other factors, the Taxing Officer then proceeded to significantly tax off the instruction fees and getting up fees that had been sought in the Bill of Costs. Therefore, that she did not make an assessment that can reasonably be viewed as being overly excessive, as contended by the 3<sup>rd</sup> Respondent, and exercised her discretion judiciously and reasonably, having taken into consideration all the relevant factors as required by Schedule 6A(j) of the Advocates Remuneration Order 2014.

9. Furthermore, that the 3<sup>rd</sup> Respondent has failed to demonstrate in what way they have been denied the right to access justice, and was actually availed of every opportunity to attend the hearing of the taxation matter in order to ventilate its case and make representations on the Ex-parte Applicant's Bill of Costs, but deliberately failed or refused to do so, and is therefore estopped from attempting to impugn the decision of the Taxing Officer.

10. That the amounts arrived at by the Taxing Officer are in no way excessive, bearing in mind the prevailing socio-economic conditions of the country. In addition, that despite the Taxing Officer deeming the subject matter of the judicial review application as not being overly complex, she appreciated that the same was of great importance both to the ex-parte Applicant as well as to Kenyans at large, in that the 10<sup>th</sup> day of October was observed as a public holiday in Kenya, and it was not merely a case of simply interpreting an ordinary piece of legislation but raised pertinent issues pertaining to both the Constitution as well as the Public Holidays Act, which called for extra diligence because it was the first time in this country that the courts were being called upon to address such a matter.

11. Therefore, that the novelty of the circumstances of the judicial review application coupled with the great importance of the matter to Kenyans at large constituted a valid and justifiable basis warranting the increase in assessment of instruction fees by the Taxing Officer, beyond the amount that is prescribed in the Advocates Remuneration Order.

12. In addition, that the Taxing Officer duly considered the amount of time that it took for the hearing and determination of the Judicial Review Application on its merits, as well as the volumes of documents on record, and having taken those into account, she was of the considered view that the amount assessed as instruction fees was justifiable in the circumstances. That having correctly assessed a reasonable amount for awarding instruction fees, the Taxing Officer duly proceeded to award getting up fees based on that amount, and took into consideration the extra level of diligence that would be required by my counsel on record to prepare for trial, in view of the nature and great importance of the subject matter of the judicial review application.

13. Lastly, the ex parte Applicant averred that whereas he is indeed an advocate, he nevertheless instructed the firm of Nyauchi and Company to represent him in the judicial review application, and was represented at every stage of the said Application, and thereby incurred legal costs attendant thereto. That he is therefore entitled to reasonable compensation on account of instruction fees for the matter.

### **The Determination**

14. The application was canvassed by way of written submissions. A.K. Ndumu Advocates, the advocates on record for the ex parte Applicant, filed submissions dated 15<sup>th</sup> May 2019, while J. Chimau, a senior state counsel at the Attorney General's Chambers filed submissions dated 26<sup>th</sup> March 2019 for the 3<sup>rd</sup> Respondent. I have considered the pleadings and submissions made by the ex parte Applicant and 3<sup>rd</sup> Respondent and find that they raise two issues for determination. The first is whether there was an error made by the Taxing Officer in the for taxation of item 1 on instruction fees in the ex parte Applicant's Party and Party Bill of Costs dated 11<sup>th</sup> September 2018. Second, whether the Taxing Officer erred in the taxation of item 2 on getting up fees in the said ex parte Applicant's Party and Party Bill of Costs.

15. The 3<sup>rd</sup> Respondent submitted that the Taxing Officer in her ruling correctly determined that the applicable law on taxation of Bills of Costs arising from public law matters such as applications for prerogative orders and petitions alleging violation of constitutional rights was Schedule 6A (1)(j) of the Advocates (Remuneration) (Amendment) Order 2014, and cited the case of **Kenyariri & Associates Advocates vs Salama Beach Hotel Limited & 3 Others**, [2015] eKLR in this regard. That while the Taxing Officer has discretion to increase the minimum instruction fees set by the Schedule, in this case she rightly stated that the ex parte Applicant's claim of Kshs 2,000,000/= was grossly excessive, and taxed the item and awarded instruction fees of Kshs 1,000,000/=.

16. That having made such findings, it is expected that the Taxing Officer would exercise her discretion to increase the figure in a much lesser. An increase of instruction fees from Kshs 100,000/= as provided in law to Kshs 1,000,000/= which was ten times more, was thus not justified. The 3<sup>rd</sup> Respondent relied on the decision of **Danson Mutuku Muema vs Julius Muthoka Muema & Others, Machakos High Court Civil Appeal No. 6 of 1991** which was cited in **Republic vs Ministry of Agriculture & 2 Others ex parte Muchiri W'njuguna & 6 others, (2006) e KLR**, and where it was held that the amount allowed being ten times more was held to be excessive.

17. Further, that the Taxing Officer did not strike an equitable balance correctly in the light of all the circumstances of this particular case, and disregarded the comparative authorities in her ruling demonstrating what would amount to a fair and reasonable compensation in view of the circumstances, and where applicants had been awarded Kshs 150,000/=, Kshs 424,774/= and Kshs 200,000/=. That it is therefore evident that the instructions fees of Kshs 1,000,000./= is grossly exaggerated and is not reflective of the value of the work done by the *ex parte* Applicant.

18. The 3<sup>rd</sup> Respondent further submitted that the application was not complex but straight forward; the time, research and skill expended in the brief was not much; and the volume of documents were not much. Reliance was placed the decision to this effect in **Kenyariri & Associates Advocates vs Salama Beach Hotel Limited & 3 Others (supra)** and on the principles guiding the review of taxation stated in **President of the Republic of South Africa and Others v Gauteng Lions Rugby Union (CCT16/98) [2001] ZACC 5**. According to the 3<sup>rd</sup> Respondent, the instruction fees in the matter herein ought not to exceed Kshs 150,000/=.

19. The ex parte Applicant in rejoinder submitted that there was no error of principle or any other kind of error on the part of the Taxing Officer, who properly directed herself on the applicable law as well as the pertinent facts and attendant circumstances of the matter, and made a detailed Ruling on the matter which clearly set out her considered reasons, backed by relevant case law. Further, that in arriving at her decision, the Taxing Officer correctly relied on the provisions of Schedule 6 A (1)(j) and 6 A (2) of the Advocates Remuneration (Amendment) Order, 2014 which prescribes the fees payable in respect of applications for constitutional and prerogative orders.

20. In addition, that the applicable law makes it clear that the amount which is awarded as instruction fees is wholly dependent on the exercise of a Taxing Officer's judicial discretion, which should be guided by the various factors and circumstances of a particular case. In this respect it was urged that the prescribed instruction fees amount of Kshs. 100,000/= is only a minimum figure, and that it is well settled that a Taxing Officer has the liberty to increase this amount when exercising discretion in a judicious and reasonable manner.

21. According to the ex parte Applicant, the amounts that were awarded by the Taxing Officer on account of the instruction fees and the getting up fees were both reasonable, bearing in mind the particular circumstances of the case as well as the applicable law. That despite the Taxing Officer deeming the subject matter of the judicial review application as not being overly complex, she nonetheless appreciated that the same was of great importance both to the ex-parte Applicant as well as to Kenyans at large, and raised pertinent issues pertaining to both the Constitution as well as the Public Holidays Act, which called for extra diligence on counsel's part. Therefore, it was not merely a case of simply interpreting an ordinary piece of legislation as was contended by the 3<sup>rd</sup> Respondent.

22. Further, that from the taxation ruling it is evident that the Taxing Master actually gave due consideration to the comparative authorities that she cited in her ruling and premised on the same, she proceeded to significantly tax off the amounts that the ex-parte Applicant had sought in the Bill of Costs. It was urged that the figures in the cited cases were arrived at in relation to matters that were terminated at the leave stage whereas in the instant case, not only did the matter go beyond the leave stage but it also proceeded to full hearing and subsequent issuance of judgment in favour of the ex-parte Applicant. The case of **Kenyariri & Associates Advocates vs Salama Beach Hotel Limited & 3 Others (supra)** was distinguished on this ground.

23. The *ex parte* Applicant reiterated the principles and circumstances under which a Court can interfere with a Taxing Master's exercise of discretion, and cited the decisions in **Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR**, **Joreth Limited vs. Kigano & Associates [2002] 1 EA 92** **President of the Republic of South Africa and Others v Gauteng Lions Rugby Union (supra)**, **Republic vs Commissioner of Domestic Taxes ex parte Ukwala Supermarket Limited & 2 Others (2018) e KLR** and **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'njuguna & 6 Others, (2006) e KLR** in this regard. The *ex parte* Applicant urged that this Court should not be persuaded to vary the amount of instruction fees that was determined by the Taxing Officer on the mere basis that the 3<sup>rd</sup> Respondent deems the amount to be high. It is our submission that in the present case, the main dispute gravitates around

the quantum of fees that were assessed by the Taxing Officer and not on any demonstrable error of principle. Accordingly, the issue of quantum in this matter should be left to the Taxing Officer who was well versed with the matter and had the adequate experience to determine the same.

24. It is not disputed in the present application that the applicable law as regards taxation of Party and Party Bill of Costs is Schedule 6A of the Advocates (Remuneration) Order 2014, which provides for party and party costs of proceedings in the High Court. 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.”**

25. Paragraph 2 of the said Schedule provides as follows as regards getting up fees:

**“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.”**

26. 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”.**

27. 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.

28. 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.”

29. 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.

30. I have perused the ruling by the Taxing Officer dated 18<sup>th</sup> July 2018, and note that she properly applied Schedule 6A of the Advocates Remuneration Order, and noted that the basic instruction fee was Kshs 100,000/=. She also noted that she has discretion to increase the amount taking into account factors such as the nature and importance of the cause or matter and amount or value of the subject matter, and the complexity of issues and novel points of law, The Taxing Officer also considered the principles as regards the exercise of discretion in taxation of costs outlined in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others, (supra)**

31. While taxing on the item on instruction fees, the taxing master in her ruling gave the following reasons:

“My analysis of the application has shown that the Application was of great importance to the Applicant and Kenyans at large. The Application sought to have 10<sup>th</sup> October observed as a public holiday. The application was filed on the backdrop of 10<sup>th</sup> October not being observed as a public holiday after the promulgation of the constitution of Kenya, 2010 by the government and employees of the citizens of Kenya. Through the Application the Applicant secured orders to have the day observed as a Public Holiday and the same commenced this year.

The Application was instituted under the provisions of the Public Holidays Act Cap 110 Laws of Kenya.

The fundamental question was whether 10<sup>th</sup> October should be observed as a public holiday The Application, even though was partly founded on the provisions of the Constitution, the same raised pertinent issues touching on the provisions of the Public Holidays Act. It follows, in my view that the responsibility entrusted to Counsel in the proceedings called for nothing but extra diligence. The Application was filed in the years 2017 and concluded in the same year. Looking at the court record and the proceedings in the Application, it appears that the amount claimed by the Applicant is excessive considering that the hearing was not protracted. I did not come across any voluminous or numerous documents that the Advocate had to synthesize and prepare for hearing.

I have also reviewed several other references in respect of Judicial Review matters with a view of determining what the trend in awards in such matter is.....

.....The court has discretion to enhance instructions fees considering the complexity of the matter, responsibility by Counsel, time spent, reason done and skill deployed by Counsel.

The court must ensure that the Advocates instructions fees is to seek and has more no less than reasonable compensation for professional work done.

Bearing in mind all the aforesaid factors and the reasons herein and in exercise of the discretion vested in me. I am fully convinced that the amount sought by the Applicant is grossly excessive.

I am fairly convinced that the basic fee applicable is governed by Schedule 6 (J) (ii) of the Advocates Remuneration Order, 2014 and the fee provided is Kshs 100,000/= I appreciate that this matter was of great importance to the Applicant and Kenyans at large. Justice Odunga in his Judgment while awarding costs to the Applicant paragraph 52 stated that. “Article 3 (1) of the Constitution enjoins every person to respect, uphold and defend the constitution. A person who decides to expend his or her time in defence of the constitution ought to be commended recompensed for doing so...”

On question of increase on the aforesaid basic fee and this being a party and Party Bill of Costs, I am of the view that **Kshs 1,000,000/=** is reasonable instruction fees taking into account the time taken in this matter, scope of the work done and the nature of the dispute herein. **(Kshs. 1,000,000/=)** is hereby taxed off.”

32. It is my finding that that the taxing Officer did take into account relevant considerations, and took into account factors specifically provided for in Schedule 6A to increase instruction fees, and that she gave reasons why she exercised her discretion to tax off the item on professional fees from Kshs 2,000,000/= to Kshs 1,000,000/= , and distinguished decisions where the fee had been taxed at lower amounts of Kshs 200,000/= and 424,774/= on the ground that the judicial review matters therein had terminated at leave stage and/or were for defending

the judicial review matter. In this respect the Taxing Officer ultimately applied the taxation decision in **Republic vs Commissioner of Domestic Taxes ex parte Ukwala Supermarket Limited & 2 Others (supra)** where the instruction fee was taxed at Kshs 1,000,000/=.

33. It is also notable that the applicable basic instruction fee was Kshs 100,000/= as correctly found by the Taxing Officer, since the judicial review proceedings herein were opposed and defended by the Interested Party, and she considered the importance of the subject matter of the judicial review proceedings to the Kenyan public in exercising her discretion to increase the instruction fees. The instruction fee awarded by the Taxing Master was therefore not excessive in the circumstances.

34. I therefore find that the decision of the taxing master in awarding instruction fees of Kshs 1,000,000/= was not based on any error of principle, neither were the said cost as awarded excessive to justify interference by this Court.

35. As regards the taxation of item on getting up fees and award of Kshs 333,334/= by the Taxing Officer for this item, paragraph 2 of Schedule 6A of the Advocates (Remuneration) Order 2014, 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 It is not disputed 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 *ex parte* Applicant.

36. Lastly, the applicable provisions of paragraph 2 of Schedule 6A of the Advocates (Remuneration) Order 2014, provides that the allowable minimum of getting up fees is one-third of the instruction fees. In this case the Taxing Master had awarded instruction fees of Kshs 1,000,000/= and the taxation of the item on getting up fees at one-third of Kshs 1,000,000/=, which is Kshs 334,334/=, was thus not in error.

37. The 3<sup>rd</sup> Respondent's Chamber Summons application dated 28<sup>th</sup> November 2018 is therefore declined for the foregoing reasons, and the 3<sup>rd</sup> Respondent will pay the *ex parte* Applicant the costs of the said application of Kshs 30,000/=.

38. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY 2019**

**P. NYAMWEYA**

**JUDGE**