



**Mathenge v Independent Electoral & Boundaries Commission & 7 others (Election
Petition Appeal 2 of 2018) [2025] KEHC 1640 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
ELECTION PETITION APPEAL 2 OF 2018
AK NDUNG’U, J
FEBRUARY 20, 2025**

BETWEEN

DENIS KANIARU MATHENGE APPLICANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

WAFULA CHEBUKATI 2ND RESPONDENT

JUBILEE PARTY 3RD RESPONDENT

ZAMZAM SALMA HUSSEIN 4TH RESPONDENT

PETER LEMERIAN MATUNGE 5TH RESPONDENT

MARY SAMKEN KESHINE 6TH RESPONDENT

CHRISTOPHER MARK MWANGI 7TH RESPONDENT

CATHERINE NYOKABI KIBUE 8TH RESPONDENT

RULING

1. This ruling resolves the reference vide chamber summons application dated 21/12/2023 by the Applicant seeking orders that;
 - i. The Honorable court be pleased to set aside the taxing officer rulings delivered on 07/12/2023 as the relate to the reasoning and determination of items 1 of the 4th, 5th, 7th and 8th Respondents bill of costs.
 - ii. That the certificate of costs or the respective bills be set aside.



- iii. This Honourable court be pleased to adjust the figures, and reassess the instruction fees due to the 4th, 5th, 7th and 8th Respondent.
 - iv. That the instruction fees awarded by this court does apply as the fee payable to all the respective Respondents' bills and or the fees payable.
 - v. That in the alternative, this Honourable court refers the matter for fresh taxation before another deputy registrar either in Nanyuki, Kerugoya, Meru or Nyeri after considering the Applicant's submissions.
 - vi. That costs of this application be provided for.
2. The application is based on the grounds on the face thereof and supported by an affidavit of the Applicant in which he deposed that he is a man of straw living with disability. That the 4th, 5th, 7th and 8th Respondents' bill of costs were taxed on item 1, the instruction fees, at Kshs.350,000/- an amount that was excessive. That the taxing master failed to appreciate that the Advocate Remuneration Order, 2014 provides for Kshs.100,000/- as fee for presentation and opposition of election petition in the lower court and he failed to appreciate this was an appeal from a matter where instruction fees were at Kshs.100,000/-. Therefore, the taxing master awarded an excessive amount of Kshs.350,000/- which was not commensurate with the work done. That the Advocate Remuneration Order, 2014 set the fees for appeals at Kshs.25,200/- as per Schedule 6 hence the taxing master erred by not holding that the fair and reasonable fees under item 1 was Kshs.25,200/- and increasing the same was unreasonable and unjustifiable. Therefore, it will be just for this court to allow the application to enable the bill be taxed appropriately in accordance with the law.
 3. The 4th, 5th and 7th Respondent filed a joint replying affidavit dated 09/05/2024 sworn by Kenneth K Mbaabu, their advocate. He averred that the bill of costs filed for taxation had charged instruction fees of Kshs.1,500,000/- but was taxed at Kshs.350,000/- based on the interest of the parties, care and labour required, interest of the client in sustaining or losing the brief and nature of prayers sought. That the manner of assessment proposed by the Applicant would result to a manifestly deficient amount which would not cover the costs of the suit nor compensate the advocates sufficiently. That the Applicant has not demonstrated that the taxing officer erred in law and principle in assessing the costs to warrant interference by this court. He prayed that the application be dismissed and uphold the taxing officer's award.
 4. The 8th Respondent filed a replying affidavit dated 20/02/2024 sworn by Muhoho Gichimu, counsel in conduct of the matter. He averred that he filed a bill of costs and prayed for instruction fees of Kshs.1,000,000/- but the taxing master taxed the same to Kshs.350,000/- after considering the interest of the parties, care and labour required, the interest of the client sustaining or losing a seat. That the taxing master gave his reasons for awarding that amount and the Applicant has not demonstrated that the taxing master erred in principle in assessing the costs to warrant this court interference and therefore, the application should be dismissed.
 5. The application was canvassed by way of written submissions. The Applicant submitted that the bill of costs emanated from an appeal hence schedule 6 of the Advocates Remuneration Order applies which provide for Kshs.25,200/- as instruction fees. That the instruction fees for an election petition at the lower court is Kshs.100,000/- as per schedule 7 paragraph 3 and therefore, the taxing master erred awarding Kshs.350,000/- as the same is not commensurate to the work done compared to time expended at the lower court. That the decision by the taxing master lacked justification and was not substantiated by any legal authority or statutory provision. He submitted that section 75(4) of the *Elections Act* limits the jurisdiction of this court to matter of laws only hence the court was limited to



- the areas of focus unlike the lower court which deals with matters of law and facts. Further, proceeding at the trial court demand greater level of involvement in contrast to those in the appellate court and therefore, the decision to increase the amount beyond the amount provided for the trial court was inequitable and contravened the principles of access to justice.
6. He submitted that the Applicant is not a person of means as he is living with a disability and excessive taxation will be beyond his financial capacity. He invited the court to take judicial notice that people living with disability are not on an equal pedestal with other litigants and that section 38 of the Persons with Disability Act provides on the leniency to be observed on persons with disability in legal systems. He prayed that the court do cap the instruction fees awarded to kshs.60,000/- as was held in the case of Omwega v Independent Electoral and Boundaries Commission & 2 others (2023) KEHC 21286 (KLR) where the court dismissed the appeal and awarded costs of Kshs.60,000/- which was capped at Kshs.20,000/-
 7. For 4th, 5th and 7th Respondents, it is submitted that the court in Phemchand Raichand Ltd Another vs Quarry Services of East Africa Ltd & another held that a court can interfere with the assessment of costs by the taxing officer if it is proved that the amount taxed was manifestly excessive or low, or if there is proof that the taxing officer followed a wrong principle in reaching his decision. He submitted that the Applicant has not provided such proof. That the taxing master followed the law and exercised his discretion judiciously as the ruling shows that he relied on sound principles set out in the legal precedents. That the Applicant is making bare averments as he has not brought forth any evidence to show that the taxing officer committed an error in principle and has not demonstrated which irrelevant factors were considered. That the taxing master took note of the labour of the parties, the interest of the clients and also the nature of the prayers and considered the overall circumstances of the case and he took into considerations the range of other election petitions.
 8. That this was an election appeal and the remuneration Order has differentiated constitutional petitions with commercial and even succession matters and therefore instructions fees for a mere appeal should not be the same as instruction fees for an election petition appeal as suggested by the Applicant. On the issue of disability, he submitted that the Applicant used the same issue to contest an election and the same cannot be used as a sword to defeat payment of costs. Further, the issue of disability does not affect and cannot be a reason for setting aside the taxing master's decision when there are laws in place on the same.
 9. The counsel for the 8th Respondent argued that the principle for setting aside the decision of a taxing master were established in the case of Kipkorir Tito and Kiara Advocates vs Deposit Protection Fund Board 2005 Eklr and Kamunyori & Co Advocates vs Development Bank Limited 2015 Civil Appeal 206 of 2006 being that the judge will not normally interfere with the exercise of discretion of the taxing officer unless the taxing officer erred in principle in assessing the costs. He relied on Joreth Ltd vs Kigano & Associates 2002 Eklr on factors to consider in assessment of instruction fees. He submitted that the taxing master exhaustively explained and expounded on the reasons and basis as to why he settled on the fees of kshs.350,000/-. He also appreciated Schedule 6 paragraph j(a) of the Advocates Remuneration Order which only sets the minimum fee at Kshs.25,200 but does not set a maximum though it states that the same should be reasonable.
 10. That looking at the taxing officer's ruling, he was cognisant of relevant factors that a taxing officer should take into account when determining instruction fees, he acknowledged and grasped in full the confines within which taxation is supposed to be and he took into consideration comparable cases and importance of the matter and the impact of the case to the parties. On the issue of disability, he submitted that the Applicant relied on the same before the trial court and during the appeal and it is



therefore not plausible for him to use his disability to challenge the election and yet use the same to deny the 8th Respondent her entitled assessed costs.

11. I have read through the application and the replying affidavits. I have had due regard to the rival submissions and the authorities cited.
12. The challenge on the award of costs is targeted at the taxation of the instruction fees for the 4th, 5th, 7th, and 8th Respondents where the taxing officer taxed the instruction fees at Kshs.350,000/- for each aforementioned Respondents. The 4th, 5th and 7th Respondent had filed a bill of costs where they had sought Kshs.1,500,000/- in instruction fees whereas the 8th Respondent had sought Kshs.1,000,000/- on this item. The taxing master awarded instruction fees at Kshs.350,000/- for each of the parties.
13. The Applicant's contention is that the amount taxed was not commensurate to the work done taking into account that the *Elections Act* limits the jurisdiction of the high court sitting on appeal to matter of laws only hence the court was limited to the areas of focus unlike the lower court which deals with matters of law and facts. Further, proceeding at the trial court demand greater level of involvement in contrast to those in the appellate court and that the decision by the taxing master lacked justification and was not substantiated by any legal authority or statutory provision. Therefore, the decision to increase the amount beyond the amount provided for the trial court was inequitable and contravened the principles of access to justice.
14. The Respondents argument on the other hand is that the taxing master followed the law and exercised his discretion judiciously as the ruling shows that he relied on sound principles set out in the legal precedents and he also took note of the labour of the parties, the interest of the clients and also the nature of the prayers and considered the overall circumstances of the case.
15. While awarding the contested amount, the taxing master relied on a line of authorities. He considered factors to be taken into account while awarding instruction fees. He considered the fact that the pleadings were voluminous and that complexity of the matter was important in determining instruction fee. He also considered the fact that the appeal sought to overturn the election court judgment upholding the election by nomination in the relevant party list of the 4th to 8th Respondents to Laikipia County Assembly and the main issue was that the list did not include a person from marginalised group-with disability. That the appeal was canvassed by way of written submissions and he proceeded to hold that;

“I have considered the interest of the parties, care and labour required. I have considered the interest of the client in sustaining or losing a brief. I have considered the nature of prayers sought by the Petitioner. Taking into consideration all the above and considering the circumstances of the case, I will exercise my discretion and award an instruction fee of Kshs.350,000/-.”

16. It also appears that the taxing master was alive to the provision of Paragraph J(a) of the Advocates Remuneration Order which he quoted and which provides as follows in regards to appeal in the High Court;

“(a) To present or to oppose an appeal in any case not provided for above; such sum as may be reasonable but not less than Kshs.25,200/.”

17. He also stated that according to remuneration order, 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 directions by



the trial judge. In awarding costs, he considered the case of Seth Ambusini Panyako v Independent Electoral and Boundaries Commission & 2 others (2020) eKLR where the election court upheld an award of Kshs.700,000/- as instruction fees for a petition challenging election of Kakamega Senator and which had proceeded to the final conclusion. It also appears that the taxing master was clearly alive to the applicable taxing principles and considered carefully the nature of proceedings in the election petition and also considered the factors that were enunciated in the case of Joreth Limited v Kigano & Another [2002] E.A. 92 where the court set out the factors to be taken into consideration in determining the instruction fees which are the importance of the matter, the general conduct of the case, the nature of the case, the time taken for its dispatch and the impact of the case on the parties.

18. It is a well-established principle 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 was held in Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others [2006][10]. Ojwang, J (as he then was) expressed himself inter alia as follows:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference 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.....”



19. The Applicant's counsel relied on Schedule 6(a) of the Advocates (Remuneration) (Amendment) Order, 2014, under the sub-heading of appeals which prescribes on Appeals, a minimum of Ksh 25,200/-. This means that the Schedule does not prescribe the maximum amount to be awarded, the amount is not capped. It is also noteworthy that the schedule is on general appeals and a distinction must be drawn between a general appeal and an election appeal which is a special jurisdiction under the electoral laws and where the interest in the matter goes beyond the Appellant to the general public.
20. The Applicant has prayed that this court do consider that he is a person living with a disability and excessive taxation will be beyond his financial capacity. This issue was well considered in his appeal before this court (Waweru J) where the learned Judge found that there was no regulation or rule or law placed before the election court or indeed this court, exempting persons with disability from paying costs in election petition proceedings, particularly those that they institute.
21. Having reviewed the proceedings before the Taxing officer and the subsequent ruling, and although the Taxing Master appears to have appreciated the applicable principles, guided by the decision in Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others [2006][10] (supra), I am of the persuasion that the award was in the circumstances of the case so high as to amount to an injustice to the Appellant, a sure invite of this court's interference with the exercise of discretion thereon. The work that was put in place by the Respondents' Counsel could not have attracted the costs that were awarded.
22. The Court of Appeal in *Supermarine Handling Services Ltd vs. Kenya Revenue Authority, Civil Appeal No. 85 of 2006*, explained the circumstances that would lead an appellate court to interfere with the trial court's exercise of discretion thus;

“Costs of any action or other matter or issue shall follow the events unless the court or judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. (Emphasis added). If, however, there be, in fact, some grounds to support the exercise by the trial judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance.... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reasons” within the meaning of the rule...(emphasis added).

23. The Taxing officer in giving his reasons for enhancing the instruction fees used generalities in the following terms;

“I have considered the interest of the parties, care and labour required. I have considered the interest of the client in sustaining or losing a brief. I have considered the nature of prayers sought by the Petitioner”
24. In so doing, the Taxing Master fell short of the threshold set in Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others [2006][10].
25. There is therefore a ripe ground for this court's interference with the award of costs made.



26. So which way the costs? On the material before the court, and considering the public interest in the matter, and in order not to discourage parties who may wish to pursue compliance by relevant bodies and especially political parties with a fair electoral process, and balancing the rights of the Respondents to recompense them for legal costs expended in the appeal, am of the view that an award of instruction fees at Ksh 100,000 would suffice.
27. With the result that the Reference herein is successful. The award of instruction fees by the Taxing Master at Ksh. 350,000 is set aside and substituted with a sum of Kshs. 100,000 for each of the Respondents.
28. As the Reference is partially successful, I direct that each party is to bear its costs.

DATED SIGNED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2025.

A.K. NDUNG’U

JUDGE

