REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC APPLICATION NO. 8 & 9 OF 2016

NGATIA & ASSOCIATES ADVOCATES……..…ADVOCATE/RESPONDENT

-VERSUS-

INTERACTIVE GAMING & LOTTERIES LIMITED …...CLIENT/RESPONDENT

RULING

1. This ruling determines the client's reference dated 20th February, 2017 challenging the decision of the Taxing Officer Honourable E.W. Mburu Deputy Registrar rendered on 26th January 2017 in the advocate/client taxation of bill of costs. The reference challenges items on instructions fees, getting up fees and VAT on disbursement as allowed by the Taxing Officer.

2. The history of this matter is that Ngatia & Associates Advocates were retained by the client Interactive Gaming and Lotteries Limited to advise the latter and file Judicial Review proceedings against the Betting Control and Licencing Board (BCLB)'s revocation of the client's lottery permit notwithstanding a stay order of the High Court.

3. The Judicial Review proceedings were allowed by the court but the client claims that all that success was an academic exercise since by that time the validity of the lottery permit had lapsed in the intervening period.

4. The advocate filed an advocate client bill of costs for taxation dated 28th January 2016 seeking kshs 6,279,705.50. Soon thereafter the client filed a preliminary objection contending that the bill was improperly before the court because there was an agreement between it and the advocate for an all inclusive legal fees of kshs 500,000 hence the advocate could not tax any bill against the client.

5. After hearing both parties on the filed bill of costs and the preliminary objection, the Taxing Master Mrs E.W. Mburu (Honourable) found the preliminary objection unfounded and dismissed it. She then proceeded to tax the advocate client bill of costs and gave her detailed ruling and reasons for taxation of 26th January 2017, taxing the advocate client bill of costs at kshs 2,483,923.

6. On 6th February 2017, the client's counsel's Mbugua Nganga & Company Advocates wrote to the Taxing Master objecting to the taxation of items 1,2,and the levying of VAT on disbursements in the Advocates Bill of Costs dated 28th January 2016 and taxed on 26th January 2017. The client's advocate requested for reasons on the said three items to enable it file a reference and or in the alternative, in the event that reasons were contained in the taxation ruling, a certified copy of the ruling be furnished upon payment of the requisite fees.

7. The notice of objection pursuant to paragraph 11(1) and (2) of the Advocates Remuneration Order was filed within the stipulated 14 days of the date of taxation.

8. As can be deduced from the detailed ruling which also contained reasons for taxation, there was no need for the reasons for taxation to be provide and the client's counsel did not pursue the issue of the reasons for taxation and as the ruling was delivered in typed format, parties only needed to pay for a certified copy to be supplied to them.

9. On 20th February 2017 the client filed chamber summons pursuant to paragraph 11(2) of the Advocate's Remuneration Order seeking:

> *1. That the decision of the taxing officer delivered on 26th January 2017 in relation to items 1,2 and the VAT on disbursements be set aside and or vacated;*
>
> *2. The advocate/client bill of costs dated 28th January 2016 be remitted back to a different taxing office for re-taxation and this court do give appropriate directions on how it should be done.*
>
> *3. In the alternative this court be pleased to retax the advocate/client bill of costs dated 28th January 2016.*
>
> *4. Cost of this application be provided for.*

10. The chamber summons is predicated on the grounds that (material) to this reference :

> *1. The amount awarded under item 1 on instructions fee was so manifestly excessive as to justify an inference that it was based on an error of principle.*
>
> *2. The Taxing Officer suffered an error of principle in finding that the matter was not complex as it was a general application for prerogative orders but then proceeded to enhance the instructions fees on the basis that the matter was not simple.*
>
> *3. The learned Taxing Officer suffered an error of principle when she proceeded to award getting up fees under item 2 in the bill of costs despite the fact that the same are not awarded in Judicial Review applications.*
>
> *4. The Taxing Officer suffered an error of principle when she included the costs of disbursements in the calculation of VAT despite the fact that the same are excluded from tax under the VAT Act.*

11. The client prayed that the Reference should be allowed with costs.

12. In the grounds of opposition filed by the advocate challenging the client's reference, it was contended that the reference is misconceived in law, that the issue of VAT was not contested by the applicant as it was never an issued before the taxing officer for determination hence this court lacks jurisdiction to determine the issue in this reference and that in any event the VAT is an allowable item in the Advocate/Client bill of costs. Further, the advocate contends that the applicant has not laid sufficient basis on which the court can interfere with the decision of the taxing officer; that the decision of the taxing officer was not based on any error of principle in the taxation of the respondent/advocate's bill of costs so as to warrant the setting aside of the decision; and finally, that the assessment made by the taxing officer is fair and reasonable. That the taxing officer took into account all the relevant factors laid out in the Advocates Remuneration Order and exercised her discretion reasonably in arriving at her decision.

13. The parties agreed and filed written submissions which they adopted as canvassing the Reference. They also filed authorities to guide the court in making the decision on the merits and demerits of the reference.

14. In the client/applicant's submissions filed on 10th April 2017, it was submitted that the instructions fees of the shs 1,000,000 allowed by the taxing officer was so manifestly excessive in the circumstances as to justify an inference that it was based on an error of principle. It was submitted that the applicable law is the Advocates Remuneration Order Legal Notice No.50/2009 under Schedule VI item1(i) which provides for Remuneration of advocates instructions fees in prerogative orders and that such fees chargeable should be reasonable but not less than shs 28,000 hence the proper reference point in determining reasonable instructions fees is shs 28,000.

15. It was submitted that shs 1,000,000 allowed by the taxing officer was manifestly excessive and unreasonable.

16. On the principles applicable for the exercise of judicial discretion in matters of taxation, the case of **Ramesh Naran Patel vs Attorney General & Another [2012] e KLR** was relied on.

17. It was further submitted that the taxing officer did not break down the elements set out in the Ramesh Naran case (supra) and that she did not demonstrate that those elements existed.

18. It was further submitted that despite the taxing officer acknowledging that the matter did not involve complex issues as it was a general application for prerogative order, she nonetheless erred in principle in finding that the nature of issues sought in court were not simple and proceeded to enhance the instructions fees to kshs 1,000,000 without explaining how unique or what novelty was involved in the proceedings as was set out in the **Republic vs Minister for Agriculture Exparte Samuel Mburu Njuguna [2006] e KLR,** case by Emukule J (as he then was). Further, that there was nothing to show that research was conducted beyond the advocates call of duty, which then falls short of the requirement that ***" if the conduct of 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."*** **(see Republic vs Minister for Agriculture (supra).**

19. It was submitted that the Judicial Review proceedings in JR 21/2011 were not particularly novel and that the application was not complex or unique but straight forward hence it is incomprehensible how the taxing officer deviated from her own observation that the same was not complex by increasing the instruction fees from shs 28,000 to a whooping shs 1,000,000.

20. It was submitted that the Judicial Review proceedings involved ensuring Betting Control and Licencing Board's compliance with the governing law, that the responsibility entrusted to counsel was quite ordinary and called for nothing but normal diligence such as must attend the work of an advocate.

21. It was submitted that enhancing instructions fees from shs 28,000 to 1,000,000 was arbitrary, capricious, excessive, unreasonable and unjustified and gratuitously given to the advocate which amounts to unjust enrichment on the part of the advocate which is against the principle of taxation as was held in **Premchand Rackhand Ltd d v Quarry Service EA Ltd (No 3) [1972} EA 162** that :

> ***"……..costs should not be allowed to rise to a level as to confine access to justice to the wealthy,"*** as reiterated in **Paul S. Moger & Another vs Attorney General SCCA 5/2001 (UG).**

22. On item No. 2 on getting up fees, it was submitted, relying on the **Ramesh Naran Patel** case (supra) that as the case did not involve adduction of viva voce evidence and witness statements, that getting up fees would not be awarded in Judicial Review proceedings that involves affidavit evidence only. Further reliance was placed on **Republic vs National Environment Tribunal Exparte Silversle N. Enterprises Ltd[2010] e KLR** and **Mits Electrical Company Ltd v National Industrial Credit Bank Ltd Miscellaneous Application 429/2004.**

23. Consequently, it was submitted that the award of getting up fees was erroneous and should be disallowed.

24. On challenge that VAT could not be charged on disbursements, the client/applicant's counsel

submitted that the taxing officer errored in law and principle in allowing a charge on VAT on disbursements yet the same are not vatable.

25. It was submitted that Section 9(3) of the VAT Act Cap 476 Laws of Kenya (Repealed) was explicit that disbursements made to a third party did not form part of the taxable value of services rendered.

26. In this case, it was submitted that the assertion that the item was not contested before the taxing officer has no basis as the item was not admitted and moreso, that VAT is a matter of law against which there can be no estoppel.

27. Further, that the obligation of the taxing officer to ensure that the items sought in a bill of costs are recoverable in law is not dependent on whether or not the adverse party contests the same since the taxing officer is expected to allow such costs, charges and expenses as authorized in Rules 16 of the Advocates Remuneration Order; and that VAT is not an authorized expense hence not recoverable.

28. The client/applicant urged the court to allow the reference with costs and correct the glaring errors by setting aside the taxation by the taxing officer, thereafter proceed to tax the bill or in the alternative refer the bill back for taxation before a different taxing officer.

29. On the part of the Advocate/Respondent it was submitted in a reply filed on 23rd May 2017 that the instructions fees awarded to the advocate was not excessive because the matter was handled under extreme urgency due to the fact that the Betting Control and Licencing Board after the extension of the Lottery to 15th March 2011 purported to revoke the licence on 15th December 2010 whilst the applicant's lottery was still running which placed great responsibility on the respondent advocate to expend numerous hours in preparation of the matter.

30. Further, that considering the novelty of the issues the advocate undertook extensive research and considered the legal principles relevant to the circumstances of the case and the remedies available to the applicant.

31. Reliance was placed on **Premchand Raichard Ltd & Another v Quarry Services Ltd**(supra) on the basic principles for the taxing master to take into account in taxing bills of costs. In this case it was submitted that the taxing officer took into account all relevant factors in assessing the costs and arrived at a reasonable figure by exercising her discretion reasonably and did not err in principle.

32. It was submitted that this court should not interfere with the decision of the taxing officer solely on the question of quantum as was espoused in the case of **Aurther v Nyeri Electricity Undertaking [1961] EA 497** and in **Nyangito & Company Advocates vs Doinyo Lessos Creameries Ltd [2014] e KLR** citing **Butt & Another vs Sifuna & Sifuna Advocates CA 45/2005 [2009] KLR 427.**

33. Further reliance was placed on **Joreth Ltd vs Kigano & Associates CA 66/1999** where the Court of Appeal laid down principles applicable in assessing instructions fees. It was submitted that this was a matter of great importance to the parties and could not be treated like any other ordinary matter or as an academic exercise as described by the client/applicant.

34. Further reliance was placed on **Thomas James Arthur vs Nyeri Electricity (supra); Bunson Travel Services & Others v Kenya Airways [2006] e KLR** where it was held that skill, industry and labour of the applicant are relevant factors to be considered in assessing advocate's bill of costs.

35. On whether the discretion of the taxing officer should be interfered with, the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] 1 KLR 529** was relied on.

36. On the nature and importance of the matter it was submitted that the taxing master took into account pressure exercised on the parties and counsel and the unique issues raised and arrived at a reasonable figure which should not be disturbed.

37. On item No.2 getting up fee, it was submitted that Schedule VI paragraph 2 of the Advocates Remuneration Order permits a fee for getting up for trial in addition to instructions fees and which shall be not less than ? of the instructions fees allowed on taxation.

38. It was submitted that in the main JR 21/2011 matter, there was a replying affidavit filed by Stephen Chege on 17th February 2011 and Lucas Mwathi on 21st February 2011 which are items 28 and 30 of the bill of costs.

39. Further, that as the Judicial Review proceedings were defended or contested, and with the advocate carrying out extensive research, preparing authorities and submissions culminating in various hearings which got the client favourable rulings, the getting up fees is justifiable hence the taxing officer made no error of law or principle in awarding it.

40. Reliance was placed on **Nguruman Ltd vs Kenya Civil Aviation Authority & 3 Others [2014] e KLR** where the taxing master ruled that the fees for getting up was properly charged because the case was heard, and whether the hearing was by way of affidavits only or by viva voce evidence was immaterial. It was submitted that the above holding was upheld by Lenaola J (as he then was) in the reference.

41. Further reliance was placed on **Kenyatta University v The Senate Student's Disciplinary Committee (KU) & Another [2008] e KLR** where the court held that getting up fees is payable in Judicial review matters because Judicial Review is a special jurisdiction and parties access the court through pleadings titled affidavit and statements which the original applicant prepared and defence to the same is by way of a replying affidavit. It was therefore submitted that the Taxing Officer correctly awarded getting up fees in this matter.

42. On the challenge that VAT was not chargeable on disbursements, it was submitted relying on **Ufundi Co-Operative Savings & Credit Society vs Njeri ONyango & Company Advocates [2015] e KLR** where the court held that where the applicant does not raise the issue before the taxing master to enable the taxing master have it canvassed by both parties and a decision made on merit, it would be too late for the applicant to raise that issue even if it might have validity hence the applicant is estopped from raising an objection before the judge in chambers (citing **Kenneth Kiplagat t/a Kiplagat & Associates v National Housing Corporation [2005] e KLR.** It was therefore submitted that VAT is a statutory requirement governed by Cap 476 VAT Act and that VAT is charged on the supply of taxable goods or services made or provided in Kenya. Reliance was placed on **Amuga & Company Advocates vs Arthur Githinji Maina [2013] e KLR** where the court cited with approval **J.P. Macharia t/a Macharia & 2 others** where Ringera J (as he then was) held that VAT is statutory requirement that legal services are chargeable.

43. Further reliance was placed on **A.N. Kimani & Company Advocates V Kenindia Assurance Company Ltd [2010] e KLR** where the court held that VAT is applicable on the entire award and not only on the instructions fees hence the taxing master lawfully charged VAT on both the instructions fees and disbursements and the court was urged to uphold the decision.

44. On the whole it was submitted by the advocate/ respondent that the taxing master's award is reasonable in the circumstances of the case hence the same should be upheld as awarded.

DETERMINATION

45. I have carefully considered the client/applicant's Reference, the objections thereto, the submissions filed by the parties and the authorities supplied and statutory provisions relied on. In my humble view, the main issue for determination in this reference is whether the Reference has any merit and if so, what orders should this court make.

46. The circumstances under which a judge interferes with the taxing officer's exercise of judicial discretion are now well settled. These principles as set out in the **First American Bank of Kenya vs**

Shah & Others [2002] 1 EA 64 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 and, according to the order itself, some of the relevant factors to be taken 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;*
>
> *3. 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 and the court is not entitled to upset the 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 instructions 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 instructions 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.*

47. In addition, while the court ought not to interfere with quantum generally, the amount awarded should not be manifestly inadequate or outside the reasonable limits to such an extend that it could be deemed to be a mockery of legal representation(see **Green Hills Investment Ltd v China National Complete Plant Export Corporation HCC 572/200** (unreported).

48. Neither should the awards be manifestly excessive as to impede access to justice for the poor and confine access to the court to the wealthy(**Premchand Raichand Ltd & Another v Quary Services of East Africa Ltd & Others** (supra).

49. Further, it is now established that a successful litigant ought to be fairly reimbursed for the costs he had to incur; the general level of remuneration of advocates must be such as to attract recruits to the profession; that so far as practicable there should be consistency in the award made.

50. From the above legal principles, it is clear that court will only interfere with the Taxing Officer's discretion if the award is so high or so low as to amount to an injustice to one party. Further, in considering bills taxed in comparable cases, allowance may be made for the fall of money's value.

51. In **Premchard Raichard Ltd** (supra) adopting **Simpson Motor Sales vs Hendon Corporation (2)** – it was stated that the fact that counsel from overseas was briefed was irrelevant; the fee of a counsel capable of taking the appeal and not insisting on the fee of the most expensive counsel must be estimated.

52. In the ruling and reasons for taxation by the Taxing Officer made on 26th January 2017, Honourable E.W. Mburu taxed item by item after finding that there was no agreement between the client and the advocate on the fees payable.

53. Under item 1 of the Bill of costs dated 28th January 2016 comprising 133 items, the taxing officer noted that the advocate had sought shs 1,000,000 being instructions fees on the ground that the matter in issue was complex , unique and important to the parties.(see page 4of 8 of the ruling on taxation).

54. After correctly observing that the matter giving rise to the Bill of Costs was filed in 2011 hence the applicable Remuneration Order was the 2009 one and 2014 in part, and after applying Schedule V1(1)(J) on the minimum instructions fees for Judicial /Review proceedings to present or oppose, she held that she had the discretion to increase the amount taking into account a number of factors including:

1. The nature and importance of the cause or matter.

2. The amount or value of the subject matter.

3. The interest of the parties.

4. The general conduct of the parties.

5. The complexity of the issues raised and novel points of law.

6. The time, research and skill expended in the brief.

7. The volume of documents involved.

55. The learned Taxing Officer also considered the decisions in **Premchand Raichand Ltd** (supra) and **Republic vs Minister of Agriculture** (supra) which espouse the above factors set out and upon her careful consideration of the court record in Judicial Review case No. 21/2011, she found as follows:

> ***"The mater was very important to the party and raised pertinent issues, although the matter raised unique issues, for determination, the same was not complex as it was a general application for prerogative order." "Having had (sic) appreciated the unique nature of the case, parties submitted substantially and research conducted was substantial. I am persuaded that the nature of issues sought in court were not simple. I am of considerate view that an amount of kshs 1,000,000 is reasonable amount to award under this head, kshs 2,000,000 is hereby taxed off."***

56. From the onset, I am in agreement with the client/ applicant herein that the taxing officer committed an error of principle in that albeit she considered that the minimum instruction fees chargeable under Schedule VI(1) (J) of the Advocates Remuneration Order was shs 28,000 and despite the fact that the Bill of Costs dated 26th January 2016 under item 1 sought shs 3,000,000/- as being basic instructions fees, the taxing officer commenced on the wrong premises in her observation that the advocate/ respondent herein was seeking for shs 1,000,000/-.(see page 4of 8 of the ruling).

57. The Taxing Officer's ruling and reasons was delivered in typed format and there is no handwritten signed format of the ruling upon which this court can conclude that probably there was a typing error. Having stated that the advocate (applicant then) had sought for kshs 1,000,000 instead of kshs 3,000,000 as per the Bill of costs filed, the taxing officer proceeded to apply the relevant factors and awarded kshs 1,000,000 as reasonable amount, after taxing off kshs 2,000,000.

58. Whereas the ultimate instructions fees was arrived at after taxing off shs 2,000,000 from shs 3,000,000 to arrive at kshs 1,000,000, it is clear that the taxing officer errored in principle in the sense that even after she had made it clear that the matter was not complex as it was a general application for prerogative order, she no doubt lost it out when she contradicted herself by stating that she appreciated he unique nature of the case, and that she was persuaded that the nature of issues sought in court were not simple and therefore found shs 1,000,000 reasonable.

59. In my humble view, the taxing officer in arriving at shs 1,000,000 was not conscious of her earlier intimation that the matter was not complex and if indeed it was not complex, she could not have proceeded to find that it was unique in nature, thereby requiring substantial research.

60. Consequently, I find no justification for increasing the minimum instructions fees from shs 28,000/- to shs 1,000,000 awarded by the taxing officer.

61. As was held in **First American Bank of Kenya vs Sh**ah (supra) case, ***" 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 compelling 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.***

62. This is not to say that the JR matter was an academic exercise as submitted by the client/applicant. In this case, the adversary is the client applicant whereas the party seeking to be compensated for the legal services rendered is the advocate/respondent. I am in agreement that legal counsels deserve to be handsomely remunerated for their legal services and moreso restrain myself from interfering with the judicial discretion of the taxing officer but I do not subscribe to the principle that where the taxing officer commits an error of principle in arriving at the award then the quantum should not be disturbed simply because taxation of bills of costs is not a mathematical exercise but a matter entirely of opinion based on experience. Here, it is not a matter of multiplication alone.

63. In law, justice must not only be done but seen to be done. In this case, justice cannot be seen to be done since the taxing officer mixed up issues while considering factors that would influence her discretionary decision to increase the figure from shs 28,000 minimum basic instructions fees to kshs 1,000,000 in a matter she considered not complex and being a general application for prerogative orders.

64. Furthermore, if there was any uniqueness or novelty issues to be taken into account, the taxing officer was expected to clarify the nature of the uniqueness and novelty. Thus, as was espoused in **Republic vs Ministry of Agriculture & 2 Others exparte Muchiri W' Njuguna & Others** (supra) Ojwang J (as the then was)

> ***"….The taxation of advocate instructions fees is to seek no more than and no less than reasonable compensation for professional work done;***
>
> ***The taxation of advocates instructions fees should avoid any prospect of unjust enrichment, for any particular party or parties;***
>
> ***So far as opposite, comparability should be applied in the assessment of advocate's instructions fees;***
>
> ***Objectivity is to be sought, when applying loose textures criteria in the taxation of costs;***
>
> ***Where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of express or implied recognition and mode of treatment by the trial judge; where responsibility borne by the advocates is to be taken into account, its nature is to be specified;***
>
> ***Where novelty is taken into account, its nature is to be clarified; and where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form."***

65. As I have stated, the nature of the novelty involved was snot clarified by the taxing officer. Neither did she specify the responsibility borne by the advocate, nor the specific elements of the complexity nor the pertinent details of the time spent, research done, skill deployed by counsel, in a summarized

form.

66. It therefore follows that the taxing officer applied loose textures criteria of invoking the established principles in taxation of advocate/client bills of costs without specifying how those principles were applicable in the circumstances of the case before her. In addition, she did not make any comparability of how similar applications were treated in assessment of advocates instructions fees.

67. Consequently, it cannot be said that the taxing officer applied any objective test in assessing the advocates instructions fees at shs 1,000,000 an increase from minimum fee of shs 28,000/.

68. It is on that account that I would not hesitate to interfere with the decisions of the taxing officer by setting aside the award of shs 1,000,000 instructions fees, because the taxing officer was not properly guided when she conducted the taxation.

69. I find that her exercise of discretion was not conscientiously conceived and that no rational criteria was used in arriving at the basic instructions fees of shs 1,000,000.

70. Iam further in agreement with Ojwang J in **Republic vs Ministry of Agriculture & 2 others** (supra) case, *"**public law claims such as those in Judicial Review, in constitutional applications, in public electoral matters are in a class of their own and the instructions fees allowable in respect of them should not, in principle, be extrapolated from the practices obtaining in the private law domain which may involve business claims and profit calculations."***

71. As was considered in **Nyangito & Company Advocates v Doinyo Lessos Creameries Ltd [2014] e KLR**, citing the **First American Bank of Kenya** case(supra), the taxing officer in this case set out the basic fee of shs 28,000 before venturing to consider whether to increase or reduce it but she did not support her increase to shs 1,000,000 with reasons.

72. In **Opa Pharmacy Ltd vs Howse & Mc George Ltd Kampala HCMA 13/70 [1972] EA 233** it was stated:

> ***"Whereas the taxing officer is given discretion of taking into account other fees and allowance 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 instructions fees, the taxing officer in this case gave no reason whatsoever for doubling the instructions fees. 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."***

73. In this case, the taxing officer had the power to increase or decrease the basic instructions fees as she did but she erred in principle in failing to clarify the reasons that guided her findings that the matter was **"not complex"** yet concluded that it was **"not simple."**

74. In **Danson Mutuku Muema vs Julius Muthoka Muema & Others Machakos HCCA 6/91** cited in **Republic vs Ministry of Agriculture & Others** (supra) Mwera J (as he then was) held:

> ***" 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."***

75. The court in the above case also 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 allowed.

76. In this case, the value of the subject matter was not a relevant factor as none was disclosed in the pleadings on item 1 of the Bill of costs. However, the taxing officer increased the basic instructions from a minimum of shs 28,000/- by 35.714 times to shs 1,000,000 without justifying why the advocate deserved the 35.714 times the basic instructions fees, having found that the matter was not complex.

77. In **Butt & Another Vs Siguna t/a Sifuna & Company Advocate (supra) [2009] KLR 427** the Court of Appeal appreciated that the basic instructions fees was kshs 9,000 in winding up Petition but awarded shs 150,000 in respect of instructions fees which was 17 times the basic instructions fees.

78. In the instant case, as stated earlier, had the taxing officer exercised her discretion based on the espoused principles set out herein, including making comparisons with other awards in similar cases before arriving at the decision that she did, this court would have no business interfering with that exercise of judicial discretion. However, I am satisfied that the decision by the taxing officer was grounded on an error of principle and as a result she awarded an instructions fees that was manifestly excessive as to justify interference.

79. On item No. 2 which is the getting up fees, the taxing officer allowed ? of the 1,000,000 instruction fees awarded thus shs 333,333. The client asserts that this fee is not awarded in matters which are determined by way of affidavits and where there was no preparation of witnesses and witness statements written for the trial and it relied in **Ramesh Naran Patel vs Attorney General[2012] e KLR** where it was held inter alia that the item on getting up fees contemplates involvement by counsel in the preparation of witnesses, witness statements and determination of the matter by viva voce evidence and relying on **Republic vs NEMA Tribunal (NET),(supra)** that on a matter of Judicial Review, getting up fees would not be allowed as evidence was contained only in the affidavits. A similar holding was in **Mits Electrical Company v NIC Bank Ltd (supra).**

80. On the part of the advocate/respondent, it was contended that contrary to the above assertions and respective holdings, the case of **Nguruman vs Kenya Civil Aviation Authority& 3 Others[2014] e KLR** is relevant and so is the decision in **Kenyatta University vs The Senate Students Disciplinary Committee (KU) & Another (supra)** and that getting up fees was awardable under Schedule V1 paragraph 2 of the Advocates Remuneration Order.

81. Schedule VI paragraph 2 of the Advocates Remuneration Order stipulates that:

> ***" 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 instructions fee and shall be not less than one third of the instruction fees allowed on taxation***.

82. From the decisions that were cited by both parties which I have carefully considered, it is clear that there are two different views and schools of thought taken by the High Court on whether or not getting up fee is changeable in addition to instructions fees in judicial review proceedings.

83. One school of thought as propounded by the client/applicant is of the view that Judicial Review proceedings do not involve preparing a case for trial because it is determined on the basis of affidavit evidence only . on the other hand, the other school of thought propounded by the advocate/ respondent firmly believes in the proposition that Judicial Review proceedings are like all other proceedings commenced in the manner prescribed in law and therefore preparation for trial does not have to involve recording of witness statements and viva voce evidence owing to their special nature hence getting up fees is awardable.

84. What is at play here in my humble view, is interpretation of Schedule VI paragraph 2 of the Advocates Remuneration Order. In **Lall v Jeypee Investments Ltd [1972] 1 EA 512 page 516,** Madan

J (as he then was) held:

> ***" Each statute has to be interpreted on the basis of its own language for, as Viscount Simmonds Said in Attorney General v Prince Ernest Augustus of Havorer [1957] A.C. 436 at page 461 Wordes derive their colour and content from their context, secondly, the object of the legislation is a paramount consideration."***

85. In other words, words in any statutory instrument or provision speak for themselves and unless the statute is ambiguous or unclear or capable of two or more different kinds of interpretation it ought not to be given any other interpretation in order to achieve the intention of the legislature.

86. Schedule V1 paragraph 2 of the Advocates Remuneration Order is clear that no fees is chargeable for getting up and preparing for trial until the case is confirmed for hearing and in case where the case is not heard, the taxing officer must be satisfied that the case has been prepared for trial.

87. I have examined the impugned taxed bill of costs which is very detailed. There are several items in the said bill of costs which were not objected to, and which refer to attendances in court before Musinga J for hearing and for which the taxing officer allowed shs 2100 on each of those occasions such as on 7th February 2011, 14th February 2011, 22nd February 2011, 24th March 2011 and 30th January 2013. All those items as allowed after taxation refer to hearings.

88. The respondent in the main or substantive motion denied liability as shown by replying affidavits filed on its behalf and for which perusal fee was charged by the advocate and allowed by the taxing officer. The parties advocates also filed opposing submissions which they relied on in their oral highlights before Honourable Odunga J and items on attendances for hearing were allowed without resistance from the client/applicant herein.

89. In my humble view, the Judicial Review matter had to be reached for trial as there was no concession on the part of the respondent that it was not going to oppose the Judicial Review application, and therefore the replying affidavits in response formed the defence for the respondent against the pleadings filed by the exparte applicant and argued by its counsel by way of submissions. It is not every case that must be determined by way of viva voce evidence.

90. Judicial Review proceedings are different from the normal civil suits or even originating summons. In judicial review matters, pleadings are in the form of an application supported by grounds contained in the statutory statement and accompanied by a verifying affidavit and the responses or defences are signified by replying affidavits or grounds of opposition or even a preliminary objection.

91. In **Republic vs The Minister for Agriculture exparte W'Njuguna** (supra) Ojwang J (as he then was) was dealing with taxation of advocate/client bill of costs reference before him and he stated that :

> ***" I will, therefore strike a clean distinction between the public purpose of the main proceedings (Judicial Review) and the profit making activities of the tea production sector. And on that basis I will now hold that the taxing officer would have been wrong in law to incorporate profit levels of the tea production sector as an element in her taxation of costs in a Judicial Review matter."***

92. The same Ojwang J in **Shamshudin Khosla & Others v Kenya Revenue Authority [2011] e KLR** held, citing with approval **Haider bin Mohamed el Mandry & 4 Others v Khadijah Binti Ali Bin Salem alias Bimkubwa [1956] EA CA 313 (CA) Briggs, JA page 316** stated inter alia:

> ***" From the foregoing authority, I would draw the inference that getting up fees in ordinary litigation, particularly overlaps with instructions fees. Whereas instructions fees represent the formal commitment of the advocate to a new client who thereafter give sufficient instructions, in a process of hearing and receiving by the advocate, getting up fees relate to the first step and (possibly, later, equally significant steps) which the advocate takes,***

in preparing the pleadings and other vital process documents for lodgment and service."

"……it is obvious that after counsel took instructions from the applicant /respondent/client, counsel moved on to the next page of formulating, lodging and serving the cause papers, so in this regard there was an element of getting up fees on the basis of very substantial monetary considerations, in a judicial review cause. The same issue arose in Republic vs Minister for Agriculture, exparte W'Njuguna & Others[2006] e KLR and this court made a statement of law which , in my opinion, remains relevant today:

" Thus, in a direct manner, the proceedings sought only the public law remedy of judicial review- for the purpose of ensuring the Minister's compliance with the governing law as enacted by Parliament .

93. Only very remotely could the proceedings have contemplated the cause of profit….. which is not to be regarded as the object of the public law remedy of judicial review…." …."on the basis of the foregoing precedents, I must come to the conclusion that the applicant/respondent's position, that the applicant's application against the respondent was complex in nature and of utmost importance and of high interest to both parties, as the value of the subject matter is approximately one billion shillings is not, for the main part, to be sustained."

94. What the above cited cases speak to is that getting up fees is applicable in judicial review proceedings like any other proceedings and is also hinged on the instructions fees but **that it should not be** ***based on very substantial monetary considerations.***

95. The learned judge in the above cited **Shamshidin Khosla** case allowed getting up fees but remitted the file to the taxing officer with specific instructions to reflect the reasoning of the court in a rectified set of taxation by ordering as follows:

a. Item No. 1 (instructions fees) of the bill of costs shall be scaled down by a figure of ?.

b. Item No 15(getting up fees) of the bill of costs shall be scaled down to stand at the figure of one quarter of the amount that shall be taxed in item No. 1.

c. The file was remitted back to the same taxing officer for mention and for directions before effecting the taxation adjustments.

96. From the above reasoned position, it is clear that judicial review proceedings attract getting up fees which must be related to the instructions fees, where there was preparation for trial of the matter which was defended.

97. In this case, I have no hesitation in finding that the Judicial Review proceedings were adequately prepared for hearing as is expected of an advocate, and that the proceedings were defended by the respondent at a hearing by way of written and oral submissions.

98. Accordingly, Iam persuaded that there is nothing in the Advocates Remuneration Order that disentitles an advocate who has represented his client in a judicial review matter and conducted the hearing in a matter which was defended from being awarded a getting up fee. I also find that the decision in **Nguruman Ltd vs Kenya Civil Aviation Authority & 3 Others [2014] e KLR** where the taxing master ruled that the fees for getting up was properly charged because the case was heard, and whether the hearing was by way of affidavits only or by viva voce evidence was immaterial, which case on a reference was upheld by Lenaola J, was a sound decision.

99. Accordingly, the objection to the taxing officer's decision to award getting up fees to the advocate is found to have no merit and the same is dismissed.

100. That being the case, the getting up fees was justified save that the figure given of shs 333,333 is

hereby set aside as it is affected by the setting aside of the instructions fees.

101. On the challenge to the VAT on disbursements, as awarded by the taxing officer, it was claimed that the taxing master erred in law in allowing VAT on disbursements contrary to the VAT Act which stipulates at Section 9(3) thereof that:

> ***" In calculating the value of any services for the purposes of Subsection (1) there shall be included any incidental costs incurred by the supplier of the services in the course of making his supply to his client provided that, if the commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value.***

102. Here, again, there are two schools of thought. According to the client, VAT is not an authorized charge and expenses under Rule 16 of the Advocates Remuneration Order and that albeit the issue was not raised at the time of taxation, estoppels does not operate against the law which stipulates that VAT is not chargeable on disbursements.

103. On the part of the advocate and relying on **Ufundi Co-Operative Sacco vs Njeri Onyango & Company** (supra) it was contended that where a party who attended the taxation does not raise issue before the taxing officer to enable canvassing and a decision made thereon, he is estopped from raising it before the judge in a reference. The case of **Kenneth Kiplagat t/a Kiplagat & Associates vs National Housing Corporation(supra)** was heavily relied on.

104. Further, that VAT is a statutory requirement that legal services are chargeable. Citing **A.N. Kimani & Company Advocates vs Kenindia Assurance Company Ltd (supra**) it was contended that VAT is applicable on the entire award and not only on the instructions fees.

105. My view is that indeed, estoppel does not operate against the law . Equally, I am in agreement with the advocate that VAT is a statutory charge on **legal services** rendered to the client.

106. However, I do not agree that VAT is chargeable on the entire award. Neither do I agree that VAT is chargeable only on instructions fees.

107. VAT is a tax levy on advocates in respect of the professional fees they charge for legal services they render to their clients. It is a charge payable to the Kenya Revenue Authority and the advocate is only but a statutory agent for KRA. The levy once collected by the advocate for the legal services rendered is then remitted on a monthly basis to KRA.

108. Disbursements not being fees but refund of money spent in the preparation and actual representation of the client should not be subjected to VAT(see **Makumbi & Another v Sale Electric (U) Ltd [190-1994] EA 306 (SC).**

109. I totally agree with the above legal position and add that the taxing officer was expected to allow VAT to all the professional fees which included instructions fees and all other items except those items where actual money like court filing fees, photocopies etc were expended by the advocate for which he was seeking in his bill of costs, a reimbursement.

110 It is for that reason that the Rules of taxation demand that disbursements be shown separately at the bottom of the bill of costs and there must be presentation of receipts or proof at the time of taxation before the award is made by the taxing officer.

111. In this case, the taxing officer at pages 7 and 8 of the ruling and reasons for taxation clearly stated that items 120-133 were disbursements and correctly held that disbursements must be proved by way of receipts. She confirmed items 122, 124,126,129,131 and 133 as receipts were in the file which she allowed and disallowed the rest of the disbursements for want of proof. she then taxed total disbursements to be kshs 16,335 which she added to shs 2,124,980 plus 16% VAT being shs 342,610

to get a grant total of shs 2,483,925/-.

112. The item on VAT is not objected to by the client. What the client has objected to and which I entirely agree is the wrongly application of VAT on disbursements which were a meager sh 16,335.

113. Having found that disbursement is not a professional fee where VAT is chargeable but an expenditure refundable to the advocate by the client, I find that the Taxing Master erred in principle in charging VAT on the whole award inclusive of disbursements and I would proceed to set it aside on account that albeit the client did not raise the issue at the point of taxation, it is a serious point of law which can be raised at any time as there is no estoppel against the law and as this court is deemed to know the law as enacted and established. In the case of **MCFOY v UNITED AFRICA CO. LTD, 1961] 3 ALL E R 1169 AT 1172**, Lord Denning observed that anything that is said to be a nullity is void *ab initio* and is as though it never existed. And that nothing can be done subsequently based on what is a nullity because one cannot put something on nothing and expect it to stay there. It will collapse. In this case, as section 9(3) of the VAT Act is clear on what is vatable, it would be illegal to allow a charge of VAT on items such as disbursements which are reimbursable expenditure.

114. In the end, therefore, i find that the item on fees was awarded in error of principle. I further find that getting up fee is awardable because Judicial Review proceedings in question were defended and involved a trial but that the item is affected by Item No.1 on instructions fees . I further find that the VAT is not chargeable on disbursements.

115. Although the client/applicant urged the court to retax the bill of costs on the items stated , both parties not having agreed that any retaxations be done by this court, I hereby allow the reference to the extend stated above and make the following final orders and directions:

a. That the ruling and reasons for taxation dated 28th January 2016 by E.W. Mburu (Mrs) (DR) be and is hereby set aside on items 1 and 2.

b. That the VAT charged on disbursements is hereby set aside.

c. That the Advocates Bill of Costs dated 28th January 2016 is hereby remitted back to the taxing officer Hon. E.W. Mburu (Mrs), Deputy Registrar for re-taxation of items 1 and 2 (instructions fees and getting up fees in line with the directions and guidelines set out in this ruling, adjusting the two items as appropriate.

d. VAT to apply to all other items except disbursements.

e. I order that each party shall bear their own costs of this reference.

f. I have compared this file with JR Misc No 9 of 2016. I find that the issues raised herein are similar to the issues raised in the other file. As the parties are in agreement that this matter is related to JR Miscellaneous No 9 of 2016 which was also taxed by the same taxing officer Mrs E.W Mburu, under the same circumstances save for the figures involved and some of the parties, and as the said parties did agree that this court adopts the ruling in this matter to be the ruling in JR Misc 9 of 2016, I hereby order that this ruling shall apply, with necessary modifications, to JR Misc App No. 9 OF 2016, as the principles adopted in the said JR Misc 9 of 2016 by the taxing officer are the same as those adopted in this file during taxation.

Dated, signed and delivered in open court at Nairobi this 18th day of October 2017.

R.E. ABURILI

JUDGE