



**PUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC PETITION NO. 1 OF 2016**

**KM (Minor suing through Mother and Best-friend SKS).....1<sup>ST</sup> PETITIONER**

**IRENE AKINYI ODHIAMBO.....2<sup>ND</sup> PETITIONER**

**MILLICENT ACHIENG AWAKA.....3<sup>RD</sup> PETITIONER**

**ELIZABETH FRANCISCA MWAILU.....4<sup>TH</sup> PETITIONER**

**ELIAS OCHIENG'.....5<sup>TH</sup> PETITIONER**

**JACKSON OSEYA.....6<sup>TH</sup> PETITIONER**

**HAMISI MWAMERO.....7<sup>TH</sup> PETITIONER**

**DANIEL OCHIENG OGOLA.....8<sup>TH</sup> PETITIONER**

**MARGARET AKINYI.....9<sup>TH</sup> PETITIONER**

**CENTER FOR JUSTICE GOVERNANCE AND ENVIRONMENTAL ACTION**

*(suing on their own behalf and on behalf of all the residents of Owino-Uhuru Village in Mikindani,*

*Changamwe Area Mombasa).....10<sup>TH</sup> PETITIONER*

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE CS, MINISTRY OF ENVIRONMENT,**

**WATER AND NATURAL RESOURCES.....2<sup>ND</sup> RESPONDENT**

**THE CS, MINISTRY OF HEALTH.....3<sup>RD</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT**

**AUTHORITY.....4<sup>TH</sup> RESPONDENT/APPLICANT**

**THE COUNTY GOVERNMENT OF MOMBASA.....5<sup>TH</sup> RESPONDENT**

**THE EXPORT PROCESSING ZONES**

**AUTHORITY.....:6<sup>TH</sup> RESPONDENT/APPLICANT**

**METAL REFINERY (EPZ) LIMITED.....7<sup>TH</sup> RESPONDENT**

RULING

The 6<sup>th</sup> Respondent's application is dated 6<sup>th</sup> September 2021 and is brought under Articles 25(c), 50(l) and 159 of the Constitution of Kenya 2010, the Advocates Act, Paragraph II of the Advocates Remuneration Order 2009, Section 3 A of the Civil Procedure Act seeking the following orders;

1. That this Application be certified as urgent and be heard on priority basis.
2. That this Honourable Court be pleased to issue an order of stay of any and all orders emanating from the ruling of C. A. Ogwenko delivered and signed on 19<sup>th</sup> August 2021, pending the hearing and determination of this Reference and/or Application.
3. That this Honourable Court do make a finding that the taxing officer erred in principle in taxing items 1,3, 4, 8, 14, 20, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46,79, 80, 81, 90, 91, 93, 96, 97, 98 and 106 in the Petitioners Bill of Costs dated 19<sup>th</sup> August 2020 and set aside the taxation thereto accordingly.
4. That the findings and ruling of the Taxing Master, C. A. Ogwenko, in Mombasa ELC Petition No. 1 of 2016, taxing the Petitioner's bill of costs at Kshs. 74,335,956.67/= be varied and/or set aside.
5. That this Honourable Court be pleased to order that due to the multiplicity of errors of principle made by the Taxing Officer in her Ruling of 19<sup>th</sup> August 2021 the Bill of Costs be re-taxed after considering the 6<sup>th</sup> Respondent/ Applicant's submissions on the Bill by any other taxing officer.
6. That this Honourable Court be pleased to interrogate the Petitioner's Bill of Costs in light of actual work done in relation to the applicable scale of the Advocates (Remuneration) (Amendment) Order and adopt the 6<sup>th</sup> Respondent/ Applicant's proposal on taxation of the costs.
7. That this Honourable Court be pleased to adjust the contested items as the justice of the case may require, in lieu of remitting the contested items to a taxing officer.
8. That this Honourable Court be pleased to make any such other order and or orders as it may deem just and appropriate in the circumstances.

It is based on the grounds that the Bill of Costs herein dated 19<sup>th</sup> August, 2020 was filed in Court on even date. The 6<sup>th</sup> Respondent/ Applicant filed submissions dated 28<sup>th</sup> April, 2021 in opposition to the Bill of Costs. The 6<sup>th</sup> Respondent/ Applicant filed further submissions dated 2<sup>nd</sup> July, 2021 in opposition to the Bill of Costs. The 4<sup>th</sup> Respondent also filed their submissions in opposition to the Bill of Costs dated 8<sup>th</sup> May, 2021. The Petitioners filed submissions dated 10<sup>th</sup> May, 2021 in support of the Bill of Costs. The Taxing Master delivered a ruling on the Bill of Costs on 19<sup>th</sup> August, 2021. The Court furnished the ruling to the 6<sup>th</sup> Respondent/ Applicant on 24<sup>th</sup> August 2021. Having perused the ruling, the 6<sup>th</sup> Respondent/ Applicant is dissatisfied with the ruling and now files this reference against the said ruling on the grounds that the Taxing Master made the following errors of principle: Finding that the subject matter was Kshs. 3 billion when the subject matter is Kshs. 2 billion and applying the erroneous subject matter in the computation of instruction fees and by extension getting up fees at items 1 and 98 respectively; Applying the wrong scale, that is, "paragraph 1 b of the Advocates (Remuneration) (Amendment) Order, 2014' (sic); Appreciating that para (j) of Schedule 6(l) of the Advocates (Remuneration) (Amendment) Order, 2014 was applicable and failing to apply it. Failing to consider the 6<sup>th</sup> Respondent's/Applicant's submissions and Supplementary submissions, thereby arriving at a wrong conclusion on the instruction fees and item 106. Erroneously, allowing item 106 as drawn when the 6<sup>th</sup> Respondent/Applicant contested it. Awarding amounts in excess of the appropriate scale. The Taxing Officer's decision was not undertaken judiciously as she did not take into account relevant considerations but took into account irrelevant considerations at arriving at instructions fees and the other contested items. The Taxing Officer exercised her discretion injudiciously and improperly. The Taxing Officer failed to apply the formula for assessing instruction or costs as specified in schedule VI of the Advocates (Remuneration) Amendment) Order 2014 and failed to give consideration to all relevant circumstances of the Petition and thereby made monstrous errors in principle and in acting arbitrarily. The Taxing Officer made errors of principle in awarding the disbursements in the sum of the Kshs.6,751,560.00 without considering 6<sup>th</sup> Respondent's/Applicant's challenges to the said disbursements in its written submissions. That considering the amount permissible by the law and the sum awarded by the Taxing Officer, the nature of the dispute before the court, the amount allowed by the taxing officer is manifestly excessive so as to amount to an error of principle being inferred.

That it is error of principle for the Petitioners to have instituted this matter as constitutional Petition rather than a civil claim in tort and then upon the award in the Petition purport to file its Bill of Costs as in a civil claim and the Taxing Officer to fall for the metamorphosis by the Petitioner and instead of applying the clear provisions of costs in a constitutional Petitions to apply the principles for a civil claim on instruction fees at paragraph l(b) Schedule VI of the Advocates (Remuneration) (Amendment) Order 2014. The Taxing Officer's award in the Ruling of 19<sup>th</sup> August 2021 contested and including instruction fees and getting up fees and disbursements resulted to and amounts to injustice and thus errors on principle. The instruction fees and getting up fees awarded are anti-thetical to the Constitution of Kenya 2010 under which the Petition was prosecuted and are tantamount to fettering access to the Constitutional Courts and therefore an error in principle and for setting aside to protect the tenets of the Constitution of Kenya 2010 on access to justice. The Taxing Master misdirected herself and acted contrary to established principles of taxation of Advocate/Client Bill of costs. The Taxing Master erred when she failed to take into account the 6<sup>th</sup> Respondent's/Applicant's submissions thereby arriving at a wrong finding on the instruction fees and item 106. The Taxing Officer abrogated the 6<sup>th</sup> Respondent/ Applicants Constitutional Rights Articles 25(c) and 50 of the Constitution of Kenya 2010 in failing to consider the 6<sup>th</sup> Respondent/Applicant's written submissions dated 28<sup>th</sup> April 2021 and Further Submissions dated 2<sup>nd</sup> July 2021

and that is an error in principle that vitiates the Ruling of 19<sup>th</sup> August 2021. The 6<sup>th</sup> Respondent/Applicant in the premises seeks that this Honourable Court finds that the Taxing Officer erred in principle in taxing items:-58, 59, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 79, 80, 81, 90, 91, 93, 96, 97, 98 and 106 as she did. It is proper and just in the circumstances that this Honourable Court be pleased to allow this Application and/or reference.

The second application by the 4<sup>th</sup> Respondent's is dated 12<sup>th</sup> November 2021 and is brought under paragraph 11(2) (4) Advocates Remuneration Order, 2009 and seeks the following orders;

1. That this honourable court be pleased to enlarge the time within which to file a reference against the decision of the taxing officer delivered on the 19<sup>th</sup> August 2021
2. That the notice objecting to the decision of the taxing master expressed through the electronic mails by the applicant dated 16<sup>th</sup> September 2021 and 10<sup>th</sup> November 2021 respectively and filed herewith, be deemed to have been properly filed though out of time.
3. That the reference filed herein be deemed to have been filed properly and timeously.
4. That the reference filed herein, be allowed on the terms that the decision of the taxing master on Items 1, 98 and 106 of the subject Bill of costs by the Petitioners and contained in the Ruling dated 19<sup>th</sup> August 2021, are manifestly excessive and be set aside.
5. That costs be provided for.

It is based on the grounds that the petitioners herein succeeded in the subject petition and consequently lodged a party and party Bill of Costs which was taxed on the 19<sup>th</sup> August 2021 at Ksh. 74,335,956.67/-. That the said Ruling on taxation was delivered in the absence of the applicant and thus was impossible for the applicant to take quick reactive action such as the lodging of the 14 days' notice towards filing of a reference. That the applicant was absent at the delivery of the said taxation ruling on 19<sup>th</sup> August 2021 for want of notice. That the applicant, being resident in Nairobi and cognizant of the digitization of the Judiciary, wrote to the Court registry via its official email address, on the 16<sup>th</sup> September 2021 after an informal discussion with the petitioners' advocates revealed delivery of the taxation ruling and requested for the reasoned Ruling. That there being no response from the court registry, the applicant visited the Mombasa ELC registry on the 18<sup>th</sup> October 2021 and collected a photo copy of the said Ruling dated 19<sup>th</sup> August 2021. That shocked and discontent with the said taxation Ruling, counsel for the applicant sought instructions from the applicant institution and was eventually instructed to lodge a reference on certain items.

That the applicant notified the court registry of its intention to lodge a reference on certain items of the taxation ruling. This was by an email dated the 10<sup>th</sup> November 2021. That the applicant was thus precluded by the foregoing grounds, in initiating reference proceedings timeously. That this application is made without any inordinate delay and with good reasons for enlargement of time. That the taxation decision awarded as instruction fees, getting up fees and disbursements, sums that are grossly excessive. That the applicant has lodged an appeal from the Judgment of this Court and obtained Orders of Stay of Execution from the Court of Appeal in E004 of 2020 and which appeal is pending hearing. That the taxing master in the decision dated 19<sup>th</sup> August 2021 has pegged her decision on the very grounds that are the subject of the pending appeal.

The Petitioners submitted that the 4<sup>th</sup> respondent's filed their notices of objection out of time as well as the application. That the first letter was not a notice but a lamentation on the ruling by the taxing master. That the reasons for the delayed in filing the same are untenable in the face of available facts. That the court should refuse to extend time in the circumstances. That the Taxing Master was right in her determination based on the material placed before her and they relied on the Petitioner's submissions dated 10<sup>th</sup> May 2021 in support of their bill of costs as well as the authorities relied upon in affirming if need be the decision of the Taxing Officer.

This court has considered the applications and the submissions therein. The procedure for the challenge of a Taxing Master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides 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.”**

On the issue of enlargement of time in the case of **Ivita vs Kyumba (1984) KLR 441**, the court held, in considering an application for dismissal of suit for want of prosecution that:

*“ The test applied by the courts.....is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse or the delay and that justice can still be served to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of discretion of the court.”*

The principles applicable of extension of time are similar and were laid down in the case of **Aviation and Allied Workers Union vs KQ Ltd (2015)eKLR** where the Supreme Court stated that the following principles should be considered by the court in the exercise of such discretion:

1. Extension of time is not a right of a party, it is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court.
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Where there is (good) reason for the delay, the delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election, petitions, the public interest should be a consideration for extending time.”

The above principles were enunciated by the same Supreme Court in **Nicholas Arap Korir Salat v IEBC & 7 Others Sc Application No. 16 of 2014**. In Applying the above principles to this case, the court notes that indeed there was delay in filing of the substantive motion by about 3 months which in my humble view is not inordinate delay bearing te nature of the case. Secondly, albeit there was delay in filing of this application that delay has been satisfactorily explained to the court. The court accepts the explanation that and grants 1, 2 and 3 of the application dated 12<sup>th</sup> November 2021.

On the question of the reference itself which is the subject matter of both applications, I have perused the court record and find that indeed the applicant herein filed an objection/reference in court as required under rule 11 (2) of the Advocates (Remuneration) Order seeking an explanation as to why the Taxing Master had taxed bill of costs as they had. That the same were never given and he filed this reference. To date the reasons have never been given and the court will rely on the Taxing Master’s ruling. In the case of **Evans Thiga Gaturu vs Kenya Commercial Bank Limited (2012) eKLR** the court held 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 provision presupposes that in delivering their decisions on taxation, the Taxing Officer 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 reasons why the taxing officer cannot be at the time of making his decision to do so together with the reasons therefor. In my view there is no magic in requiring the Taxing Officer to furnish reasons before the making of a reference.”**

The Respondents basically submitted that being dissatisfied with the ruling they filed this reference against the said ruling on the grounds that the Taxing Master made the following errors of principle: Finding that the subject matter was Kshs. 3 billion when the subject matter is Kshs. 2 billion and applying the erroneous subject matter in the computation of instruction fees and by extension getting up fees at items 1 and 98 respectively and applying the wrong scale. I have perused the judgement in question and indeed find that the subject matter is Kshs. 2 billion.

Be that as it may, the principles of varying or setting aside a Taxing Master’s decision as set out in the cases of **First American Bank of Kenya vs Shah and Others (2002) EA 64** and **Joreth Ltd vs Kigano and Associates (2002) 1 EA 92**, that the Taxing Master’s judicial discretion can only be interfered with when it is established that the there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law. In **First American Bank of Kenya vs Shah and Others (2002) E.A.L.R 64** the court held that;

**“First, I find that on the authorities, this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle”.**

These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) eKLR**, where the said Court held that a Taxing Master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the Taxing Master is excessive to amount to an error in principle.

In the instant case I find that the subject matter is materially different and cannot be ignored. I have perused the said judgement and it appears to be that the subject matter was Kshs. 2 billion and not Kshs. 3 billion. Judge Omollo held that;

*“171. In the absence of alternate proposals, this court is persuaded to adopt the proposal given by the petitioners in regard to the sum awardable. I have considered the fact that the comparative Case law cited awarded amounts which is close to the submitted amount. Consequently: in place of Kshs. 2 billion proposed for personal injury and loss of 1 life, I shall award Kshs.1.3 Billion due and payable to the 1<sup>st</sup> – 9<sup>th</sup> petitioners and persons claiming through them. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 6<sup>th</sup> – 8<sup>th</sup> Respondents shall pay in accordance with apportionment of their liability in paragraph 158 above the total sum of Kshs.1.3 Billion within a period of 90 days from the date hereof and in default, the petitioners are at liberty to execute. The court further direct the named liable respondents to within 4 months (120 days) from date of this judgment to clean-up the soil, water and remove any wastes deposited within the*

settlement by the 7<sup>th</sup> respondent. In default, the sum of Kshs.700,000,000 comes due and payable to the 10<sup>th</sup> petitioner to coordinate the soil/environmental clean-up exercise. “

In **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W’njuguna (2006) eKLR Ojwang, J** (as he then was) expressed himself 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...”

I have perused the court record and the ruling by the Taxing Master and find that indeed on page 7 therein she stated and I quote;

*“I am therefore persuaded that the value of the subject matter was clearly outlined in the judgement of the court to be Kshs. 3 billion.”*

I find that the Taxing Master used the wrong value for the subject matter. Some of the relevant factors to take into account when taxing a bill 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. From the discrepancy mentioned above I find that there was an error in principle by the Taxing Officer in the assessment. Consequently, I find that the two applications are merited and I grant the following orders;

1. The Taxing Master’s decision of taxed bill of costs dated 19<sup>th</sup> August 2020 and ruling delivered on 19<sup>th</sup> August 2021 be and is hereby set aside.
2. The bill of costs dated 19<sup>th</sup> August 2020 shall be remitted to another Taxing Master for taxation.
3. Costs to the 4<sup>th</sup> and 6<sup>th</sup> Respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MARCH 2022.**

**N.A. MATHEKA**

**JUDGE**