REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
(Coram: Ojwang, J.)

FORMERLY MISC. APPLICATION NO. 111 OF 2008 NAIROBI

NEW NO. MISC. APPLICATION J.R NO. 10 OF 2010 MOMBASA

SHAMSHUDIN KHOSLA ***as Chairman***
ABDUL GAFUR PASTA ***as Honorary Secretary***
MOHAMED BAYUSUF ***as Treasurer [on their own behalf and on behalf of]***

THE MEMBERS OF KENYA TRANSPORT ASSOCIATION................................APPLICANT/RESPONDENT

VERSUS

KENYA REVENUE AUTHORITY...RESPONDENT/ APPLICANT

JUDGMENT

The original respondent, as now the applicant, moved the Court by Chamber Summons dated ***22nd September, 2010*** and brought under Regulation 11(1) and (2) of the Advocates (Remuneration) Order. The applicant herein was objecting to the ruling on taxation delivered by the taxing officer on ***30th July, 2010***, in respect of certain particular items of the bill of costs filed by the respondent herein (Item Nos. 1 and 15).
The objection is founded on the following grounds:

(i) the taxing master erred in holding that Kshs. 4 million was justifiable as instruction fees without assigning reasons;

(ii) in taxing instruction fees at Kshs. 4 million, the taxing master exercised his discretion wrongly;

(iii) the taxing master erred in law and fact by holding that, since the matter was extremely important and was filed under certificate of urgency, it was justifiable to tax instruction fees at Kshs. 4 million;

(iv) the taxing master erred in fact, by holding that the matter was heard during vacation, when there had, in fact, been no hearing at all;

(v) the taxing master erred in law and fact by holding that the matter had received exceptional

dispatch, when there was no material presented before him to prove such exceptional dispatch;

(vi) the taxing master failed to find and hold that a fair and reasonable instruction fee payable under item No. 1 was Kshs. 500,000/= as proposed by the respondent in that cause;

(vii) the taxing master, in allowing getting-up fees at Kshs. 1,333,333/00 on the grounds that there was a denial of liability, or that issues had been joined by the pleadings, and that the case was prepared for hearing, failed to appreciate that –

(a) the respondent in the main cause "never denied liability and there were no pleadings filed on behalf of the respondent";

(b) the matter was "never ready for hearing since the respondent, from the [beginning], had informed the applicant it was not going to oppose the Judicial Review application";

(viii) the taxing master failed to appreciate that getting-up fees do not apply in Judicial Review matters.

The applicant asked that the taxation of instruction fees be fixed at Kshs. 500,000/=, and the assessment of getting-up fees be taxed off.

In a supporting affidavit sworn on ***23rd September, 2010*** learned counsel, ***Mr. Matuku*** deponed that he was familiar with the facts of this matter, which (in summary) are as follows:

(i) the Judicial Review matter was settled out of Court on *9th March, 2009****;***

(ii) thereafter the applicant/respondent filed a bill of costs for *Kshs. 23,296,770/08****;***

(iii) the taxing of the bill of costs took place on *16th July, 2010****;***

(iv) the taxing master delivered his ruling on *30th July, 2010****;***

(v) the deponent had objected to the taxation of item 1 of the bill of costs at *Kshs. 4,000,000/=* ***and item 15 at Kshs. 1,333,333/00;***

(vi) the taxing master gave his reasons for the taxation by his letter of *16th September, 2010****;***

(vii) the respondent objected to the taxation of items 1 and 15 of the bill of costs.

Learned counsel for the applicant/respondent, ***Mr. Ochwa***, swore a replying affidavit on ***22nd October, 2010*** deponing (in summary) as follows:

(i) the applicant/respondent had instituted a Judicial Review application seeking to stop the respondent/applicant from collecting annually a total of Kshs. 917,700,000/=;

(ii) the applicants' members, numbering over 300, owned more than 30,000 trucks which were affected by the respondent's decision to levy or increase licence fees to the figure of Kshs. 917,700,000/= annually;

(iii) the applicants were successful in their application/suit against the respondent, and Judgment was entered in their favour;

(iv) though the applicants' head office is in Mombasa, the suit was filed, heard and finalized in Nairobi;

(v) the firm of Advocates, M/s. Cootow & Associates, who practice law in Mombasa, had to undertake essential travel to Nairobi;

(vi) the High court in Nairobi granted leave for a Judicial Review motion against the respondent/applicant's decision to enforce new licensing conditions upon the applicants/respondents;

(vii) the applicants/respondents were successful in their proceedings, with Judgment/Ruling being entered enabling the applicants/respondents to save Kshs. 917,700,000/= which would otherwise be payable to the respondents/applicants as licence fees;

(viii) if the applicants/respondents had failed in the proceedings, the respondents/applicants would be earning Kshs. 917,700,000/= as licence fees;

(ix) "*the applicants' 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 1 billion Shillings, hence the [application] required diligent [preparation] and research and utmost responsibility by the Advocates acting for all the parties****";***

(x) "*the taxing master's decision was not based on an error of principle****"; and "****the fees awarded was not so manifestly excessive as to justify an interference****";***

(xi) "*the taxing master did not take into account irrelevant factors or omit to consider relevant factors****".***

Learned counsel, ***Mr. Matuku***, for the respondent/applicant, submitted that the taxing officer, in assessing instruction fees, had taken into account irrelevant matters: for instance, he took into account the fact that the contention was in respect of a large sum of money, though the proceedings were in the nature of judicial review in respect of alleged excess of jurisdiction. Counsel urged that judicial review proceedings do not contemplate the value of the subject-matter; and that the taxing officer should not have alluded to the loss which the applicants would have sustained if the prayers were refused.

Counsel urged that the taxing officer had relied on an undefined criterion which the officer had referred to generically as "*the importance of the matter*"; and that the taxation of instruction fees at Kshs. 4 million

did not take into account the fact that the judicial review proceedings were not challenged, and no reply was ever filed; the matter did not proceed to hearing, as the parties recorded a consent – hence there was no reason to enhance instruction fees from Kshs. 28,000/= (minimum) to Kshs. 4,000,000/=. The matter did not involve the filing of authorities, and no time was expended in hearing the application. Counsel submitted that counsel for the applicant/respondent should be *"compensated only for the efforts actually deployed*".
Counsel submitted that although the taxing officer had rationalized his mode of taxation on the basis that he "*exercised a discretion*", this had obscured the objective criteria which guided such exercise of discretion. On this point, counsel further submitted that "*discretion, [for the purpose of] judicial review, is to be guided by transparent principles*".

Counsel contested the taxation of "*getting-up fees*" at Kshs. 1.33 million: on the basis that "*getting-up fees would not apply in judicial review, which is conducted by affidavits; it can only apply in suits requiring special preparation*." Moreover, counsel urged, this is a matter that was "*never ready for hearing; it was clear we were not going to oppose the judicial review*".

Learned counsel relied on a decision of this Court: ***Republic v. The Minister for Agriculture***, ***ex parte W'Njuguna***, Nairobi HCCC No. 621 of 2000 (***Ojwang, J***); [2006]eKLR. That case, just as this one, concerned a taxation matter in judicial review proceedings; and counsel relied on the following passage, ***inter alia***:

"I will, therefore, strike a clear 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".***

Learned counsel, ***Mr. Ochwa***, for the applicant/respondent, contested the application, mainly on the following grounds: the applicant/respondent did file a judicial review application; the applicant/respondent filed and served all the relevant documents; the applicant/respondent obtained leave for the filing of the substantive motion for judicial review, and the motion was then filed and served, and a hearing date assigned; the applicants prepared fully for their judicial review motion, and they appeared several times before the Judge, in relation to cause-listings; the matter was listed for hearing on at least three occasions.

Counsel submitted that there was overwhelming evidence against the respondent/applicant: and this factor led the respondent/applicant to concede, and judgment was then entered in favour of the applicant/respondent.

Learned counsel urged certain financial considerations to be relevant in the determination of party-and-party costs: the fact that the respondent/applicant would collect almost Kshs. 1,000,000,000/= if the judicial review proceedings had not been lodged; the consideration that the matter was one "*of grave financial implications*"; the consideration that "*this is a weighty matter*"; the perception that this matter "*speaks for itself*". From those perceptions of special rank to the calibre of proceedings, ***Mr. Ochwa*** urged: "*A successful litigant and advocate should not be denied their fruits*".

Counsel acknowledged that the minimum fee-scale allowed for ***instruction***, under the Advocates (Remuneration) Order, is ***Kshs. 28,000/=***: but he disagreed with the proposal that this figure be raised to only Kshs. 500,000/= – for the reason that the suggestion by counsel for the respondent/applicant was *not guided by any formula*. ***Mr. Ochwa*** urged that there was no significance, in the conception of the instruction fee-scale, to the fact that the judicial review cause bore *no contentious element,* as the respondent/applicant filed no replies.

Mr. Ochwa called in aid certain authorities. In ***Premchand Raichand Ltd. and Another v. Quarry Services of East Africa Ltd. and Others*** [1972] E.A. 162, counsel sought to substantiate his argument

that there was ***no formula to dictate a particular mode of taxing the instruction fees;*** he relies on a passage in the judgment of ***Spry, V-P*** (at p.164):

"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, and 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."

Counsel next cites the decision of ***Mr. Justice Ringera*** (as he then was) in ***First American Bank of Kenya v. Shah and Others*** [2002] 1E.A. 64 (at p.69):

"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…….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 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."

Counsel submitted that the award made in the instant case, in favour of the applicant/respondent, was ***reasonable***, and was ***not too high***; the applicant/respondent had made payments in moving the Advocate to proceed to Court, and the applicant/respondent was successful and should now be reimbursed by the award of party-and-party costs, in the manner ordered by the taxing officer. Counsel urged that, since what was at stake in the proceedings was nearly ***Kshs. 1,000,000,000/=,*** "was it too much to pay Kshs. 4,000,000/= [as instruction fees]?" Counsel's answer was no.
On the question that the proceedings involved were ***judicial review*** proceedings, ***Mr. Ochwa*** presented no legal argument based on authorities, but urged: "*The Court must take into account the value of the subject-matter, and should not turn a blind eye simply because it was judicial review. The value of the subject-matter must be taken into account*".

Learned counsel relied on certain passages and authorities appearing in this Court's Judgment in ***Republic v. Minister for Agriculture, ex parte W'Njuguna & Others***, Nairobi H.C. Misc. Civ. Application No. 621 of 2000 [2006] eKLR: specifically at p.10 where the pronouncement of ***Gould, J.A.*** in ***Thomas James Arthur v. Nyeri Electricity Undertaking*** [1961] E.A. 492 (at p.494) is set out:

"….a taxing officer, when he has decided that the scale should be exceeded, 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".

Mr. Ochwa ended with the submission that the taxing officer had been right to award ***getting-up fees***, as one-third of the instruction fees; but he did not deal with any relevant principles, or consider the appropriateness of the claim in the circumstances of this matter.

Counsel in this matter have taken diametrically opposed approaches: the respondent/applicant's approach is that, firstly, the level of ***instruction fees*** depends on the facts and circumstances attending the particular legal proceedings; and on certain principles of assessment; and the applicability of ***getting-up fees*** depends on the contention involved, and the kind of papers lodged. The applicant/respondent's approach is that the determination of Advocate's charges rests on the ***liberal mind*** of the taxing officer, and always

takes account of the extent of the ***financial stakes*** attending Court process.

Both approaches cannot, in my opinion, be right at the same time; for that would entail the proposition that the Court, in the determination of Advocates' rights to professional fees regulated under the Advocates Act (Cap. 16, Laws of Kenya), is guided purely by ***eye-rhyme***; that would be the very opposite of regular, ***judicial process.***

It is necessary, therefore, to rethink and restate the criteria that guide the Court, even as I consider the specific question before me.
The base-line is in the ***case law***; and the best sense is to be drawn from the several authorities which counsel have cited.
When, in the ***Premchand Raichand*** case [1972] EA. 162 ***Spry, V-P*** stated (p.164) that "*The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience*", was he giving licence for a free-ranging taxation of costs, with no guiding rules? I doubt it, even though it is clear he was laying much trust in "[*a taxing officer] of great experience*". ***Mr. Justice Ringera,*** in ***First American Bank of Kenya v. Shah and Others*** [2002] 1EA. 64 (at p.69), was certainly mindful of beacons that must guide the taxing officer.
This Court has recently dealt with the subject of ***instruction fees*** in a judicial review matter, in ***Republic v. National Environmental Tribunal, ex parte Silvercrest Enterprises Limited***, Mombasa H.C. Misc. Application No. 295 of 2008. That application went along the trajectory of hearings, rather than of forbearances (such as is the case now before the Court); the scenario is thus described in the ***Silvercrest*** case:

"After leave was granted for the judicial review motion to be filed, the applicants herein filed a motion to have such leave set aside, and to have the motion for judicial review orders dismissed. Counsel submitted that the hearings were protracted, and the *ex parte* ***applicant retained two counsel to conduct its case. The Court gave its ruling on*** *9th may, 2009****, setting aside the leave granted, and dismissing the*** *ex parte* ***applicant's motion with costs to the applicant herein. The applicant thereafter lodged a bill of costs before the taxing master".***

It is in that context that this Court ordered as follows:

"(1) the element of getting-up fees is set aside…………

"(2) on Item No. 1 (instruction fees)…..the sum of Kshs. 500,000/= is taxed off, leaving Kshs. 1,000,000/=."

It was urged, in that case, that the taxing officer had been in error, in allowing for getting-up fees in respect of a judicial review matter – even though this point was not substantiated by counsel.

"***Getting-up fees***" is clearly a potential area of misunderstanding, in the matter now before the Court. Learned counsel, ***Mr. Ochwa*** contended that, even though this be an uncontested judicial review matter, it was right for the taxing officer, first, to assess a substantial award under the head of ***instruction fees***, and then, to compute one-third thereof, as a top-up, under the head of ***getting-up fees.*** Clearly, counsel had a ***formula***, though he gave ***no rationale***.

In ***Haider bin Mohamed el Mandry & 4 Others v. Khadija Binti Ali Bin Salem*** *alias* ***Bimkubwa*** (1956) 23EACA 313, the Court of Appeal (***Briggs, J.A.***, at p.316) thus stated, in relation to ***instruction fees*** and ***getting-up fees***:

"In the main bill only one item is excessive, namely the fee from instructions to defend. Shillings 9,000/= was claimed and only Shs. 1000/= was taxed off. I consider the sum of Shs. 9,000/= allowed so

excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles. This is merely a 'getting-up' fee. Even attendances to take witnesses' statements are separately charged…….[The] figure of Shs. 9,000/= would be appropriate only to a long and heavy case……I think [the taxing officer] must have failed entirely to consider relevant factors, such as the small sum involved, the comparatively short time occupied in hearing, the very modest amount of research required to examine the issue of law…."

From the foregoing authority, I would draw the inference that "*getting-up*" fees, in ordinary litigation, partially overlaps with ***instruction fees***. Whereas ***instruction fees*** represent the formal commitment of the Advocate to a new client who thereafter gives 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.

Mr. Ochwa defended the decision of the taxing officer in assessing the applicant/respondent's Advocate's getting-up costs at one-third of the amount assessed as instruction fees; while ***Mr. Matuku***, for the respondent/applicant, urged that *getting-up fees* were inapplicable in this particular judicial review matter – though no rationale was stated.

It is obvious that after counsel took instructions from the applicant/respondent, counsel moved on to the next stage of formulating, lodging and serving the cause papers; so in this regard, there was an element of getting-up fees.
The real question, however, which must determine the outcome in this matter, is the setting of the level of fees on the basis of very substantial monetary considerations, in a ***judicial review cause***. The same issue arose in ***Republic v. Minister for Agriculture, ex parte W'Njuguna and Others*** [2006] eKLR, 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. 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."***

Another passage in that judgment may be set out here:

"I will, therefore, strike a clear 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".***

On the basis of the foregoing precedents, I must come to the conclusion that the applicant/respondent's position, that '*the applicants' 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 1 billion Shillings*", is not, for the main part, to be sustained.

Indeed, since the matter was not even contested, it is not a valid contention that the proceedings were ***complex*** and "*required diligent [preparation] and research and utmost responsibility by the Advocates acting for the parties*".

The respondent/applicant, who must succeed in this matter, referred to the Court only two contested points: bill of costs items No. 1 (***instruction fees***) and No. 15 (***getting-up fees***). As these items are both

specific, and are now subject to the detailed reasoning in this Ruling, it will be appropriate that I remit this file with specific instructions to the taxing officer, to reflect the same in a rectified set of taxation orders. I will order as follows:

(1) Item No. 1 of the bill of costs shall be scaled down by a figure of two-thirds.

(2) Item No. 15 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.

(3) This file shall be remitted to Deputy Registrar, *Mr. T. Gesora****, for mention and for directions, before effecting the taxation adjustments.***

DATED and **DELIVERED** at **MOMBASA** this *27th* day of ***May, 2011.***

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J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*
Court Clerk: *Ibrahim*
For the Respondent/Applicant: *Mr. Matuku*
For the Applicant/Respondent: *Mr. Ochwa*