



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**PETITION NO. 8 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 2(1),3 (1),10 (1),(2),a,b,&c,27 & 73 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF ARTICLE 20 (1), (2), (3) a & b,(4) a & b ,ARTICLE 21 (1),22 (1) , (2) & (3) a,b,c,d & e OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENshrINED UNDER ARTICLE 27,28,32,40,42,43,47 AND 70 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL AND CO-ORDINATION ACT,1999**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS,2003**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (JURISDICTION, PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE RULES 2006 AS READ WITH CLAUSE 19 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**TRANSITIONAL CLAUSES AND CONSEQUENTIAL PROVISIONS OF THE SCHEDULE TO THE CONSTITUTION**

**BETWEEN**

**BENSON AMBUTI ADEGA.....1<sup>ST</sup> PETITIONER**

**ERICK OCHIENG .....2<sup>ND</sup> PETITIONER**

**BETHER ATIENO OPIYO.....3<sup>RD</sup> PETITIONER**

**-VERSUS-**

**KIBOS SUGAR AND ALLIED INDUSTRIES LTD.....1<sup>ST</sup> RESPONDENT**

**KENYA POWER LIMITED.....2<sup>ND</sup> RESPONDENT**

**KIBOS DISTILLERS LIMITED.....3<sup>RD</sup> RESPONDENT**

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY...4<sup>TH</sup> RESPONDENT/APPLICANT

COUNTY GOVERNMENT OF KISUMU.....5<sup>TH</sup> RESPONDENT

AND

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS.....INTERESTED PARTY

## RULING

### INTRODUCTION

National Environment Management Authority (NEMA), the 4<sup>th</sup> Respondent herein filed an Application dated the 25<sup>th</sup> November 2021, under Order 40 of the Civil Procedure Rules and paragraph 11 (2) (4) of the Advocates Remuneration Order, 2009 seeking for orders that there be a stay of execution of the taxing officer's decisions delivered simultaneously on 4<sup>th</sup> November 2021 touching on the 3 separate bills of costs dated 19<sup>th</sup> April 2021 (3<sup>rd</sup> Respondent's), 3<sup>rd</sup> June 2021 (5<sup>th</sup> Respondent's) and 14<sup>th</sup> April 2021 (Interested Party's), pending the hearing and determination of this Application.

That there be stay of execution of the Taxing Officer's decisions delivered simultaneously on 4<sup>th</sup> November 2021 touching on the 3 separate bills of costs dated 19<sup>th</sup> April 2021 (3<sup>rd</sup> Respondent's), 3<sup>rd</sup> June 2021 (5<sup>th</sup> Respondent's) and 14<sup>th</sup> April 2021 (Interested Party's), pending the hearing and determination of the reference to the decision.

That the reference filed herein, be allowed on the terms that the decisions of the Taxing Master dated 4<sup>th</sup> November 2021 on items 1 and 2 respectively in each of the 3 separate bills of costs dated 19<sup>th</sup> April 2021 (3<sup>rd</sup> Respondent's), 3<sup>rd</sup> June 2021 (5<sup>th</sup> Respondent's) and 14<sup>th</sup> April 2021 (Interested Party's), are manifestly excessive and be set aside. That costs to be provided for.

The Application was based on grounds that the 3<sup>rd</sup>, 5<sup>th</sup> Respondents and the Interested Party herein succeeded in the subject Petition and consequently lodged separate party and party Bills of Costs dated 19<sup>th</sup> April 2021, 3<sup>rd</sup> June 2021 and 14<sup>th</sup> April 2021 respectively taxed in the sum of Kshs. 12,872,854/=. That the Applicant enjoys informal stay orders that will expire on 3<sup>rd</sup> December 2021 a period that may expire before this reference is heard and determined.

That without protection of stay orders, the Applicant will be exposed to execution proceedings that will expose its moveable properties to risk and equally render this reference nugatory. That the Applicant is a public institution/state agency that does not enjoy the immunity from execution afforded to the government by the Government Proceedings Act and has been a soft target for execution from decree holders.

It is stated that the Applicant is not a flight risk and thus no prejudice is possibly imminent on any party. That the three Bills of Costs were heard jointly and three separate rulings delivered simultaneously on 4<sup>th</sup> November 2021. It is further stated that the three Rulings /decisions of the Taxing Master were fairly assessed save for Items 1 and 2 being the Instructions Fees and getting up fees respectively which were assessed in a manner that goes contrary to the appropriate scale for constitutional petitions being Schedule 6 (A) (j) of the 2014 Advocates Remuneration Order.

The 4<sup>th</sup> Respondent being aggrieved and in keeping with the Advocates Remuneration Order, requested for reasons for the taxing officer's decisions on 12<sup>th</sup> November 2021 and is desirous of having the said decisions reviewed by way of this reference to a Judge. That the taxation decision award as instruction fees and getting up fees is grossly excessive on each of the 3 decisions.

It is further stated that this Application is timeously and without delay and if the Applicant was to pay the sum awarded which is denied, such sums would require to be factored within its budgeting cycle and not in the middle of a financial year. That it is only fair and just that the 4<sup>th</sup> Respondent's reference be allowed to proceed for hearing and thus need for stay of execution orders.

The Application was supported by the Affidavit of MAMO B. MAMO who barely relied on the grounds of the Application.

The 3<sup>rd</sup> Respondent herein filed a Replying Affidavit to the Application where JOYCE OPONDO deposed and stated that there is no urgency as there is inordinate delay in bringing up this Application from 4<sup>th</sup> November 2021 when the Ruling was delivered or from the date it was notified of the reasons of the Ruling. That a prayer for stay of execution of costs cannot be granted in law and the Applicant has not demonstrated how grossly excessive is the instruction fees of any particular bill that it can warrant interference by the court downwards instead of upwards as should be the case.

She stated that the Applicant has not offered any security for conditional stay and there is no demonstration from the Applicant that the Taxing Master did not exercise her discretion properly or applied wrong principles according to law on awarding instruction fees which is very favourable to the Applicant unlike the 3<sup>rd</sup> Respondent. That the only interference on the instruction fees is to increase the same in the view of the nature, difficulty and importance of the matter to the parties. The 3<sup>rd</sup> Respondent was in opposition of the Application and prayed for the instruction fees to be increased upwards.

### **4<sup>th</sup> Respondents /Applicant's Submissions**

The 4<sup>th</sup> Respondent filed Submissions in support of the Application where the following issues were raised for determination:

i. Whether the taxing master failed to identify and acknowledge the basic instruction fee.

The 4<sup>th</sup> Respondent relied in the case of **First American Bank of Kenya Ltd v Gulab P. Sha & 2 Others (2002) eKLR** where the court stated that “.....it is within the discretion of the taxing officer to increase or reduce the instruction fee and that the amount of the increase or reduction is discretionary.....”

The 4<sup>th</sup> Respondent relied in **Ratemo Oira & Co. Advocates v Magereza Sacco Society Ltd (2019) eKLR** where it was held as follows:

**“.....A taxing officer’s decision is not exercised judiciously where a relevant consideration has not been taken into account or irrelevant considerations have been taken into account and this would amount to an error of principle”.**

That the Taxing Master appreciated and recognized that Schedule 6A (j) of the Advocates Remuneration Order (2014) relating to Petitions is applicable but failed to apply it for purposes of determining the basic instructions fees. If an increase of the amount was necessary, the Taxing Master should have used the Kshs.100,000/= supplied under the aforementioned paragraph as the basic instruction fee.

That in the case of **Republic vs Ministry of Agriculture & 2 Others Ex parte Muchiri W’njuguna & 6 Others...Ojwang J** stated as follows:

**“The taxation of costs is not 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 low; it will only interfere if it thinks the award so high or low as amount to an injustice to one party or the other.....”**

That as per the Ruling of 4<sup>th</sup> November 2021, Item 1 and 2 was kshs. 3,000,000/= and Kshs. 1,000,000/= respectively. The taxing master therefore committed an error of principle in failing to identify and put forth the correct basic instruction fee of Kshs. 100,000/=.

ii. Whether the correct provision of the Advocates Remuneration Order was used.

It was submitted that taxation of bill of costs arising out of public law matters such as applications for prerogative orders and petitions alleging violation of constitutional rights fall under Schedule VI (1) (j) of the Advocates Remuneration Order. That the taxing master cannot use decisions under private law as a guide for determining matters under public law. It is not available to use the scale for ordinary suits in assessing instruction fees. The 4<sup>th</sup> Respondent relied in the case of **Cannon Assurance Limited v Attorney General & Another (2018) e KLR**.

In the case of **Kenvariri and Associates Advocates v Salama Beach Hotel Limited & 3 Others (2015) eKLR** it was held as follows;

**“It is fairly settled now that taxation of bill of costs arising out of public law matters such as applications for prerogative orders and petitions alleging violation of constitutional rights falls under Schedule VI (1) (j).”**

The 4<sup>th</sup> Respondent therefore submitted that the taxing master made gross errors of principle and if allowed to be carried on, would cripple the operations of the 4<sup>th</sup> Respondent and that the reference should be allowed as prayed for.

#### **Interested Party’s Submissions.**

The Interested Party submitted on a number of issues as discussed below.

a. That the Application dated 25<sup>th</sup> November 2021 is defective.

It was submitted that as per the provisions of paragraph 11 (2) the Application seeking to challenge the decision of the taxing officer should be made by way of chamber summons and relied in the case of **Lalji Bhimji Shangani Builders & Contractors vs City Council of Nairobi (2012) eKLR**. The Interested Party also relied in the case of **OJSC Power Machines Limited, Transcentury Limited and Civicon Limited (Consortium) vs Public Procurement Administrative Review Board, Kisii High Court Misc Application No. 31 of 2016** where Justice Nyamweya dismissed a reference Application that was filed without compliance with the procedure provided for in the law.

b. That the reference application is time barred.

It was submitted that the Ruling of the taxing officer was delivered on 4<sup>th</sup> November 2021 and the application was filed on 25<sup>th</sup> November 2021 which is beyond 14 days as provided under paragraph 11 of the Advocates Remuneration Order. The Interested Party placed reliance in the case of **Muri Mwaniki & Wamiti Advocates v African Banking Corporation Limited (2020) eKLR** and the case of **Wambugu Motende & Co. Advocates v Kajulu Holdings Limited & 5 Others (2014) eKLR** where the Application for reference was dismissed as it was time barred.

The Interested Party submitted that there was no application pending before this court for enlargement of time and no reason has been adduced why the reference was filed outside time and therefore the plication should be dismissed.

c. Whether the reference has got merit.

It was submitted that the application lacks merit and should be dismissed with costs as the amount awarded by the taxing officer on items 1 and 2 was commensurate with the complexity of the matter before the court and that the court should not interfere with the taxing officer's decision unless it is very much clear that there was error of principle as was held in the case of **Joseph Tamata v Mary Nthambi Mbuvi (2021) eKLR**.

That the Applicant raised two issues that the taxing officer assessed the bill of cost contrary to the provisions of Schedule 6 (a) (j) of the Advocates Remuneration Order and that the amount awarded by the deputy registrar is grossly excessive. It was submitted that the bill assessed was in compliance with the provisions of the Advocates Remuneration Order as the taxing officer awarded the basic minimum fee. That in the case of **Thomas James v Nyeri Electricity Undertaking (1961) E.A 492** where the court stated that **"in departing from what is provided for in the scale the taxing officer is not multiplying the figures but places he considers a fair value upon the work and responsibility involved.** The Interested Party also relied in the case of **Kerosi Ondieki & Company Advocates v Narok County Government (2017) eKLR**.

The Interested Party further submitted that on the issues of item 2 in the Bill of Costs that is getting up fees, the law is that it is 1/3 of the instruction fees and therefore it should be allowed as taxed by the taxing officer. That the Applicant has not submitted that the Interested Party was not entitled to the getting up fees and their only issue is that it is grossly excessive and having submitted that the bill was rightly assessed, it is their submission that the reference be dismissed with costs.

The Interested Party also relied in the case of **Seth Ambusini Panyako v Independent Electoral and Boundaries Commission & 2 Others (2020) eKLR**

It was submitted that this matter was very complicated and novel in terms of the issues raised that deals with environmental rights and the constitution. That the matter involves closure of three factories which employs more than two thousand people and loss of revenue Kshs.2 billion. The matter required extensive research and preparations of the pleadings, authorities and submissions and therefore there was no error of principle in the taxing officer's decision and the reference should be dismissed with costs.

### **3<sup>rd</sup> Respondent's Submissions**

The 3<sup>rd</sup> Respondent filed its Submissions on 22<sup>nd</sup> December 2021 where it was submitted that the court's jurisdiction is not properly invoked to warrant the prayers sought as the application is purported to be brought under 40 of the Civil Procedure Rules, 2010. That the Advocates Act is a complete code on its own and the Civil Procedure Rules do not apply unless so granted under the Act. The 3<sup>rd</sup> Respondent relied in the case of **Administrators of the Estate of Simon Mokuia Gichuru v Ameli Inyang & Partners Advocates (2017) eKLR**.

The 3<sup>rd</sup> Respondent further submitted that there is no provision for stay execution for taxed costs as was held in the case of **Lubullelah & Associates Advocates v P & L Investments Limited & Another (2013) eKLR** where the court held as follows:

The Court was referred to the case of **Orbit Chemicals Industries Ltd versus Otieno-Odek & Co. Advocates (2006) eKLR** where the learned sister **Kasango J** stated:

**"It is correct that the Advocates Act does not provide for stay of taxed costs. That being the case this court ought not to grant such a stay. I am however, of the view that the party should immediately raise an objection as provided as under paragraph 11 and also seek reasons for the ruling of the taxation. With such an application before court, the court may be persuaded to invoke its inherent power to grant stay of execution of the taxed costs which prayer will be alongside with the prayers seeking to set-aside the ruling of the taxation. I am of the view that a party cannot invoke the Civil Procedure Act or Rules for indeed the Advocates Act is a complete Act in itself. I am of the view that the preliminary objection raised by the Advocate has merits."**

That by assuming that the instant application is equated to an appeal, the Applicant has not offered security for the taxed costs as required in law nor has the Applicant stated that the 3<sup>rd</sup> Respondent will not be able to refund in the event the reference succeeds or till the bill is taxed in either way and relied in the case of **Lubullelah & Associates Advocates v P & L Investments Limited & Another (2013) eKLR** where the court refused to grant stay of execution in similar grounds.

It was submitted that the Applicant did not annex the bill of costs to her application and failure to annex the bill of costs subject of this reference, the court cannot comprehend the Applicant's application without the bill of costs as was held in the case of **Joseph Tamata v Mary Nthambi Mbuvi (2021) eKLR**. That the Applicant has not demonstrated that there was an error in principle on the part of the taxing master as was held in the case of **First American Bank Ltd v Shah & Another (2002) 1 EA 64** and therefore the application is bad in law as the Applicant has moved court by way of motion other than as provided.

It was further submitted that the instruction fee is begged on the value of the subject matter among other factors to consider and the case of **DK Law Advocates vs Zhong Gang Building Material Co. Limited & Another (2021) eKLR** gave the guidelines on taxing a bill of costs on instructions fees. It is the 3<sup>rd</sup> Respondent's submission that the Taxing Master should have even increased the instruction fees as it is not excessive. That all items are drawn to scale and ought to be taxed as drawn and therefore the reference lacks merit and ought to be dismissed with costs.

### **Analysis and Determination**

This court has carefully looked into the application and the evidence adduced by parties together with the submissions and the following

issues need to be determined:

## 1. Whether the Application is defective

Paragraph 11 of the Advocates Remuneration Order which states as follows:

**“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.**

**(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.”**

**(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**

**(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**

**(5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”**

**Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016]eKLR where the court stated thus:**

**“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.**

**Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, “...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”**

It is this court’s finding that the Applicant ought to have complied with the rules of procedure as required. The Applicant ought to have brought this Application by way of Chamber Summons as provided for under the Advocates Remuneration Order.

## 2. Whether the Application is merited

The Applicant has sought for orders of stay of execution of the taxing officer’s decision delivered simultaneously on 4<sup>th</sup> November 2021 touching on three separate bills of costs dated 19<sup>th</sup> April 2021 for the 3<sup>rd</sup> Respondent, 3<sup>rd</sup> June 2021 for the 5<sup>th</sup> Respondent and 14<sup>th</sup> April 2021 for the Interested Party, pending the hearing and determination of the reference to the decision. The Applicant has stated that without protection orders, it will be exposed to execution proceedings that will expose its moveable properties to risk and render this reference nugatory. It is the Applicant’s case that it is a public institution that does not enjoy immunity from execution afforded to the government by the Government Proceedings Act.

The 3<sup>rd</sup> Respondent in its submissions has stated that there is no provision for stay of execution for taxed costs. This court disagrees with the 3<sup>rd</sup> Respondent as the case of *Labh Singh Harman Singh Ltd V Attorney General & 2 Others [2016] e KLR* it was held as follows: -

**“Jurisdiction to order stay of certificate of taxation of costs**

**.. I am unable to agree with the submission by counsel for the respondent that the Court has no power to order stay in cases of taxation for costs as exists in the Civil Procedure Rules. It is clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. Indeed, section 94 of the Civil Procedure Act provides as a general rule that execution of orders of the court should await the confirmation of the costs by taxation unless the Court grants leave for execution before taxation of costs.**

**9. Section 94 of the Civil Procedure Act is in the following terms:**

**94. Execution of decree of High Court before costs ascertained**

**Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be**

executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

10. Moreover, section 89 of the Civil Procedure Act provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs. Section 89 of the Act is in terms as follows:

**“89. Miscellaneous proceedings**

*The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”*

It follows, in my view, that the provisions of the Civil Procedure Act with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the Court from the taxation of a Bill of Cost by a Taxing Officer of the Court under the Advocates’ Remuneration Order.

**This position accords with the interests of justice that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates’ Remuneration Order, which is the procedure provided for such determination. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.”**

The Applicant has sought for an order that the reference filed be allowed in terms that the decisions of the Taxing Master dated 4<sup>th</sup> November 2021 on Items 1 and 2 respectively in each of the three separate bills of costs dated 19<sup>th</sup> April 2021 (3<sup>rd</sup> Respondent’s), 3<sup>rd</sup> June 2021 (5<sup>th</sup> Respondent’s) and 19<sup>th</sup> April 2021 (Interested Party’s) are manifestly excessive. This court has looked into the Ruling of the Taxing Officer’s decision where it was ordered as follows in terms of Items 1 and 2 of the Bill of costs:

I. Ruling on the Interested Party’s Party and Party Bill of Costs dated 14<sup>th</sup> April 2021 that Item 1 on Instruction Fess shall be Kshs. 3,000,000/= and Item 2 which is 1/3 of the instruction fees shall be Kshs. 1,000,000/=.

II. Ruling on the 3<sup>rd</sup> Respondent’s Party and Party Bill of Costs dated 19<sup>th</sup> April 2021 that Item 1 on Instruction Fess shall be Kshs. 3,000,000/= and Item 2 which is 1/3 of the instruction fees shall be Kshs. 1,000,000/=.

III. Ruling on the 5<sup>th</sup> Respondent’s Party and Party Bill of Costs dated 3<sup>rd</sup> June 2021 that Item 1 on Instruction Fess shall be Kshs. 3,000,000/= and Item 2 which is 1/3 of the instruction fees shall be Kshs. 1,000,000/=.

It is the Applicant’s case that the Taxing Officer committed an error in principle in failing to identify and put forth the correct basic instruction fee of Kshs. 100,000/ or even explain reasons for departure. The 3<sup>rd</sup> Respondent in its Replying Affidavit has stated that the Applicant did not demonstrate how the instruction fees is grossly excessive that it can warrant the interference of court. The Interested Party herein in its submission stated that the Taxing Officer considered all the relevant factors in the mater before arriving at the figures.

The term error of principle was defined in the case of **Kagwimi Kang’ethe & Company Advocates v O-lerai Nurseries Limited [2009] eKLR** as follows;

**“An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles-**

**Kipkorir Titoo & Kiara Advocates –vs- Deposit Protection Fund Board [2005] eKLR**, the Court of Appeal held as follows:-

**“On reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”**

Schedule 6 Paragraph1 (j) of the Advocates Remuneration Order provides as follows:

**1. Instruction fees**

**Subject as hereinafter provided, the fees for instructions shall be as follows-**

....

**(j) Constitutional petitions and prerogative orders**

**To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing officer in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—**

(i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000

(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000

(iii) to present or oppose application for setting aside arbitral award 50,000.

This court has looked into each of the Ruling delivered by the Taxing Officer where the 5<sup>th</sup> Respondent sought for a sum of Kshs. 40,000,000/= and the 5<sup>th</sup> Respondent gave reasons that he defended a petition seeking orders for the closure and discontinuation of the operations of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents factory .That the claim is vehemently defended and taking into account the labour required , the number and length of the papers to be perused , the nature, magnitude, complexity and importance of the matter to the client on terms of the adverse economic, social and political effects of shutting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the client, the country and the general public and if the orders sought are granted will prejudice the client since they will lose the revenue collected from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, occasion job loss to thousands of people within the county and the surrounding areas will lose their on means of livelihood and adversely affect its economic agenda for the county of Kisumu with the pecuniary value of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being approximately Kshs. 2 billion.

In the case of Joreth Limited v Kigano & Associates Advocates [2002] EA 92 the court stated thus;

**“the value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment 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, among other matters, the nature and 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 relevant circumstances.”**

Mereka & Co. Vs. National Bank of Kenya Ltd. – Misc. Application No. 540/2001 Mbaluto, J. said:-

**“In any case the law would appear to be against interference in the Taxing Officer’s decision on quantum unless it is shown that the amounts allowed are so excessive as to constitute an error in principle.”**

Rogan Kamper & Grosvenor [1989] KLR, the Court held that;

**“The taxing master may allow a fee for instructions which he shall consider reasonable; the Judge, on a reference to him, may make a deduction or addition thereto which will render the bill reasonable only if he is of the opinion that a bill of costs as taxed, in all the circumstances, is manifestly excessive or manifestly inadequate.”**

Schedule 6 (1) (j) (ii) of the Advocates Remuneration Order clearly provides for a reasonable sum but not less that Kshs. 100,000/=. Based on this provision and the complexity of the matter, this court finds that the Taxing Officer was fair in awarding Kshs. 3,000,000/= as basic instructions fees and Kshs. 1,000,000/= as getting up fees.

This court therefore finds that the Application dated 25<sup>th</sup> November 2021 lacks merit and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>th</sup> DAY OF FEBRUARY, 2022**

**ANTONY OMBWAYO**

**JUDGE**

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.