**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**MISC. APPL. 430 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL**

**REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE MEDICAL PRACTITIONERS &**

**DENTIST ACT CAP 253 AND THE RULES**

**MADE THEREUNDER**

**AND**

**IN THE MATTER OF PRELIMINARY INQUIRY COMMITTEE**

**(PIC) CASE NUMBER 2 OF 2015 (COMPLAINT BY**

**ISAAC KATITU WAMBUA – ON BEHALF OF THE**

**LATE MARGARET KATILU WAMBUA (DECEASED)**

**AND**

**IN THE MATTER OF THE MEDICAL PRACTITIONERS &**

**DENTISTS (DISCIPLINARY PROCEEDINGS)**

**(PROCEDURE) RULES**

**REPUBLIC……..……..…….APPLICANT**

**VERSUS**

**THE MEDICAL PRACTITIONERS & DENTIST BOARD…. RESPONDENT**

**AND**

**1. NAIROBI WEST HOSPITAL…….....…..1ST INTERESTED PARTY**

**2. ISAAC KATILU WAMBUA..…….....…… 2ND INTERESTED PARTY**

**EX-PARTE: DR. MARY A. OMAMO-NYAMOGO**

**RULING**

1. This ruling arises from a taxation by **Hon. S Mwayuli**. By her decision dated 27th March, 2017, the learned Taxing Officer taxed the ex parte applicant's costs in the total sum of Kshs 373,715/=.

2. This reference was instituted by way of Chamber Summons 7th April, 2017 in which the Respondent herein seeks the following orders:

> **1. That the decision of the Taxing Officer delivered on 27/3/2017 be set aside.**
>
> **2. That this Honourable Court do refer the Ex parte Applicant's Bill of Costs dated 30/11/2016 to another Taxing Officer for fresh taxation and with proper directions thereof.**
>
> **3. That in the alternative to prayer 2 above, this honourable court be pleased to re-tax the Bill of Costs dated 30/11/2016.**
>
> **4. That the costs of this reference be borne by the Ex parte Applicant.**

3. The application was based on the following grounds:

4. On behalf of the Respondent it was submitted that by an application dated 19th September, 2016 *the ex parte* Applicant herein sought leave to commence judicial review proceedings against the Respondent which leave the Court granted by an order dated 20th September, 2016 and the *ex parte* Applicant filed the substantive motion on 22nd September, 2016. The matter was then scheduled for mention on 12th of October, 2016 to take directions on the hearing of the matter. However, parties preferred to compromise and recorded a consent in court on 25th October, 2016 under the following terms;

> *1. The decision of the PIC dated 11th April 2016 be and is hereby quashed;*
>
> *2. The application for review by the 1st Interested Party (Nairobi West Hospital) lodged with the Board be withdrawn;*
>
> *3. The Board shall be at liberty to commence a fresh inquiry on the complaint by the 2nd Interested Party (Isaac Katilu Wambua);*
>
> *4. There be no orders as to costs to the Interested Parties.*
>
> *5. The Ex-Parte Applicant be granted costs for the cause.*

5. According to the Respondent, it was on the strength of the consent orders that the *ex-parte* Applicant then filed the bill of costs dated 30th November, 2016 and prayed for costs amounting to Kshs 591, 215.00 which was opposed by the Respondent vide submissions filed on 14th February, 2017 and prayed that the bill of costs be taxed at Kshs 143, 420.00. However the Taxing officer awarded costs of Kshs 373,715.00.

6. Being aggrieved by the said decision the Respondent filed a notice of objection dated 30th November, 2017 and this Reference dated 7th April, 2017.

7. According to the Respondent, though it is trite principle that quantum of costs is best left to the discretion of the taxing master, it also settled law that where the costs are taxed at a level so grossly excessive as to betoken the application of wrong principals, then it becomes an occasion for the judge to intervene. I was contended that the taxing officer is obligated to exercise the discretion donated by law in a judicial manner which according to the Respondent the Taxing Master failed and/or did not adhere to in awarding *inter alia* the instructions fees. This, according to the Respondent was because the Taxing Master failed to give a specific statement of the authorizing clause in law or a particularized justification of the mode of exercising any discretion provided for in allowing the amounts in respect of the disputed items.

8. According to the Respondent, in the instant matter the instruction fees was awarded in the sum of Kshs.300, 000 and in arriving at the figure, the taxing officer expressed herself as follows:

> ***"… instruction fees of this nature are taxed under schedule VI (1) (j) which provides for a minimum of Kshs. 100,000/=…. The taxing officer has discretion to increase this figure taking into account the following factors;***
>
> **a. Nature and importance of the cause,**
>
> ***b. The amount or value of the subject matter,***
>
> ***c. The general conduct of the parties,***
>
> ***d. Complexity of the issues raised and the novel points of law,***
>
> ***e. The time, research and skill expended in the brief,***
>
> ***f. The volume of documents involved.***
>
> **…. Having taken into consideration all the above factors, the Taxing Officer in exercising her discretion awards Kshs. 300,000/= as instruction fees and hence Kshs. 200,000/= is taxed off."**

9. It was submitted that the principles that guide the court in determining when a judge of the High court may interfere with the taxing officer's discretion were laid down in the case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 65,** where the court held that:

> **"(1) that the 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 manifestly excessive as to justify an inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the 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…".**

10. In this case it was submitted that from her ruling apart from listing what she considered, the taxing officer did not:

> **i. Give any specific complex elements she considered in her decision;**
>
> **ii. State how much research was undertaken and how much time was expended in the matter; or**
>
> ***iii. The documents that were filed by both parties.***

11. It was therefore submitted that the Taxing Officer failed to justify her exercise of discretion, analyse

the complexity, responsibility or otherwise to amount to reasonable, fair exercise of the same and, according to the Respondent this was a clear case of wrong exercise of discretion donated by the law which calls and justifies interference by this Honourable Court.

12. The Respondent reiterated that mere reference and/or listing of what ought/was considered in exercising discretion without expounding the same cannot amount to judicial exercise of discretion.

13. Further reliance was sought in **Green Hills Investments Limited -vs- China National Complete Plant Export Corporation** wherein **Ibrahim, J** (as he then was) stated that:

> **"…the court will not interfere with the award unless the taxing master is shown to have gone wholly wrong…the tax master is given discretion ought to be exercised within reason, fairly and judiciously. Some valid reasons or explanation must be given for the award of specific sum."**

14. Further, whereas the taxing officer correctly found that the matter was to be taxed under schedule VI (I) (j) which provides for a basic minimum of Kshs. 100,000/= she grossly misdirected herself noting that the matter was not opposed as no response was ever filed noting that parties resulted to record a consent on 26th October, 2016 when the same came up for mention for purposes of taking directions. It was submitted that the correct schedule ought to have been scheduled 6(1)(j)(i) which provides for a minimum instruction fees of Kshs. 45,000/=. To the Respondent therefore, Kshs.300,000.00 was excessive as the proceedings were commenced by way of judicial review and in awarding the same the taxing officer adopted wrong principles which would wrongly enrich the Applicant and punish the Respondent herein.

15. It was further contended that the taxing officer in the ruling held that *"all other items are taxed as drawn that is item 13- 40, save for item 23 have been taxed to scale and they all be taxed as drawn"*. In so holding the taxing officer allowed the bill of costs as drawn under item 15 under which the *ex parte* Applicant had prayed for costs on instructions to file the substantive motion. To the Respondent this was an error in principle since it amounted to award of instruction fees under two different items. In this respect the Respondent relied on **Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92** in which it was held that:

> **"The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle, the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs."**

16. In the Respondent's submissions, the taxing officer erred in principle by allowing the bill of costs as drawn under item 15 since in so doing, instruction fees was charged twice, whereas it is a matter of principle that instruction fees is an independent and static item. It is charged once and it is not affected or determined by the stage which the suit has reached.

17. Based on the foregoing the Respondent prayed that the application dated 7th April, 2017 be allowed, the decision by the Taxing officer delivered on 27th March, 2017 be set aside and the *ex parte* Applicant's bill of costs be referred to another taxing officer for fresh taxation with proper directions and in the alternative this Court be pleased to tax the bill of costs dated 30th November, 2017.

**Respondent's Case**

18. The application was opposed by the ex parte applicant.

19. In so doing the ex parte applicant filed the following grounds of opposition:

**1. The Chamber Summons is misconceived, frivolous, incompetent, vexatious and otherwise a Gross abuse of the Court process and should be dismissed with Costs to the Ex-Parte Applicant.**

**2. The Deputy Registrar/Taxing Officer in her Ruling and Reasons for Taxation dated 27/03/17 considered all the applicable principles clearly outlined in the Ruling/Reasons at Page 2 together with Legal Authorities at Page 3 before exercising her discretion to Award Kshs.300,000/= and Tax-off Kshs.200,000/= from the sum of Kshs.500,000/= on instructions fees claimed in the Bill of Costs**

**3. The Compromise of the Suit was at the stage of hearing after full preparations for the Case and long after the grant of Leave and this Court has previously awarded higher figures even where Proceedings terminate at the stage of Leave when such Leave was denied in the Case of *TJRC –vs- CJ and Another [2014] eKLR* which was cited in the Ex-parte Applicant's Submissions where the Deputy Registrar/Taxing Officer increased the Award from Basic Instructions fees of Kshs.28,000/= to Kshs.200,000/= which was Seven (7) Times and this Court held that the same was justified due to the importance of the matter, value of the subject matter, general conduct of parties, research and skills expended and volume of documents.**

**4. Based on the Ruling/Reasons by the Deputy Registrar given at Pages 2 – 3 the Principles applicable, the Authorities and the Law, the Grounds set out in the Chamber Summons are not only spurious but frivolous and lacks any merit.**

**5. The Learned Deputy Registrar/Taxing Officer in her Ruling Pages 3 – 4 considered that all the other items were drawn on Scale including Item 15 which is expressly provided for as the same comes separately after grant of Leave and cannot be covered in Item 1 as Leave may be granted or denied by the Court as was held in the *TJRC Case (Supra)* hence the Taxing Officer properly directed herself and gave sound reasons and Ruling.**

**6. The Chamber Summons/Reference dated 07/04/17 and filed on 10/04/17 lacks merit and should be dismissed with costs to the Ex-parte Applicant.**

20. It was submitted on behalf of the ex parte applicant that the taxing officer in her decision gave sufficient reasons for the exercise of the discretion and in so doing relied on several decisions and consequently arrived at a well-reasoned and supported decision which should not be set aside or interfered with in any manner.

21. It was further disclosed that following the issuance of the Certificate of Taxation, the Respondent unconditionally drew and paid a cheque in favour of the ex parte applicant's advocates in full and final settlement of the taxed costs.

22. It was therefore the ex parte applicant's case that the act of settlement of the costs amounted to according and satisfaction. Therefore the Respondent is estopped from challenging the taxing officer's decision.

**Determinations**

23. I have considered the foregoing and this is the view I form of the matter.

24. The first issue is whether by settling the taxed costs the Respondent is estopped from contesting the decision of the Taxing Officer on taxation. A not too dissimilar issue arose before the Court of Appeal in **Machakos District Co-Operative Ltd. vs. Nzuki Kiilu Civil Application No. Nai 17 of 1997** where it was argued that since the decretal sum had been paid, the right of appeal had been lost. The Court **(Shah, JA)** however had no hesitation in holding that the fact that the decretal sum has been paid does not deprive a party of the right of appeal. It was however contended that the payment of the taxed costs

amounted to accord and satisfaction. In a layman's language an accord and satisfaction is a compromise with something in it for both sides; It is the purchase of a release from an obligation whether under contract or tort by means of any valuable consideration not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration, which makes the agreement operative. See **British Russian Gazette and Trade Outlook Ltd. vs. Associated Newspapers Ltd. (1932) KB 66.**

25. What I understand is that for the principle to apply the person obliged to satisfy an obligation must give something to the other party which though not the debt owed, is taken by that other to be in satisfaction of the debt. In other words the principle operates to bar the creditor who has accepted the payment from making further claims against the debtor. In this case it is the ex parte applicant's case that in fact what was due was paid in full. In those circumstances according and satisfaction, assuming that the same could be raised by the ex parte applicant in the first place, does not arise.

26. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that the 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 manifestly excessive as to justify an inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the 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; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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 and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**.

27. Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

28. Further guidance if necessary may be obtained in the case of **Joreth Limited vs. Kigano & Associates [2002] 1 EA 92 at 99** where the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or

settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.

29. In **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna** (supra) **Ojwang, J** (as he then was) expressed himself *inter alia* as follows:

> **"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…The 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 manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant 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 case 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…A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved…Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for…The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs…"**

30. While remitting the matter for fresh taxation the learned Judge in the above matter gave the following guidelines:

> **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.**

31. I however agree that the Taxing Officer ought to disclose what informed the decision to tax the costs in one way as opposed to another. I therefore agree with the decision in **Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna & 6 Others (2006) eKLR** that:

**"… It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant's firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria…"**

32. And that:

**"…it was necessary to specify clearly and candidly how she exercised her discretion… it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs…complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction…if novelty is involved in the main proceedings the nature of it must be identified and set out in a conscientious mode….if the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming, the details of such a situation must be set out in a clear manner…"**

33. In this case, the Taxing Officer found that the basic instructions fees payable was Kshs 100,000.00. As was held in **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**, the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it. The taxing officer however did set out the basic fee and was aware of the principles guiding taxation of costs. She proceeded to award the applicant Kshs 300,000.00 in respect of instructions fees. In **Opa Pharmacy Ltd vs. Howse & Mcgeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233**, it was held:

**"Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave**

**no reason whatsoever for doubling the instruction fee. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The failure to give any reason for the choice, surely, must, therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."**

34. The principles guiding taxation were similarly reiterated by the Court of Appeal of Uganda in **Makula International vs. Cardinal Nsubuga & Another [1982] HCB 11** where the Court pronounced itself as follows:

**"The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it."**

35. In the case of **Paul Ssemogerere & Olum vs. Attorney General - Civil Application No.5 of 2001** [unreported] the Court held:

**"In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference."**

36. In **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** (supra) **Mwera, J** (as he then was) held that whereas the Court was entirely right to give the costs within its discretion, the amount allowed being ten times the sum provided for, the Court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The Court further found that since the Taxing Officer was bound to give reasons for exercising his discretion and as none were given in his ruling save to say that he simply exercised his discretion, it was just and fair to set aside the sum he allowed.

36. This Court is aware that in **Butt & Another vs. Sifuna T/A Sifuna & Company Advocates Civil Appeal No. 45 of 2005 [2009] KLR 427**, the Court of Appeal while appreciating that the basic instructions fees was Kshs 9,000.00 in a winding up petition nevertheless awarded Kshs 150,000.00 in respect of instructions fees which was 17 times the basic instructions fees.

38. In **Kenya Union of Commercial Food & Allied Workers (K) vs. Banking Insurance & Finance Union (K) Civil Appeal No. 60 of 1988**, instructions fees was taxed downwards from Kshs 1,000,000.00 to Kshs 150,000.00 where leave to apply for judicial review proceedings was disallowed. That decision was based on the old Remuneration Order.

39. I wish to disabuse the notion that where a reference is unopposed, the reference must be allowed. Taxation of costs is a judicial process which is not determined by the positions taken by the parties or not

as costs, as stated hereinabove, is not meant to penalize the losing party but to compensate the successful party for the trouble taken in prosecuting or defending the suit. Order 51 rule 14 of the ***Civil Procedure Rules*** was dealt with in **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998** in which the Court of Appeal held that:

> **"Order 50 rule 16(2) does not say that the applicant may proceed *ex parte,* but empowers the Court to make orders *ex parte* on being satisfied that the Respondent has no good reason or reasons for not filing its papers at all and therefore it is not true that documents filed out of time in response to an application are necessarily invalid and should not be looked at. A court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so... It is an error for the Court to hold that a failure to file grounds of opposition automatically entitles the applicant to orders *ex parte* as the applicant is not relieved of the onus on him of justifying his application.**

40. Whereas in this case the Taxing Officer did not offer any explanation as to why she opted for the said sum of Kshs 300,000.00 and not any other figure, considering the foregoing decisions, I am not satisfied that I ought to interfere with the award even if this Court itself would have awarded a different figure. I am not satisfied that the decision was based on an error of principle, or the fee awarded was manifestly excessive or low as to justify interference.

41. As that was the only figure that was seriously contested I do not see any reason to deal with the other items.

**Order**

42. In the result I find no merit in this reference which I hereby dismiss with costs.

**Dated at Nairobi this 26th day of September, 2017**

***G V ODUNGA***

***JUDGE***

***Delivered in the presence of:***

**Miss Mukururi for Mr Kopere for the applicant**

**CA Ooko**