Republic v Energy and Petroleum Regulatory Authority; Lake Gas Limited & another (Interested Parties); Proto Energy Limited (Exparte Applicant) (Judicial Review Application E1118 of 2020) [2025] KEHC 8943 (KLR) (Judicial Review) (23 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8943 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E1118 OF 2020

RE ABURILI, J

JUNE 23, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

ENERGY AND PETROLEUM REGULATORY AUTHORITY ..... RESPONDENT

AND

LAKE GAS LIMITED ..... INTERESTED PARTY

AND

PROTO ENERGY LIMITED ..... EXPARTE APPLICANT

AND

LAKE OIL LIMITED ..... INTERESTED PARTY

RULING

1. Being aggrieved by the ruling and reasons for taxation on the Interested Parties' Party and Party bill of costs dated 31st July 2023 delivered by Honourable Christine Asuna Okello (Deputy Registrar/ Taxing Master) on 23rd April 2024, the Interested Parties, Lake Gas Limited and Lake Oil Limited, vide Notice of objection to taxation dated 23rd April, 2024, objected to the Ruling intending to file a reference.

2. Vide a chamber summons application dated 7th May 2024, the Ex parte Applicant's reference seeks the following orders, challenging the aforesaid taxation and reasons thereof that:

1. That this Honourable Court be pleased to review and/or set aside the Ruling and/or award of the Taxing Master (Hon.Christine Asuna Okello) delivered on 23rd April 2024 in respect to the 1st and 2nd Interested Parties party and party bill of costs dated 31st July 2023.

2. That the Party and Party bill of costs dated 31st July 2023 be taxed afresh interpartes and/or this court proceeds to make a finding.

3. That the costs of this application be in the cause.

3. The grounds upon which the reference is predicated and which are also contained in the supporting affidavit sworn by Nagib Hussein on 7th May 2024 are that the Taxing Master failed to appreciate the complex nature of the work done in seeking the Judicial Review remedies. It is also their case that the instruction fees awarded was excessively low as the matter was handled under extreme urgency.

4. It is also stated that the Taxing Master failed to appreciate the nature and importance of the case as well as its novelty. She is also said to have failed to appreciate the value of the subject matter in awarding the instruction fee.

5. The Applicant/Interested Parties also object to the getting up fees that was awarded on the ground that the same is calculated based on the amount awarded under Item No.1. They also object to Items No. 30; 7, 18, 25, 33, 39; 11, 26, 28, 29, 43, 47, 53,59,68,69,93;44,81,85,92,96,97;72,74,76,78 and 91 of the party and party bill of costs.

6. In response, the Respondent/ Ex parte Applicant filed a replying affidavit sworn on 2nd May 2025 by Wambui Maina who introduces herself as the Ex parte Applicant's Head of Legal.

7. According to Ms. Wambui, the Taxing Master's decision is sound, well-reasoned and grounded in law and principle. It is further contended that the Applicants sought taxation for Kshs.148,769,014 which is grossly exaggerated, unjustifiable and not commensurate with the nature or volume of work demonstrated.

8. It is the Ex parte Applicant's case that the Interested Parties have not identified or outlined the principles which they claim the Taxing Master misapprehended and misapplied nor have they demonstrated how she erred.

9. According to Ms. Wambui the taxing master rightfully dismissed and taxed off the exaggerated claims, for instance Items 7,18,25,33 and 39 which relate to courts attendances but there were no particulars furnished to the court showing all day court attendances.

10. Item 30 is said to be a duplicative claim already covered under Schedule 6A 1 of the Advocates Remuneration (Amendment) Order. Items 44,81,85,92,96 and 96 according to the Ex Parte Applicant, were disallowed because no particulars were furnished before the court to prove attendance.

11. The Ex parte Applicant contends that the Interested Party's Bill of Costs appears designed to unjustly inflate compensation, containing figures unsupported by court filing receipts or relevant disbursements.

Submissions.

12. Only the Ex parte Applicant filed written submissions which are dated 2nd May 2025. It is submitted on its behalf that the Taxing master's ruling is sound, lawful, and well-reasoned. It is argued that the Taxing Master properly considered all relevant factors under the Advocates (Remuneration) Order

such as the nature, complexity, pleadings, volume of work, and remedies sought and awarded a fair amount of Kshs. 968,282.

13. The Exparte Applicant criticizes the 1st and 2nd Interested Parties' claim for Kshs. 95,990,003/= in instruction fees as grossly excessive and contrary to established principles. It is submitted that the Taxing Master correctly exercised discretion by awarding Kshs. 600,000/= which is six times the prescribed base fee under Schedule 6A(j)(ii) of the Advocates (Remuneration) Order 2014), reflecting the effort involved without acceding to the Interested Parties' inflated and speculative demand.

14. The Ex parte Applicant relies on the case of Republic v Commissioner of Domestic Taxes Ex Parte Ukwala Supermarket Limited & 2 Others [2018] eKLR where the court stated that while the monetary value of the subject matter may be relevant, it is not the sole determinant of instruction fees.

15. The Ex parte Applicant contends that the 1st and 2nd Interested Parties' claim of Kshs. 148,769,014/= is excessive, unjustified and resembles an attempt to extort. It places reliance on the case of Commissioner of Domestic Taxes and argues that the value of the claim should not be the sole factor in taxing costs, particularly where the judicial review matter was simple and concluded upon the grant of an order of mandamus.

16. The Ex parte Applicant asserts that the Kshs. 95,990,003/= sought as instruction fees lacks legal or factual basis, as the Interested Parties have not demonstrated complexity, novelty, or exceptional diligence to justify such a claim. Further that the Kshs. 600,000/= awarded by the Taxing Master was appropriate and lawful.

17. The Ex parte Applicant further argues that the Kshs. 31,996,667/= claimed as "getting up fees" contravenes Schedule 6A (2) of the Advocates (Remuneration) Order, which caps such fees at one-third of the instruction fee. It is also urged that no evidence of substantive preparation was presented, making the claim speculative. The Ex parte Applicant also relies on Section 107 of the *Evidence Act* to support the position that he who alleges must prove.

18. It is also submitted that 1st and 2nd Interested Parties have failed to demonstrate any legal principle misapplied by the Taxing Master, nor have they shown that the award caused any substantial injustice. Furthermore, that the Interested Parties improperly included VAT in their Party and Party Bill of Costs yet it is well established that VAT can only be charged by an advocate in an Advocate Client bill, not in Party and Party bills. Consequently, the Court is urged to dismiss the reference with costs.

19. The Ex Parte Applicant submits that, the firm of Mwaniki Gitau was not instructed by the Ex Parte Applicant, so the Taxing Master correctly disallowed VAT. To support this position reliance is placed in the case of Pyramid Motors Limited v Langata Gardens Limited [2015] eKLR, where the court held that VAT is only applicable where there is a taxable supply of services or goods, and not in party-to-party costs.

20. In conclusion, the Court is urged to uphold the Taxing Master's discretion, which considered the complexity, documentation, and work involved, resulting in the award of Kshs. 968,282/=.

Analysis and Determination.

21. Having considered the Ex parte Applicant and Interested Parties' positions on the reference, although the interested parties did not file their submissions, and therefore this court has relied on the chamber summons as filed and the supporting affidavit, the main issue for determination is whether this court should interfere with the ruling of the taxing master on the items objected to by the Interested Parties.

22. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known as was stated in the First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64. 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 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.

23. Further guidance is found in the case of Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92 where the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable, the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the 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.

24. Therefore, it is generally not within a Judge's mandate to re-tax a bill of costs. If the Judge determines that the taxing officer made an error in principle, the proper course is to remit the bill to the same or a different taxing officer with suitable guidance on how it should be taxed. A Judge should only intervene in the taxing officer's assessment of costs if there has been a misdirection on a point of principle.

25. As a matter of principle, instruction fees are a distinct and fixed item, charged only once, and are not influenced by the stage at which the suit stands. When taxing a bill of costs, the Taxing Officer is performing duties specific to that role. The taxing master serves as an officer of the Superior Court, designated to assess and determine bills of costs.

26. Specifically, regarding the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was), in Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) eKLR:

> " 1. . the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
>
> 2. the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;
>
> 3. the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
>
> 4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
>
> 5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
>
> 6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
>
> 7. where responsibility borne by advocates is taken into account, its nature is to be specified;
>
> 8. where novelty is taken into account, its nature is to be clarified;
>
> 9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form."

27. The above guidelines were also applied by Odunga J. (as he then was) in Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd, [2014] eKLR, where the learned Judge in addition held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

28. The primary complaint raised by the 1st and 2nd Interested Parties in the reference is that the instruction fees awarded by the Taxing Master was manifestly low and failed to reflect the complexity, novelty, and urgency of the judicial review proceedings. They further object to the manner in which getting up fees and numerous other items were taxed off or disallowed.

29. The Supreme Court in the case of Fredrick Otieno Outo vs. Jared Otieno Odoto & 3 others Petition Nu.6 of 2014 observed thus;

> [10] The principles of setting aside the decision of a Taxing Officer are now old hat, going by the numerous decisions of the superior courts below. As early as 1972 these principles were propounded by Spry VP, in the leading case of Premchand Raichand Limited & Another v. Quarry Services of East Africa Limited and Another; [1972] EA 162, which has been approved in a long line of subsequent rulings, for example, First American Bank of Kenya v. Shah and Others; (2002) EA 64 and Joreth Ltd v. Kigano and Associates (2002); 1 EA 92, to name but two.

(11) A certificate of taxation will be set aside and a single Judge can only interfere with the taxing officer's decision on taxation if;

a. there is an error of principle committed by the taxing officer;

b. the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy;(and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).

c. the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and

d. the award proposed is so far as practicable, consistent with previous awards in similar cases.

To these general principles, I may add that;

i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances

ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,

iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes

30. In making a determination on how much instruction fees was to be awarded, the Taxing Master made the observation that the applicable law was schedule 6 A (j) (ii) of the Advocates Remuneration Order 2014 and the a taxing officer had the discretion to increase the figure provided under the said schedule, taking into account several factors such as the nature and importance of the course or matter, the amount or value of the subject matter, the interest of the parties, the general conduct of the parties, the complexity of the issues raised and novel points of law, the time, research and skill expended in the brief and the volume of documents involved.

31. She went ahead to observe that this discretion must be exercised judiciously and subject to the principle of reasonableness. The Taxing Master relied on the case of Premchand Raichand Limited & Another v. Quarry Services of East Africa Limited and Another; [1972] EA 162. It was her finding that advocates ought to be fairly, appropriately and justly rewarded for their fees bearing in mind the skill they exercised. Also, that the applicant had failed to demonstrate or show the number of hours they devoted for taking instructions from the time they were employed.

32. The Taxing Master stated that the amount sought was excessive and that in public law litigation, the amount involved is not the sole determinant when it comes to costs. According to her, judicial review suits are not money suits as they merely seek declaratory reliefs as orders.

33. The Taxing Master observed that the matter was filed in the year 2020 and concluded in the year 2021 and as such, the same was therefore concluded in approximately one year. Taking into consideration these issues she awarded the sum of Kshs.600,000/= as reasonable instruction fees and taxed off

Kshs.95,390,003/=. Based on this, Item No.2 relating to getting up fees was taxed at Kshs.200,000, which is 1/3 of the instructions fees.

34. In this court's humble opinion, the Taxing Master in reaching the decision that she did, was well within her mandate and the confines of the law. The Interested Parties' claim for Kshs. 95,990,003/= as instruction fees was not only unsubstantiated but also grossly exaggerated.

35. Besides, the reference filed before this court does not identify how the claimed amount correlates with any known or measurable valuation of the subject matter in judicial review litigation. As was held in Republic v Commissioner of Domestic Taxes Ex Parte Ukwala Supermarket Ltd & 2 Others [2018] eKLR, while the subject matter's value may be considered, it is not the sole determinant of instruction fees particularly in public law litigation where monetary claims are not the central issue.

36. In the instant case, the issue for determination at the leave sage was whether the exparte applicant had a prima facie arguable case to warrant grant of leave to file a substantive notice of motion. The matter arose from what the exparte applicant sought to bar the respondent from licensing or renewing licences in favour of the 1st interested party alleged, for storage, filling and wholesale of liquefied petroleum gas in cylinders of the interested parties before they could settle the debt owed to the exparte applicant. The court in the ruling delivered on 18th June 2021 found that the application was premature as no decision to license the interested party had been reached by the respondent.

37. That cannot be a complex or novel case whose value of the subject matter is stated in the bill of costs to be Kshs 2,742,571,500 billion which the exparte applicant stated was the cost of storing the cylinders of the interested parties as at 4th August 2020 and the charges continued to accrue. This was not a civil suit where the amount of over 2 billion was being sought to be recovered.

38. To determine instructions fees on the basis of that amount, in these public law litigations would drive away justice seekers yet all that the applicant was seeking was an order of prohibition, barring the respondent from licensing the interested parties.

39. Regarding the "getting up fees" claimed at Kshs. 31,996,667/=, the Court concurs with the Ex parte Applicant's submission that such fees are governed by Schedule 6A (2), which expressly limits them to not less than one-third of the instructions fee and only in situations where the matter proceeds to hearing on a substantive motion.

40. In this case, the matter never reached the substantive stage for a full hearing as the Court dismissed the judicial review application at the leave stage. The parties filed written submissions to canvass the application. No justification was offered to displace the statutory ceiling. No evidence was presented of extensive preparation or trial readiness that would justify any departure from the default rule, noting that at leave stage, the threshold is whether the applicant has demonstrated an arguable case for judicial inquiry at the substantive stage.

41. The Interested Parties also challenge the Taxing Master's decision to disallow Items 7, 18, 25, 30, 33, 39, 44, 47, 53, 59, 68, 69, 72, 74, 76, 78, 81, 85, 91, 92, 96 and 97. A review of the Taxing Master's ruling indicates that these items were disallowed on account of lack of provision for the same under the law, duplication, lack of particularization or want of supporting documents such as court attendance slips or receipts. The law requires that each item in a party and party bill be supported by reasonable evidence and therefore mere assertion is insufficient. The reference does not furnish additional particulars or countering evidence to displace the findings of the Taxing Master.

42. The Ex parte Applicant has further raised the issue of VAT and relied on the case of Pyramid Motors Ltd v Langata Gardens Ltd [2015] eKLR, where the court emphasised that VAT cannot apply in Party and Party costs as neither party fetched nor supplied services to the other.

43. Whereas VAT may be claimed in party and party bill of costs and the Court of Appeal has pronounced itself on this issue before, there must be proof that the interested parties paid VAT and that they were seeking for reimbursement of the same from the exparte applicant. No such evidence was presented before the Taxing Master or before this Court for consideration.

44. This Court had the opportunity to determine this question of VAT inclusion in a number of matters and quite recently in Judicial Review Application No. E154 Of 2024 Between Hellen Muhonja Mwanje v ICS Technical College & Kenya National Examination Council 10th June, 2025- Ruling on a Reference, citing many other decisions including the Pyramid Motors Limited (supra) case. This is what I had to say, after analyzing the many decisions which decisions also analyzed many other decisions on the same issue:

> " In Kenya Commercial Bank Limited v Stagecoach Management Limited [2017] eKLR, my brother Tuiyot J (as he then was) was faced with the question of whether or not the Taxed Costs ought to have been subjected to a charge on VAT.
>
> In resolving that issue, the learned Judge appreciated that there are divergent views on this issue and stated as follows, citing some of the cases that I have cited herein including the Four Farms Limited and Pyramid Motors Limited:
>
> "13. There are divergent views as to whether Value Added Tax is chargeable on Party and Party costs. In Pyramid Motors LTD vs. Langata Gardens Limited [2015] eKLR Onguto J. took the following position:
>
> "On the final issue of VAT, I hold the simple view that in allowing the same the Master erred under the *Value Added Tax Act*, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by a registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills of if there was tendered evidence before the Master that the Plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the Plaintiff was a vatable person. I would vacate the award on VAT as the Master erred".
>
> A different result was reached by Emukule J. in Four Farms Ltd vs. Agricultural Finance Corporation [2015]eKLR when he held:-
>
> "To answer this question, it is necessary to ask another question, namely, what is the basis of a Party and Party Bill of costs. This question was answered by the learned Taxing Officer when she cited the decision of the court in Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR where the court said:-
>
> "The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the case".

> The fight referred to by the court is conducted by counsel for the successful litigant. It is a service rendered by counsel. The supply or rendering of services is one of the activities which attracts VAT under section 5 of the *Value Added Tax Act*, 2013 (No. 35 of 2013). It was properly charged on the basic instruction fee of Kshs.332,675/=. The contention to the contrary has no basis, and this leg of the reference also fails".
>
> Both decisions are of persuasive value and at the "T"-junction I turn with Emukule J, but add as follows. As held by the Supreme Court in Jasbir Singh Rai (supra) costs are a means by which a successful litigant recoup amounts expended in fighting a case. If the successful Litigant has hired the services of an Advocate and has had to pay out VAT to the Advocate then that ought to be recouped by including a charge of VAT on the Party-to-Party Costs. That, however, cannot arise if the Litigant acts in person.
>
> In the matter at hand, the successful party was represented by Counsel and since there is no argument that the said Counsel is not registered to pay VAT, I cannot fault the Taxing Officer's decision to allow VAT. However, there could be a small error on how the Taxing Officer applied the charge. She appears to have charged VAT even on Court Filing Fees."

45. I concluded that the position of the court in all the above decisions is that VAT would only be chargeable on party and party bill of costs where there is evidence that the party paid such VAT to the advocate representing them and was seeking a reimbursement, not seeking for blanket VAT on all the items as was the case therein, where there was no such evidence of payment of VAT or whether the applicant and her advocate were VAT payers, there being no VAT Certificates filed in Court to support the item.

46. I have no reason to depart from my above position reached quite recently, on 10th June, 2025 which decision is in pari materia with this matter, where the interested parties seek VAT to be calculated and payable on the total amount arrived at after taxation and they sought 20,519,864 which is 16% of the total claimed amount being 128,249, 150, yet there is no evidence that they paid such VAT and therefore qualifying to be reimbursed, on disbursements and instructions fees alike.

47. I therefore find that the inclusion of VAT in the bill of costs dated 31st July 2023 by the interested parties was impermissible, there being no evidence that the applicant paid VAT to its advocate and was seeking reimbursement of the same in the bill of costs. See Kenya Commercial Bank Limited v Stagecoach Management Limited [2017] KEHC 7336 (KLR).

48. Finally, I note that the Interested Parties have not pointed out to this Court any identifiable misdirection in law or in principle by the Taxing Master. Nor have they demonstrated that the award is so inordinately low as to constitute a miscarriage of justice.

49. The reference, taken in its entirety, appears to be a collateral attempt to escalate compensation far beyond the bounds of proportionality and legal entitlement in judicial review matters.

50. In the end, I find the reference lacks merit. I decline to set aside the taxation ruling dated April 23, 2024.

51. Each party to bear their own costs of this reference.

52. I so order.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 23RD DAY OF JUNE, 2025

R.E. ABURILI

JUDGE