



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 366 OF 2015

NATIONAL OIL CORPORATION LIMITED.....APPLICANT

AND

REAL ENERGY LIMITED.....1ST RESPONDENT

THE BUSINESS PREMISES RENT TRIBUNAL.....2ND RESPONDENT

(Being a reference from the decisions of the Taxing Officer, Hon. R Aganyo DR on 26th January, 2016)

RULING

1. This ruling arises from a taxation by **Hon. R Aganyo, DR** on 26th January, 2016.
2. This reference was instituted by way of Chamber Summons dated 29th January, 2016 in which the applicant seeks the following orders:
 - a. **That this Honourable Court be pleased to certify this matter urgent and the same be heard ex parte in the first instance.**
 - b. **That pending the hearing and determination of this application, this Honourable Court be pleased to order that the execution of the Certificate of Costs arising from the Deputy Registrar's Ruling on taxation dated 26th January 2016 be stayed.**
 - c. **That the decision of the Learned Deputy Registrar dated 26th January 2016 with respect to Item 1 on Instruction fees on the 1st Respondent's Party and Party Bill of Costs dated 24th November 2015 be set aside and taxed afresh by this Honourable Court.**
 - d. **That the costs of this application be provided.**
3. The application was supported by an affidavit sworn by **Pauline Kimotho**, the applicant's Company Secretary.
4. According to the applicant on 22nd October 2015, the Applicant filed a Chamber Summons application under Certificate of Urgency seeking the following orders:
 - a. ***That this Honourable Court grants leave to the Applicant to file an application for Judicial review for orders of Certiorari to quash the Order of the 2nd Respondent made on 19th October***

2015 by which order the 2nd Respondent granted an injunction against the Applicant with regard to possession of property known as LR. No. 209/6776, Ngong Road; and

- b. **An order of prohibition restraining the 2nd Respondent from further proceeding with hearing of Nairobi BPRT Case No. 720 of 2015.**
5. On 27th October 2015, the 1st Respondent filed a Replying Affidavit and on the same day, the parties made oral submissions before the trial judge. The only question for determination was whether the Court could grant leave to the Applicant to institute the judicial review proceedings. On 30th October 2015, this Court delivered its ruling disallowing the application for leave on grounds that the application was premature as the Respondent had not exhausted the available remedies before the 2nd Respondent and awarded the Respondents one third of the costs as the substantive application was not filed. Subsequently, the 1st Respondent filed a Party and Party Bill of costs dated 24th November 2015 claiming the sum of Kshs. 6,061,845.00 as against the Applicant. The Bill of Costs was dispensed with by way of written submissions and the Deputy Registrar delivered a ruling on 26th January 2016 taxing the said Bill at Kshs. 4,037,445.00.
6. Based on advice from Counsel, the applicant averred that the Learned Deputy Registrar in assessing the instructions fees at Kshs. 4,000,000.00, completely erred in law and in fact for the following reasons:
 - a. The Deputy Registrar failed to take into account the scale of fees prescribed under the Schedule VI (j) of the **Advocates (Remuneration) Order 2014** (hereinafter referred to as “the Order”) in an application for prerogative orders being a minimum of at Kshs. 100,000.00. In awarding an amount higher than the minimum, she failed to give any justification as prescribed under the said schedule.
 - b. The Deputy Registrar failed to consider that the Applicant’s application (*JR Misc App. No. 366 of 2015*) was dispensed with at an interlocutory stage as leave to file the substantive application was not granted.
 - c. The Deputy Registrar failed to consider that the application involved a simple and ordinary question of law as to whether the Court could grant leave or not and no complex or novel issues of law were determined as parties were not even required to submit on the merits of the matter. In any event, the parties did not file any written arguments to justify any research expended in the matter. The application was argued orally in court.
 - d. The Deputy Registrar ought to have considered that the application was determined in a span of seven (7) days having been filed on 23rd October 2015 and a ruling made on 30th October, 2015 and as such the fees sought should be commensurate to the work done.
 - e. The Deputy Registrar’s finding was made under the misapprehension of fact that there was more than one counsel representing the 1st Respondent as erroneously submitted by the 1st Respondent. It is however evident from the Court record that Respondent was represented by the firm of Hassan N. Lakicha & Co Advocates and no other firm is on record. In any event no Certificate for more than one counsel was issued by the trial court.
7. In the applicant’s view, the Deputy Registrar totally disregarded the comparative authorities presented by the Applicant demonstrating what would amount to a fair and reasonable compensation in view of the circumstance of this particular case. To it, in view of the work done by the 1st Respondent, the nature of the application subject for determination and the stage at which it was dispensed with, it is evident that the instructions fees of Kshs. 4,000,000.00 is grossly exaggerated and is not reflective of the value of the work done by the 1st Respondent.
8. It was contended that the Learned Deputy Registrar made serious errors in principle in taxing the said Bill of Costs and thereby arrived at the wrong decision. In the disclosed circumstances, it was averred that the said taxation was irregular and the decision of the Learned Deputy Registrar ought to be set aside and the Bill of Costs dated 25th November 2015 taxed afresh.
9. The applicant asserted that the taxed costs herein relate to a claim for a colossal amount of money against a State Corporation and as such this is a matter of substantial general public interest as the amounts claimed relate to utilization of public resources.

1st Respondent's Case

5. In response to the application, the 1st Respondent filed the following grounds of opposition:
 - a. **That the Application is incompetent, misconceived and fatally defective.**
 - b. **That the Application is bad in law, incompetent and procedurally improper before the court.**
 - c. **That the Plaintiff's Application is therefore incurably defective and ought to be dismissed.**
6. Apart from that the said Respondent filed a replying affidavit in which it was deposed that the instruction fees taking into consideration nature of the case is not grossly exaggerated as alleged or at all and is a true reflection of the value and nature of the work involved to warrant the taxing master arrive at instruction fees of Four Million shillings (Kshs. 4,000,000/=).
7. In its view, the taxing master did not make any error in taxing the Bill of cost and the decision arrived thereat is regular and ought not to be set aside.
8. To the 1st Respondent, there is no public interest involved in this matter and the 1st respondent is entitled to enjoy the fruits of its judgment
9. It was averred that the applicants' only avenue is to challenge the taxed by way of a reference as provided under paragraph 11(4) of the Advocates (Remuneration) Order. Having failed to do so the Applicants' stay of execution of taxed costs should be dismissed.

Determination

10. I have considered the issues raised herein.
11. It was contended that the application was incompetent for failure to adhere to paragraph 11(4) of the *Advocates (Remuneration) Order*. The said paragraph provides that:
 1. ***Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he object.***
 2. ***The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.***
12. With respect to the need to ask for reasons before instituting a reference, this Court expressed itself in Evans Thiga Gaturu Advocate vs. Kenya Commercial Bank Limited [2012] eKLR as follows:

“That brings us to the question of what happens, as the client alleges in this case, where no reasons are given. First, and foremost, the above provisions presuppose that in delivering their decisions on taxation, the taxing officers only pronounce the results of the taxation without the reasons behind them. In most cases, the court is aware that, taxing officers, in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons, thereafter. In such circumstances it would be foolhardy to expect the taxing officer to redraft another “ruling” containing the reasons. In my view, this is another provision that requires to be looked into afresh. I do not see the reason why the taxing officer cannot be at the time of making his decision to do so together with the reasons therefor.”
13. In my view there is no magic in requiring the Taxing Officer to furnish reasons before making a

reference. Where reasons are contained in the decision a party ought not to seek the same simply because it is fashionable to do so. Accordingly, nothing turns on the issue that the applicant did not seek the reasons for the decision before filing the reference.

14. 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.**
15. 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.
16. Further guidance if necessary may be obtained in the case of **Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92** 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.

17. In **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna & 6 Others [2006] eKLR**, 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...”

18. 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.

19. In my view the complexity of a case is not necessarily determined by the value of the subject matter in terms of the amount of money involved. It may well be that the amount of money involved may be high but the issue may be a very simple legal issue. However, it cannot be gainsaid that where the amount is high the issue is likely to be very important for the parties.
20. As was held by **Ojwang, J** (as he then was) in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra):

“The taxing officer was 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...Although the taxing officer referred to the complexity of issues in judicial review proceedings, the judgement has not shown anything in the application to have risen at all above the work a day chores of legal practitioners. It follows that the responsibility entrusted to counsel in the proceedings was quite ordinary and called for nothing but normal diligence such as must attend the work of a professional in any field...There was nothing novel in the proceedings on such a level as would justify any special allowance in costs. There is nothing to indicate any time-consuming, research-involving or skill engaging activities as to justify an enhanced award of instruction fees. There is also no great volume of crucial documents which counsel for the judicial review applicants had to refer to, to prosecute their cause successfully. Further the matter was not urgent, for urgency would have mainly attached to prayers for orders of prohibition...The taxing officer was not properly guided when she conducted the taxation. Her exercise of discretion was done perfunctorily and as a mere formality. It is necessary to specify clearly and candidly how she had exercised her discretion since discretion as an aspect of judicial decision-making is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out 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...Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer should avoid the possibility of unjust enrichment for any party and ought to refuse any claim that tends to be usurious; so far as possible the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of the matter to the parties, or importance of the matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the court and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel...Private law claims do not fall in the same class as public law claims such as those in judicial review, in constitutional application, in public electoral matters. Such matters are in a class of their own and the instruction 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.” [Underlining mine]

21. In this case, on 23rd October, 2015, **Mr Munyu** for the applicant appeared before **Korir, J** for leave to commence judicial review proceedings. The Judge, as he was entitled to, directed that the application be served for inter partes hearing. The said inter partes hearing took place before me on 27th October, 2015 when **Mr Munyu** appeared for the applicant while **Mr Ndege** appeared for the 1st Respondent together with **Mr Cohen**. After hearing counsel for the parties, I reserved the delivery of my ruling to 30th October, 2015 when I struck out the application with one third of the costs to the Respondents. On the basis that judicial review application proper was yet to be filed.

The basis for striking out the application was not that the application was not merited but because the applicant had not exhausted the remedies available to it hence the application was misconceived.

22. It is therefore clear that these proceedings were terminated before leave was granted. Can it therefore be said that by the time of the said termination judicial review proceedings had been commenced? Judicial Review, are mandatorily required as a matter of law to be commenced by way of leave. Accordingly Order 53, rule 1(1) of the **Civil Procedure Rules** provides:

No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

23. The word “leave” is defined by **Black’s Law Dictionary**, 9th Edn. at page 974 as “*Judicial permission to follow a non-routine procedure*”. “Leave” is clearly therefore a permission to take a particular judicial procedure and in this case it is permission to commence judicial review proceedings.
24. It is therefore clear that an application for judicial review is not made until after leave is granted. If the grant of leave was to be construed as an application for judicial review, it would in my view constitute an absurdity. If the Rules Committee was of the view that an application for leave constitute the suit as is contended by the objector, the said Committee would in my view have used the phrase such as “***an application for an order of mandamus, prohibition or certiorari shall be commenced by leave***” or similar provision.
25. The issue is, however not moot. The Court of Appeal in **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** held that proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. Similarly in **Matibavs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** it was held by a three Judge bench of this Court that it is consequent upon leave being granted that an application is brought. In **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996**, this Court held that application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.
26. Therefore both on the letter of the law and on authorities, judicial review proceedings are commenced after leave therefor is granted. Such application for leave is usually heard and disposed of ex parte unless directed otherwise by the Court.
27. In the decision under challenge, the only item which the applicant is aggrieved with is instructions fees. The learned Taxing Officer in the exercise of her undoubted discretion, taxed the said item in the sum of Kshs 4,000,000.00 down from the Kshs 6,000,000.00 that was claimed by the 1st Respondent. In her decision the learned Taxing Officer expressed herself with respect of the said item *inter alia* as follows:

“I have perused the relevant files touching in (sic) this mater. I have also considered the documentations related to this matter, the No. of Counsels (sic) in the matter, the nature of the claim and the prayers sought. In any view the Kshs 100,000/- is too low as suggested by the Respondent after looking at the application. Also, the sum of Kshs 6,000,000/= is value to (sic) high as sought by the applicant. In the exercise of my discretion after considering all above, I award Kshs 4,000,000/= which I find to be fair and reasonable in the conduct of this suit.”

28. In this case the basic instructions fees payable in respect of item 1 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. In this case the learned Taxing Officer increased the instructions fees to Kshs 4,000,000.00 which was 40 times the basic fees in an application proper. 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."

29. 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.
30. In this matter the learned taxing officer did not set out the basic fees before proceeding to increase the same. The learned Taxing Officer alluded to the number of counsel involved in the matter. I presume this was with respect to the submissions by the 1st respondent that the number of law firms representing the 1st Respondent was three. In my view the principles guiding taxation are trite. The mere fact that a party retains several law firms in a matter which is otherwise mundane does not necessarily merit an award of colossal amount of fees. As stated herein above the Court is required to 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 and then decide what fee this hypothetical character would be content to take on the brief.
31. From the submissions filed on behalf of the 1st Respondent, during taxation, it is clear that the firm of advocates which received instructions to defend the cause was **M/s Hassan N. Lakicha & Co. Advocates**. There was no mention anywhere that three firms were instructed in the matter. In any case there is a provision for costs of more than one advocate. Paragraph 59(1) of the **Advocates (Remuneration) Order** provides that:
- The costs of more than one advocate may be allowed on the basis hereinafter provided in causes or matters in which the judge at the trial or on delivery of judgement shall have certified under his hand that more than one advocate was reasonable and proper having regard, in the case of a plaintiff, to the amount, recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case.*
32. In this case, it was not sought and the Court did not certify that fee for more than one advocate was warranted. Accordingly, the issue of more than one counsel for the 1st Respondent was immaterial and ought not to have been a consideration.
33. In striking out the application the Court did not refer to any novel issues in the matter. That an applicant for judicial review has not exhausted the available remedies cannot by any stretch of imagination be termed as novel. Authorities are bound on the issue and a cursory perusal of the provisions of the **Fair Administrative Action Act, 2015** would place any keen advocate on notice. It does not require a rocket scientist to object to an application for leave on the ground that alternative remedies have not been exhausted.
34. Having considered the material before me, I cannot find any justification whatsoever in the increase of the basic instructions fees 40 times in an application that did not go past the leave stage. In absence of material upon which the learned Taxing Officer exercised her discretion, this Court must interfere with the said exercise of discretion.

35. In the premises, I allow this reference set aside the Taxing Officer's decision awarding Kshs 4,000,000.00 in respect of the instructions fees and direct that the matter be placed before any other Taxing Officer other than **R Aganyo, DR** for fresh taxation of that item pursuant to the directions in this ruling.

36. As the taxation is to start de novo, each party will bear own costs of this reference.

Dated at Nairobi this 23rd day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Akhaabi for the Applicant

Mr Mohamed for Mr Lakicha for the 1st Respondent

Cc Mutisya