Geyser International Assets Limited v Attorney General & 3 others (Constitutional Petition 209 of 2015) [2024] KEELC 7289 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7289 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 209 OF 2015

LL NAIKUNI, J

OCTOBER 9, 2024

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLES 10, 19, 20, 23, 163(3) AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 40, 47 AND 64 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

GEYSER INTERNATIONAL ASSETS LIMITED ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

KENYA RAILWAYS CORPORATION ..... 2ND RESPONDENT

NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

CHINA ROAD & BRIDGE CORPORATION (KENYA) ..... 4TH RESPONDENT

RULING

I. Introduction

1. This Honourable Court is tasked with the determination of the Chamber Summons application dated 17th May 2024 brought by Geyser International Assets Limited, the Petitioner/Applicant herein under the dint of the provision of Sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap. 21, Paragraph 11 of the Advocates Remuneration Order and Article 159 of the *Constitution* of Kenya, 2010.

2. Upon service 2nd and 4th Respondents responded to the Chamber Summons through a ground of opposition dated 12th July, 2024.

II. The Petitioner/Applicant's case

3. The Petitioner/Applicant sought for the following orders: -

    i. Spent.

    ii. Spent.

    iii. The decision of the Taxing Master, Hon. Nyariki J delivered on 8th May 2024, taxing the 2nd Respondent's Bill of Costs dated 11th February 2022 at Kshs. 2,774,438.89 be varied and/or set aside.

    iv. The decision of the Taxing Master, Hon. Nyariki J delivered on 8th May 2024, taxing the 4th Respondent's Bill of Costs dated 16th February 2022 at Kshs. 2,704,423.89 be varied and/or set aside.

    v. That this Honorable Court be pleased to set aside the two (2) Certificate of Costs both dated 9th May 2024 certifying costs of Kshs. 2,704,423.89 and Kshs. 2,774,438.89.

    vi. This Honourable Court be pleased to make any additional orders as the demands of justice dictate.

    vii. The costs of this Application be provided for.

4. The application is premised on the grounds, testimonial facts and the averments made out under the 22 Paragraphed supporting affidavit of PETER KIMANGA one of the directors of the Petitioner/Applicant's sworn on the same day as the Chamber Summons. He averred that: -

    a. The Petitioner filed a Constitution Petition dated 10th September 2015 arising from a dispute over the compulsory acquisition of a portion of its property known as Plot No. MN/VI/3892 by the 2nd Respondent. The Petitioner sought orders to restrain the 1st, 2nd,3rd and 4th Respondents from interfering with the Property before payment of just compensation. The genesis of the Petition was that the Petitioner's right to property was violated in a brazen manner when without notice, the Petitioner's wall was demolished by agents of the 2nd and 4th Respondents and construction activities were started within the Petitioner's land in total violation of the Petitioner's constitutional right to property. The 2nd and 4th Petitioner's were embarking on the construction of the Standard Gauge Railway in a hurried manner in complete disregard of property rights.

b. The Petitioner sought and obtained conservatory orders prohibiting the Respondents (including the 4th Respondent contracted to construct the Standard Gauge Railway that would pass through the Petitioner's Property) from invading the Property, interfering with the developments thereon and from constructing on the Property.

c. After several years of court battles and contempt applications, compensation was finally paid to the Petitioner by the National Land Commission resulting in most of the complaints by the Petitioner being rendered moot. The Petitioner decided to amend the Petition to only focus on pursuing the interest element in respect of the compensation amount. On 6th February 2019, the Petitioner filed a Further Amended Petition claiming interest on the delayed payment as well as general damages and costs of the Petition.

d. On 14th July 2021, the 2nd and 4th Respondents (collectively the Respondents) filed an application seeking to have the claim against them in the Further Amended Petition dated 6th February 2019 and filed on even date, be dismissed with costs.

e. By a ruling dated 15th December 2021 (the Initial Ruling), the Honourable Mr. Justice L.L. Naikuni dismissed the claim against 2nd and 4th Respondents in the Further Amended Petition.

f. Before judgment was delivered on the Further Amended Petition, the 2nd Respondent filed a bill of costs dated 11th February 2022 and sought a sum of Kenya Shillings Sixteen Million Five Eighty Thousand Seven Hundred and Thirty (Kshs. 16,580,713.00/=) from the Petitioner while the 4th Respondent also filed a separate bill of costs dated 16th February 2022 seeking a sum of Kenya Shillings Sixteen Million Four Ninety Eight Thousand Two Twenty Hundred and Sixty Cents (Kshs. 16,498,220.60/=) from the Petitioner (together referred to as the Bills). The Bills cumulatively amount to a sum of Kenya Shillings Thirty Three Million Seventy Eight Thousand Nine Thirty Three Hundred (Kshs. 33,078,933/=). The Respondent's Bill of Costs dated 11th February 2022 and 16th February 2022 appear at pages 1 to 30 of the bundle.

g. On 6th November 2023, Judgment was entered by Honourable Justice LL. Naikuni in favour of the Petitioner, where the court awarded costs of the entire further amended petition to the Petitioner (the Judgment).

h. On 5th March 2024, the Petitioner filed its submissions in opposition to the two separate Bills. On 24th March 2024, the Taxing Master confirmed that the parties had complied with the directions on filing written submissions and directed that the taxation ruling would be delivered on 8th May 2024. A copy of the Petitioner's Written Submissions dated 5th March 2024 together with the efiling receipt, and a screenshot of the E-Filing Portal Case Activities appear at pages 31-48 of the bundle.

i. Despite confirming on 24th May 2024 that the written submissions of both parties were on record, by two separate rulings dated 8th May 2024 (the Taxation Rulings), the Taxing Master found that the Bills were unopposed despite service having been effected. The Taxing Master proceeded to tax the Bills without considering the Petitioner's written submissions and awarded a cumulative and exorbitant sum of Kenya Shillings Five Million Four Seventy Eight Thousand Eight Sixty Two Hundred and Seventy Eight Cents (Kshs. 5,478,862.78/=) to the 2nd and 4th Respondents notwithstanding that none of these respondents participated in the hearing of the Further Amended Petition and the claim against them was dismissed in limine without a defence on the merits. Furthermore, notwithstanding that the application seeking to have the claim dismissed was a single joint application filed jointly by the 2nd and 4th

Respondents through the same firm of advocates representing them both, the Taxing Master went ahead to tax both Bills independently and awarded separate amounts in costs to the 2nd and 4th Respondents. Copies of the Taxation Rulings dated 8th May 2022 appear on pages 49-52 of the bundle.

j. The Petitioner was aggrieved by the Rulings based on the following grounds:

a. the Taxing Master erred in fact and law by finding that the Bills were unopposed despite confirming on 24th March, 2024 at a plenary mention that the Petitioner had filed written submissions in opposition to the Bills. The Taxing Master violated the Petitioner's right to a fair hearing as guaranteed under Article 50 (1) of the *Constitution* of Kenya, 2010;

b. The Taxing Master erred in fact and law by finding that the Respondents were entitled to a cumulative sum of Three Million, Five Hundred Ninety-Eight Thousand, Three Hundred Forty and Eighty-Four Cents (Kshs. 3,598,340.84/=) as instructions fees whereas the Respondents had applied for the claim against them to be dismissed without engaging the Further Amended Petition on its merits.

c. The Taxing Master erred in fact and law by finding that the applicable provision for assessment of the instruction fees for the taxation of the Bills was paragraph 1 (b) (ii) of Schedule 6 instead of Schedule 6 (1) (J) of the Advocates (Remuneration) (Amendment) Order of 2014;

d. The Taxing Master erred in fact and law by failing to consider that Respondents were only granted costs of their application dated 14th July 2021 as opposed to costs of the entire Further Amended Petition. Further, in his final Judgment, the Honourable Judge allowed the Petitioner's claim in its entirety including an award for costs of the further amended petition. The order of costs in favour of the Respondents in the Initial Ruling did not extend to the underlying Petition which, as of the date of the Initial Ruling dismissing the claim against the 2nd and 4th Respondents, was pending hearing and determination.

e. The Taxing Master erred in fact and law by finding that the 2nd Respondent was entitled to Two Million Seven Hundred Seventy-Four Thousand Four Hundred Thirty-Eight And Eighty-Nine Cents (Kshs. 2,774,438.89/-) and the 4th Respondent was entitled to Two Million Seven Hundred Four Thousand Four Hundred Twenty-Three and Eighty-Nine Cents (Kshs. 2,704,423.89/=) as separate amounts yet they had jointly filed one application seeking for dismissal of the claim and were, throughout the Petition represented by the same firm of advocates who was acting for them jointly.

a. By failing to consider the Petitioner's written submissions and holding that the Bills were undefended and issuing the Rulings, the Petitioner's constitutional right to be heard under Article 50 (1) of the *Constitution* has been violated.

b. Unless this Honourable Court granted the orders sought, the Petitioner will be condemned to pay costs arising from Taxation Rulings that have been delivered in complete violation of a non-derogable constitutional right to be heard. This will undoubtedly occasion a miscarriage of justice against the Petitioner.

c. The 2nd and 4th Respondents had now hurriedly extracted the certificate of costs in respect of each ruling a day after the Taxation Rulings were delivered

and has threatened execution unless the sums certified are deposited in a joint interest earning account. The 2nd and 4th Respondent's certificates of costs appear at pages 53 to 54 of the bundle.

d. It was in the interests of justice that this court ought to suspend any execution of the certificate of costs against the Petitioner considering that the Petitioner's constitutional right to a fair hearing has been violated by the Taxing Master. Whereas the principle to furnish security is in a court's discretion, the Petitioner urged the Court not to impose any security since in this instance, the Taxation Rulings were issued in complete disregard and violation of the Petitioner's right to a fair hearing as guaranteed under Article 50 (1) of the *Constitution*. It did not auger well for the administration of justice for a court to impose security against a party whose right to a fair hearing has been violated in the manner in which the decision being challenged was arrived at.

e. From the foregoing, the decision of the learned Taxing Master was manifestly wrong both in law and fact and should be varied and/or set aside by this Honourable Court.

f. The affidavit is in support of the orders sought in the Chamber summons.

III. The response from the 2nd and 4th Respondents

5. The 2nd and 4th Respondents herein opposed the Chamber summons application and filed 10 paragraphed grounds of opposition dated 12th July, 2024 on the following grounds: -

a. The taxing master did not error in finding that the value of the subject matter for taxation was One Hundred Six Million Six Hundred Eleven Thousand Three Hundred Sixty-One and Fifty Cents (Kshs.106,611,361.50/=) because: -

a. This was the amount pleaded by the Petitioner in paragraph 14 (d) of the further amended petition dated 6th February, 2019.

b. This was the amount found due and awarded in the judgment delivered on 6th November, 2023 by the trial Judge who in addition granted interest at the Court rates from 19th October, 2015 to 6th November, 2023 as decreed in order No. (f) of the judgment

b. The allegation that the Petitioner was not heard when the bill was taxed is misleading because the taxing master made a finding that the Petitioner was served with the bill of costs dated 16th February, 2022 by the 4th Respondent and the bill of costs dated 11th February, 2022 by the 2nd Respondent but the Petitioner did not file Grounds of Opposition or a Replying Affidavit to the bills.

c. There was no finding in the ruling that the submissions by the parties were not considered before the rulings delivered on 8th May, 2024 on behalf of both the Petitioner or 2nd and 4th Respondents.

d. The application by the 2nd and 4th Respondents dated 14th July, 2021 sought only one prayer to dismiss the Petition with costs. In verbatim the 2nd and 4th Respondents prayed that "the claim against the 2nd and 4th Respondents in the Further Amended Petition dated 6th February, 2019 and filed on 6th February, 2019 be dismissed with costs."

e. In paragraph 2 of the ruling delivered on 15th December, 2021 determining the said application dated 14th July, 2021 the court made a finding that the 2nd and 4th Respondents only sought a single prayer to dismiss Further Amended Petition dated 6th February, 2019 and filed on 6th February, 2019 with costs.

f. The ruling delivered by honourable court on 15th 2021 awarded the 2nd and 4th Respondents costs as shown in paragraph 38 of the ruling where the Judge decreed that "in this case the 2nd and 4th Respondents have succeeded and therefore deserve the orders of costs to be borne by the Petitioner."

g. The is no confusion as to whether the 2nd and 4th Respondents were awarded costs in the further amended petition dated 6th February, 2019 because in paragraph *39* (a) and (e) the court held as follows: -

> "That the Notice of Motion application dated 14th July, 2015 by the 2nd and 4th Respondents be and is hereby allowed with costs.
>
> That costs of the application to be borne by the Petitioner."

h. The Advocates for the 2nd and 4th Respondents were well within their rights in filing two separate bills of costs for its separate clients since Rule 62(2) of the Advocates Remuneration Rules allows for taxation of separate Bills of Costs where the same advocate representing two different clients' files separate pleadings.

i. As a matter of fact, the 2nd and 4th Respondents filed separate pleadings in opposition to the Further Amended Petition dated 6th February, 2019 as shown below;

   a. The 2nd Respondent filed its Replying Affidavit sworn by Stanley Gitari on 2nd July, 2021 in response to the Further Amended Petition.

   b. The 4th Respondent then filed its separate Replying Affidavit sworn by Jude Obiero on 2nd July, 2021 in response to the Further Amended Petition.

   c. The two Replying Affidavits contained separate averments, were sworn and signed by separate deponents, filed and paid for separately. The two affidavits were therefore separate pleadings separately filed by each of the Respondents.

j. Accordingly, the taxing master did not error in awarding the 2nd Respondent Two Million Seven Hundred Seventy-Four Thousand Four Hundred Thirty-Eight And Eighty-Nine Cents (Kshs.2,774,438.89/=) as costs on one hand and Two Million Seven Hundred Four Thousand Four Hundred Twenty-Three and Eighty-Nine Cents (Kshs.2,704,423.89/=) as costs to the 4th Respondent to the second hand since the costs were lawfully due to the 2nd and 4th Respondents respectively

6. The 2nd and 4th Respondent relied on their submissions filed on the 22nd April, 2024 and bundle of authorities dated 23rd April, 2024 and filed on the same date.

IV. Submissions

7. On 26th June, 2024 while all the parties were present in Court, they were directed to have the Chamber summons application dated 17th May, 2024, 2024 be disposed of by way of written submissions and

all the parties complied. Pursuant to that all the parties obliged and on 17th July, 2024 a ruling date was reserved on 9th October, 2024 by Court accordingly.

8. On 17th July, 2024 the parties highlighted their submissions as follows: -

A. The Petitioner's oral submissions

9. While submitting orally, M/s Onesmus, the Learned Counsel for the Petitioner told the what was before Court was the Chamber Summons application dated 17th May, 2024 where prayer 1 and 2 were spent. To be considered were prayers 3, 4, 5, 6 and 7. According to the Learned Counsel, the Petitioner wished to have the decision of the ruling delivered on 8th May, 2024 by the Deputy Registrar taxing separate Bills of Costs dated 8th May, 2024 and 11th February, 2022 be4 varied and set aside and for the court to make orders as it may deem fit.

10. Further, the Learned Counsel averred that their issues from the ruling the taxing master treated the Bills of Costs as unopposed. It was not true because they had filed a bundle of submissions a bundle of authorities and served; pursuant to this direction by the deputy registrar; the Petitioners indicated that they would be opposing the Bills of costs. They admitted having been served; the effect of treating the bill of costs as unopposed was unfair and breached on the Petitioner's right to a fair hearing; under Article 50(1) and (2) of the *Constitution* of Kenya. The taxing master had no obligation to take into consideration to the submission.

11. According to the Learned Counsel this had occasioned the miscarriage of justice. Had the taxing master taken into consideration their submissions, he would have noted all the issues raised thereof. When the Court rendered the ruling on 15th December, 2021, the Respondents had been taken out and only remained as the Interested Parties. Their Opposition was that they were only entitled to costs for the applications but the taxing officer noted that the value of the land was disclosed from the judgment. He ought to have been guided by it. Assuming they were entitled to fees for the Petition; there was a guide for schedules at part 1(g);

12. Her contention was that the Taxing Master adopted the wrong scale. The taxation was conducted and there was an error of the principles and unfair improper exercise of discretion and hence they urged them to rely on the written submissions filed.

A. The 2nd and 4th Respondents' oral submissions

13. On his part and as a rejoinder, Mr. Karina, the Learned Counsel for the 2nd and 4th Respondents told the court that they had opposed the Chamber Summons application through a ground of opposition dated 12th July, 2024. He framed the following three issues:

    a. Whether the 2nd and 4th Respondents were entitled to costs.

    b. Whether the 2nd and 4th Respondents being distinct legal entities were to file on or two separate Bill of Costs.

    c. Whether what was before the Court was a claim for land or money.

    Firstly, the Learned Counsel submitted that the answer to issue (a) was contained in the ruling dated 15th December, 2021 (see Paragraphs *6* and *7*); whereby there was a plea for costs. Paragraph *39*(a) and (c) the Court held – (be paragraph *7*);

    > " 39. Ultimately in view of the foregoing and for avoidance of doubt I do order as follows: -

a. That the Notice of Motion application dated 14th July, 2015 by the 2nd and 4th Respondents be and is hereby allowed with costs.

b. .....

c. That unless otherwise stated, the Honourable Court shall henceforth unconditionally discharge, dispense and/or dispel the 1st and 2nd Interested Parties from the matter upon the final conclusion and/or determination of the case."

14. On the issue of the application, the Learned Counsel submitted that there were orders that were clear. The subject matter showed/ arose from the filed pleadings. There was no consent; they pleaded for a sum of One Hundred Six Million (Kshs 106,000,000/-) as interests. There was no dispute as to the subject matter; the taxing master used a sum of One Hundred Six Million (Kshs 106,000,000/-) but it was higher as he considered interest.

15. On the second issue. The Learned Counsel averred that the 2nd and 4th Respondents were two distinct and separate and thus were entitled to filing two (2) bills of costs; they were allowed to do so. Further, they were two parties; a state corporation and a company. His contention that The Mutunga rules allowed for two separate bills of costs. They filed replying affidavits on behalf od the 2nd and 4th Respondents; hence they are entitled to two (2) distinct costs. They never filed the responses to the applications apart from the submissions. The taxing master never disregarded that fact. The taxing master was correct in the ruling. Thirdly, he referred to the list of cases; - the case of "Mwarumbo Land Case".

16. According to the Learned Counsel, it was not a claim for land but an issue for money. He urged that they deposit the decretal amount as security as per the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 – the decretal sum was Five Million Four Hundred Seventy-Eight Thousand Six Hundred Seventy-Eight (Kshs. 5,478,678/-) to be deposited in Court security. They urged the court to dismiss the reference.

A. Rebuttal by the Petitioner's Learned Counsel

17. While rebutting, M/s. Onesmus submitted that it's a certificate of costs and not a decree. The orders issued were ex parte orders on costs. They were not seeking extension of security. They should have filed a formal application to enable the Learned Counsel respond and not orally. On the issue of scale fees adopted; Schedule VI; the Learned Counsel submitted that its by the time spent by the advocate, complexity of the matter. On the issue of the two separate bills of costs filed, the learned Counsel submitted that Rule 62 of the Advocates Remuneration Order (ARO) – provided for that as long as a Counsel is representing more than on party on one pleadings but there were three pleadings; the bills of costs which were exaggerated.

V. Analysis and Determination

18. I have keenly assessed the filed Chamber Summons application filed by the Petitioner/Applicant and the grounds of opposition by the 2nd and 4th Respondents, the submissions and the myriad of authorities, the relevant provisions of the *Constitution* of Kenya, 2010 and the statures.

19. For the Honourable Court to reach a reasonable, Fair and Equitable decision, it has condensed the subject matter into the following three (3) salient issues for its determination. These are: -

    a. Whether the Chamber summons application dated 17th May, 2024 by the Petitioner/Applicant herein has any merit whatsoever.

    b. Whether the 2nd and 4th Respondent ought to have filed their costs in one Bill of Costs.

    c. Who will bear the costs of the application.

Issue No. a). Whether the Chamber summons application dated 17th May, 2024 by the Petitioner/ Applicant herein has any merit whatsoever.

20. Under this sub - title, the Honourable Court shall examine the merits of the Chamber summons applications filed by the Petitioner seeking to reference the Taxing Master's ruling on bill costs dated 8th May, 2024. The legal parameters within which the Court can interfere with the Taxing Officer's decision are well settled. In the case of:- "First American Bank of Kenya – Versus - Shah and Others [2002] E.A.L.R 64 AT 69", Ringera J (as he then was) delivered himself thus;

> " 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".

21. That is to say that a court will not interfere with the award unless it is in a clear error of principle or the sums awarded are either manifestly too high or too low as to lead to an injustice. The principle is found in the old Court of Appeal decisions:- "Premchand Raichand Limited & Another – Versus - Quarry Services Of East Africa Limited And Another [1972] E.A 162";

> " 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 is somewhat too high or too low: it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other"

22. The provisions of Paragraph 11(1)(2) of the Advocates Remuneration Order imposes a duty to give reasons on the Taxing Master taxing a Bill of Costs. Without providing any reasons for his action, the Taxing Officer erred in principle thereby giving what appears to be manifestly low award. Even if the pleadings and Judgment in the present case did not disclose the value of the subject matter, the Taxing Officer would still be enjoined to consider all the relevant factors. The relevant factors, which the Applicant listed in his Bill of Costs, include the nature and importance of the Petition, the complexity of the matter, the novelty of the questions raised, the value of the subject matter and the time expended by the advocate. None of these factors were considered by the Taxing Master in the Ruling.

23. On 6th November 2015 the Law firm of Messrs. Ndegwa, Katisya, Sitonik & Associates filed grounds of opposition on behalf of the 2nd respondent (Kenya Railways Corporation), to the petitioner's application dated 22nd October 2015. On 16th November 2016, the same firm filed a memorandum of appearance for the 3rd respondent (National Land Commission). On 13th February 2017 the same Law firm of Messrs. Ndegwa, Katisya, Sitonik & Associates filed a notice of appointment for China Roads and Bridges Corporation (Kenya). The said Law firm filed pleadings on behalf of the 2nd, 3rd and 4th Respondents until 15th December 2021 when the court dismissed the Petitioner's suit against the

2nd and 4th Respondents. Some of the pleadings that were filed by the said Law firms on behalf of the 2nd and 4th Respondents, include: Submissions and bundle of authorities dated 10th September 2021, Notice of Appeal filed on 9th July 2020, Submissions and bundle of authorities dated 21st October 2015, grounds of opposition filed on 1st October 2018, replying affidavit and grounds of opposition both dated 22nd February 2017, grounds of opposition dated 22nd April 2016 and 16th November 2016.

24. On 16th July 2021, the Law firm of Messrs. Ndegwa, Katisya, Sitonik & Associates filed a Notice of Motion application dated 14th July 2021 as the counsel representing the 2nd and 4th Respondents. The orders sought were: 'The claim against the 2nd and 4th Respondents in the further amended petition dated 6th February 2019 and filed on 6th February 2019 be dismissed with costs.' The Petitioner opposed the application vide a Replying Affidavit sworn by Peter Kimanga, the director of the Petitioner on 5th August 2021. On 10th September 2021 the Law firm of Messers. Ndegwa, Katisya, Sitonik & Associates filed submissions as well as a list and bundle of authorities, on behalf of the 2nd and 4th Respondents, in support of their application dated 14th July 2021. Meanwhile, the Petitioners filed their submissions together with a list of authorities in opposition to the application on 25th October 2021.

25. On 15th December 2021, the court ruled in favour of the 2nd and 4th Respondents with costs to be borne by the Petitioner. In particular, the court concurred with the 2nd and 4th Respondents and critically accessed the prayers sought under the Petitioner's Further Amended Petition as follows: -

    a. Prayer (a) – that the Petitioners rights to own and acquire property under Article 40 was breached. However, by amendment the Petitioner struck off the names of the 2nd and 4th Respondents. As their names were struck out by the Petitioner, it follows that the clam under prayer (a) does not lie against the 2nd and 4th Respondents.

    b. Prayer (b) A declaration that the Petitioner's rights for fair administrative action were breached. However, by amendment the Petitioner struck off the names of the 2nd and 4th Respondents. As their names were struck out by the Petitioner, if follows that the claim under Prayer (a) does not lie against the 2nd and 4th Respondents.

    c. Prayer (b) A declaration that the Petitioner's rights to fair administrative action were breached by the 1st and 3rd Respondents. It is clear that the relief sought in this prayer are squarely and expressly against the 1st and 3rd Respondents only and not against the 2nd and 4th Respondents herein.

    d. Prayer (d) the Petitioner seeks for damages for violation of the Petitioner's right to Property and right to fair administrative action.

26. After they successfully had the suit against them dismissed, the 2nd and 4th Respondents through the Law firm of Messrs. Ndegwa, Katisya, Sitonik & Associates filed two separate party-to-party costs against the Petitioner on 17th February 2022. The 2nd Respondent's party-to-party bill of costs was Sixteen Million Five Hundred Eighty Thousand Seven Hundred Thirteen (Kshs. 16,580,713/-) while the 4th respondent's party-to-party bill of costs was at Sixteen Million Four Hundred Ninety-Eight Thousand Two Hundred Twenty and Sixty Cents (Kshs 16,498,220.60). On 8th May 2024, the Taxing Master ruled on the two party-to-party bill of costs in two separate rulings. In the 4th Respondent's party-to-party bill of costs dated 16th February 2022, he found that he was satisfied that service was effected on the Petitioner and that the same was unopposed. He proceeded to tax the said bill at a sum of Kenya Shillings Two Million Seven Hundred Four Thousand Four Hundred Twenty-Three and Eighty-Nine Cents (Kshs. 2,704,423.89/=). While in the 2nd Respondent's party to party bill of costs dated 11th February 2022, he found that he was satisfied that service was effected on the petitioner

and that the same was unopposed, and proceeded to tax the said bill at a sum of Kenya Shillings Two Million Seven Hundred Seventy-Four Thousand Four Hundred Thirty-Eight And Eighty-Nine Cents (Kshs 2,774,438.89.

27. In the case of:- "Rachier & Amollo Advocates LLP – Versus - National Hospital Insurance Fund Board of Management [2019] eKLR", it was stated that:

> " The principle to be applied when assessing instruction fee in a suit are well settled. The Court of Appeal in the case of Joreth Limited – Versus - Kigano & Associates [2002] eKLR outlined the principle as follows:
>
> > " We would at this stage point out that the value of the subject matter of a suit for the purpose 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 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 other relevant circumstances"
>
> Similarly, the principles upon which a judge of the superior court interferes with the taxing officer's exercise of discretion are well settled. Ojwang J (as he then was) outlined these principles in the case of Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W'Njuguna & others [2006] 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 is somewhat too high or too low; it will only interfere if it thinks the award is 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 authorizing clause in the law, or a particularized 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..."

(See John Maina Mburu t/a John Maina Mburu & Co. Advocates – Versus - George Gitau Munene (Sued as Administrator of the Estate of Samuel Gitau Munene) & 3 others [2015] eKLR)

9. In KANU National Elections Board & 2 others v Salah Yakub Farah [2018] eKLR, it was held that:

> " The principles applicable to a review of a taxing master's decision
>
> The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in the case of Visser – Versus - Gubb 1981 (3) SA 753 (C) 754H – 755C as follows:-
>
> > " The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."
>
> Differently put, before the court interferes with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing

master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling. (See Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others [1984] ZASCA 2; 1984 (3) and Legal and General Insurance Society Limited – Versus - Lieberum NO and Another 1968 (1) SA 473 (A) at 478G.)

It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision. (Johannesburg Consolidated Investment Co. vs Johannesburg Town Council 1903 TS 111).

The Taxing Master is required to take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The ultimate question raised by the applicant for review/setting aside the taxation is therefore whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case.

The scope of this application requires this court be satisfied that the Taxing Master was clearly wrong before interfering with her decision. The quantum of such costs is to be what was reasonable to prosecute or defend the proceedings and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles.

It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.' (Per SMIT AJP in Preller – Versus - S Jordaan and Another 1957 (3) SA 201 (O) at 203C - E.)

Guidance can also be obtained from the Canadian case of Reese – Versus - Alberta {1993} 5 A.L.R. (3rd) 40in which McDonald J. sets out the general principles applicable to awarding costs, at page 44: -

> "While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. ... The costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees ....plus reasonable disbursements...."

In principle, costs are awarded, having regard to such factors as: - (a) the difficulty and complexity of the issues; (b) the length of the trial; (c) value of the subject matter and (d) other factors which may affect the fairness of an award of costs. The law obligates the taxing master to take into account the above principles.

Restating the principles of taxation of costs, the Ugandan Supreme court in Bank of Uganda – Versus - Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC). stated:-

> " Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.
>
> Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.
>
> Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

...The principles guiding the review of taxation in this court were settled in President of the Republic of South Africa and Others – Versus -Gauteng Lions Rugby Union and Another:

QUOTE{startQuote "}

a. Costs are awarded to a successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.

b. A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.

c. The taxing master must strike this equitable balance correctly in the light of all the circumstances of the case.

d. An overall balance between the interests of the parties should be maintained.

e. The taxing master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.

f. And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate the ruling."

28. It is trite law that this court should not set aside or vary the decision of the taxing master merely because it would have awarded a higher or lower amount unless the taxing master's decision was based on an error of principle. The court in the case of the case of:- "Nyangito & Co. Advocates – Versus - Doinyo Lessos Creameries Ltd [2014] KEHC 5481 (KLR)" held that: -

> " 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 Remuneration 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 – Versus - Shah and Others [2002] 1 EA 64.
>
> 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."

29. The Petitioners claims that the taxing master found that the 2nd and 4th respondents' party-to-party bill of costs was unopposed, even though they had filed written submissions in opposition to the bills. Submissions cannot be taken as a response to the bill of costs and as such, the taxing master did not err in principle when he found that the bills were not opposed. Submissions have been held by court to be only a convincing tool in a case, the Court of Appeal in "Daniel Toroitich Arap Moi – Versus - Mwangi Stephen Muriithi & Raymark Limited [2014] KECA 642 (KLR)" held,

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

30. In my view, the discretion that a taxing master has during taxation is an aspect of judicial decision-making which is guided by principles. The failure to consider submissions in reaching his decision is not a ground to set aside the decision of a taxing master. The court in the case of: - "Robert Ngande Kathathi – Versus - Francis Kivuva Kitonde [2020] KEHC 7276 (KLR)" held that

> " Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande – Versus - Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007: "Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."
>
> The same Judge in Nancy Wambui Gatheru – Versus - Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows: "Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."
>
> Similarly, in Ngang'a & Another – Versus - Owiti & Another [2008] 1KLR (EP) 749, the Court held that: "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the

absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

31. It is the Petitioner's case that the Respondents were only awarded the costs of the application dated 14th July 2021 and not the entire petition. The Petitioner argued that the costs that the 2nd and 4th Respondents were awarded, by the court in its ruling dated 15th December 2021 did not extend to the Petition, since at that stage the Petition had not been heard and determined. After the Petition was heard and determined, vide its Judgement dated 6th November 2023 the costs of the entire suit were awarded to the Petitioner. It is clear to the court that the Petitioner's case is that the 2nd and 4th Respondents are only entitled to the costs of the application dated 14th July 2021 and not the whole Petition.

32. From the onset, it is important to refer to Section 27 of the *Civil Procedure Act*, Cap. 21 which provides as follows: -

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

> provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

33. Costs are at the discretion of the court, and they follow the event unless the court has a good reason to order otherwise. In this case, the petitioner argues that the 2nd and 4th respondents were awarded costs of the suit and not the entire Petition. In my view, the 2nd and 4th Respondents were awarded costs to the application as well as the Petition itself. The 2nd and 4th Respondents sought to have the Petitioner's suit against them dismissed with costs and the same was allowed. In its ruling dated 15th December 2021, this court in paragraph *38* held that,

> " The provisions of Section 27 (1) of the *Civil Procedure Act* hold that costs follow the events. In this case, the 2nd and 4th respondents have succeeded and therefore deserve the order of costs to be borne by the petitioner."

34. The question that arises is what is the meaning of 'costs follow event'. The court in the case of "Cecilia Karuru Ngayu – Versus - Barclays Bank of Kenya & Credit; Reference Bureau Africa Ltd [2016] KEHC 7064 (KLR)" held that:-

> " Justice (Retired) Richard Kuloba in the earlier cited book states as follows:-
>
> > " The words "the event" mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact

it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part"

35. Further, this being a constitutional petition, the instruction fees is governed by Schedule 6 paragraph (j) of the Advocate 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 ma be reasonable but not less than 45,000.

(ii) Where the matter is opposed and fond 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.

36. On the Taxing Master calculating the instruction fee with regards to the value of the suit rather than Schedule 6 paragraph (j) of the Advocate Remuneration Order, it is clear from the proceedings of the Taxing Master that the value of the subject matter was discerned from the proceedings. I do find that there was no error of principle of awarding costs as the taxing officer considered the issue of passage of time and inflation.

37. I find the decision to be sound and judicious, and I see no reason to interfere with the same, as the said amount was not manifestly low so as to occasion an injustice on the part of the applicant. It is also do not find that the taxing officer applied the wrong principles in arriving at the decision to tax the instructions fees as was contended by the Applicant.

Issue No. b). Whether the 2nd and 4th Respondent ought to have filed their costs in one Bill of Costs.

38. As discussed above, I am of the view that the 2nd and 4th Respondents were granted the general costs of all the proceedings relating to the Petition up to the point where the suit was dismissed against them. The application dated 14th July 2021 led to the end of their involvement in the petition, it is therefore proper to consider that the court awarded them all the costs incidental to the Petition as well as the application since they were the successful party at that point.

39. The Petitioner has argued that in the two rulings, the Taxing Master ruled that the 2nd and 4th Respondents are entitled to instruction fees as per the judgement dated 6th November 2023 which valued the suit property at a sum of One Hundred Six Million Six Hundred Eleven Thousand Three

Hundred Sixty-One and Fifty Cents (Kshs 106,611,361.50). As a result, the taxing master applied Paragraph 1 (b)(ii) of Schedule 6 of the Advocates (Remuneration) Order 2014, which based the instruction fees on the subject of the matter. The petitioner argued that the instruction fees ought to be assessed as stated in Paragraph 1 (j) of Schedule 6 of the Advocates (Remuneration) Order 2014 where fees as assessed in a Constitutional Petition.

40. The court has carefully considered the rulings of the Taxing Master issued on 8th May 2024 and notes that indeed the taxing master applied the value of the suit property. In my view, the Taxing Master did not err in using the value of the suit property that was stated in the Judgement of this court, in assessing the instruction fees. The Taxing Master could not base the value of the property on the claim stated in the pleadings as the same could have been allowed or disallowed. The Taxing Master did not make an error on principle by basing the instruction fee on the value of subject matter as determined in the final judgement. Paragraph 1 (j) of Schedule 6 of the Advocates (Remuneration) Order 2014, allows a Taxing Master to consider the value of the subject matter in a Constitutional Petition in arriving at the instruction fees. It states:-

> To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master 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...

41. Though the advocate was instructed individually by the 2nd and 4th Respondents to defend them in the *Constitution* Petition; the same was determined before the petition could be heard and determined, when their application was allowed by the court on 15th December 2021. It is therefore important to state that the advocate cannot be entitled to the whole amount claimed, as would have been if the 2nd and 4th Respondents had been parties to the petition till its logical conclusion. As such, the taxing master did not err when he exercised his discretion and awarded the minimum instruction fees based on the value of the suit property as determined by the court in its judgement. The court in the case of:- "D. Njogu & Company Advocates – Versus - Panafcon Engineering Limited [2006] eKLR" held that:-

> " The principles applicable upon a reference on a taxation by a Taxing Master are well settled. Where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the Taxing Masters are particularly fitted to deal and the court will intervene only in exceptional cases. See Thomas James Arthur –vs – Nyeri Electricity Undertaking [1961] E.A. 492.
>
> In the present case the action in respect of which the bill of costs was taxed is not in dispute. The advocates demanded and subsequently filed suit for recovery a principal sum of KShs.8,446,000.00. The value of the subject matter of the suit was therefore clearly ascertained. It is clear to me that that is the value that the Taxing Master applied. Was there basis for awarding less than the instruction fees awardable? In Joreth Limited – Versus – Kigano and Another [2002] 1 E.A 92 the Court of Appeal observed at page 100 as follows:-
>
> > " By the first ground thereof the Respondent states that 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. In principle that is correct" underlining mine.
> >
> > Although the decision in that case would appear to contradict the decision of the Court's earlier decision in Mayers and Another –Versus – Hamilton and

Others[1975] E. A. 13, in reality there is no contradiction. At page 16 of that case their Lordships stated as follows:-

> "I accept that the moment an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee but it is necessary .....to realize that an advocate will not ordinarily become entitled at the moment of instruction to the whole of the fee which he may ultimately claim. Suppose for example, that within a few minutes of receiving instructions to defend a suit, an advocate were informed that the plaintiff had decided to withdraw. The advocate would as I see it be entitled to claim the minimum instruction fee but he could not properly claim in respect of work he had not done. (underlining mine)."
>
> To my mind it is clear that on being instructed an advocate is entitled to the minimum instruction fee. The figure may be increased at the discretion of the Taxing Master."

42. The 2nd and 4th Respondents filed an application dated 14th July 2021 and sought a single order i.e. "That the claim against the 2nd and 4th Respondent in the further amended Petition dated 6th February 2019 and filed on 6th February 2019 be dismissed with costs." The application was determined on 15th December when this court found it merited and ruled that the costs were to be borne by the Petitioners. It is the Petitioner's case that what the court held was that the 2nd and 4th Respondents are entitled to the costs of the specific application only and not the entire Petition as was. The Petitioner has also maintained that the 2nd and 4th Respondents were represented by one law firm hence there ought to have been one bill of cost. The Petitioner argued that the 2nd and 4th Respondents jointly filed one application for dismissal of claim and throughout the petition were represented by the same firm of advocates.

43. In my view the Taxing Officer must have been guided by the Provisions of Rule 62 of the Advocates (Remuneration) Order, 2009 which provides as follows;

> "Where the same advocate is employed for two or more Plaintiffs or Defendants and separate pleadings are delivered or other proceedings had by or for two or more such Plaintiffs or Defendants separately, the taxing officer shall consider in the taxation of such advocates Bill of Costs, either between party and party or both between advocates and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any party of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed.

44. In the case of Desai Sarvia & Pallan Advocates – Versus - Tausi Assurance Company Limited [2017] KECA 456 (KLR) the Court of Appeal held that:-

> "It is trite that an advocate is entitled to his fees once he is instructed, retained or employed by a client. In the absence of instructions or engagement by a client an advocate is deemed to have acted without the authority of the client hence, not entitled to fees. See Omulele

& Tollo Advocates – Versus - Mount Holdings Limited [2016] eKLR. Section 2 of the *Advocates Act* defines a client in the following manner:

> " "client" includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs;"

45. I make reliance in the case of "Re Ali Bin Hamed (Deceased) (1909-1910) 3 KLR 74", and "Nguruman *Limited – Versus - Kenya Civil Aviation and 3 Others, High Court Petition No. 143 of 2011*(2014) eKLR", where the principle of law emanating is an advocate is entitled to a separate fees in respect of every party that he represents in a suit notwithstanding that he acts for them only in a single suit or proceeding. The Advocates (Remuneration) order itself specifically recognizes that in non-contentious business an advocate may act for more than one party in a single transaction and is entitled to charge each party he acts for a separate fee for the same. The position is reinforced by Rule 62 of the Advocates (Remuneration) order which gives the deputy registrar the discretion to disallow costs which have been unnecessarily or improperly incurred by an advocate who acted for more than one party in a suit and has filed separate pleading for them.

46. In my view, the 2nd and 4th Respondents individually instructed the Law firm of advocates to represent them in the Petition, specifically on 6th November 2015 the Law firm of Messrs. Ndegwa, Katisya, Sitonik & Associates filed grounds of opposition on behalf of the 2nd Respondent (Kenya Railways Corporation). On 13th February 2017, the same Law firm of Messrs. Ndegwa, Katisya, Sitonik & Associates filed a notice of appointment for China Roads and Bridges Corporation (Kenya). It is therefore clear to the court that the Law firm of Messrs. Ndegwa, Katisya, Sitonik & Associates was instructed at separate times by the 2nd and 4th Respondents.

47. Each of the respondents engaged the advocates to act on their behalf creating two distinct transactions. It is therefore the finding of this court that each of the Respondents engaged the firm for legal representation separately, and as such are entitled to file two separate bill of costs; further the Court noted that one was a government corporation and the other is a private entity; they could have been instructing the Advocate in the same way.

Issue No. c). Who will bears the Costs of the application?

48. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus - Tarchalan Singh" eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

49. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. I find this to be an appropriate case where the Respondents shall have the costs of the application, the provision of section 27 of the *Civil Procedure Act* chapter 21 of the Laws of Kenya notwithstanding.

VI. Conclusion & Disposition

50. Consequently, upon causing in depth analysis of the issues crafted herein, the Honourable Court on the Preponderance of probabilities and the balance of convenience is not persuaded by the Petitioner to vary or set aside the said decisions. It finds no fault in the decision of the Taxing Master, Hon. Nyariki delivered on 8th May 2024, taxing the 2nd Respondent's Bill of Costs dated 11th February 2022 at a sum of Kenya Shillings Two Million Seven Hundred Seventy-Four Thousand Four Hundred Thirty-Eight And Eighty-Nine Cents (Kshs 2,774,438.89; and of taxing the 4th Respondent's Bill of Costs dated 16th February 2022 at a sum of Kenya Shillings Two Million Seven Hundred Four Thousand Four Hundred Twenty-Three and Eighty-Nine Cents (Kshs. 2,704,423.89. Thus, for avoidance of any doubt it proceeds to orders as follows: -

    a. That the Chamber Summons application dated 17th May 2024 by the Petitioner/Applicant do and is hereby found to be devoid of merit and is hereby dismissed.

    b. That costs of the application be awarded to the 2nd and 4th Respondents to be borne by the Petitioner/Applicant herein.

    It is so ordered accordingly.

RULING DELIVERED ON THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF OCTOBER 2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. M/s. Onesmus Advocate for the Petitioner/Applicant.

c. Mr. Karina Advocate for the 2nd & 4th Respondents.