



**REPUBLIC OF KENYA**

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

**ELC MISC. APPL. NO. 4 OF 2020**

**WAMAASA, MASESE, NYAMWANGE**

**& CO. ADVOCATES .....APPLICANT**

**VERSUS**

**KENYA POWER &**

**LIGHTING CO. LTD.....RESPONDENT**

**RULING**

1. This is a ruling on two applications, one filed by the applicant dated **17/5/2019** and another one filed by the respondent dated **26/5/2021**.
2. The application dated **17/5/2021** seeks the following orders:
  - (1) **...spent**
  - (2) **That the Certificate of Costs issued on 4/5/2021 be adopted and/or endorsed as a decree of this honourable court for execution.**
  - (3) **That costs of this application be provided for.**
3. The application is supported by the affidavit sworn on **17/5/2021** by applicant's Counsel. The grounds on the face of the application are that the costs were taxed and a Certificate of Costs issued on **4/5/2021** and that the respondent has ignored, refused, failed and/or neglected to pay the taxed costs.
4. The respondent filed a replying affidavit dated **3/6/2021**.
5. It is clear that the court's decision on the application dated **17/5/2021** is predicated on the decision of the court in the application dated **26/5/2021** and I will deal with the latter application first.
6. On the Chamber Summons dated **26/5/2021**, the respondent seeks the following orders:
  - (1) **That pending the hearing and final determination of this reference, there be a stay of execution in respect of the taxed costs awarded to the respondent/advocate.**
  - (2) **That this honourable court do set aside the Taxing Master's Ruling and or decision delivered on 4/5/2021 awarding the advocate/respondent taxed costs amounting to Kshs.54,255,491/-.**
  - (3) **That any consequent certificate of taxation be vacated and or set aside.**
  - (4) **The advocate/client bill of costs dated 18<sup>th</sup> February 2020 be remitted to a different taxing master for review and reconsideration with appropriate directions on and for taxation;**
  - (5) **The cost of this application be provided for.**
7. The application is supported by the affidavit sworn on **26/5/2021** by **Justus Ododa**, the Chief Legal Officer of the applicant. The grounds

relied on are as follows: that the taxing master erred and misdirected herself in awarding the said costs; that she acted on mistaken principles and considerations; that she failed to exercise her discretion judiciously; that the project was not the subject matter of the suit and therefore cost of the project did not matter since the suit was only aimed at ensuring compliance with environmental provisions; that there was therefore no basis to apply the value used by the advocate as a basis for computing the instruction fees; that in any event the project was rolled out by KETRACO and not by the 2<sup>nd</sup> defendant; that also, the suit was dismissed for want of prosecution at the preliminary stage before being set down for hearing or even pre-trial directions; that the taxing master ignored the submissions of the applicant; that the taxing master failed to consider that there was no cause of action against the applicant; that in any event the value of the Kitale sub-station is far less than the value of the three substations whose aggregated value was applied in the taxation and that there is a risk that the advocates for the plaintiff would be unjustly enriched if the costs were executed on as awarded. It is stated that **Schedule 6 B** of the remuneration order provides that the reasonable instructions fees should be taxed and allowed at **Ksh 300,000/=** and the taxing master had no discretion to exercise in the matter; that owing to the nature of the matter and the summary conclusion and taking into consideration the general conduct of the matter and all other relevant circumstances thereof the maximum amount of **Ksh 262,000/=** being 75% of the instruction fees payable under **Schedule 6 A, 1B** is reasonable; that consequently **item no 3** of the bill is also challenged as it is predicated on **item 2**; that **items 7,10,14,21,25,32,34,41,43,47, and 50** were not supported by receipts or relevant evidence as required by law; that **items 9,20 and 24** were wrongfully taxed at **Ksh 7100** rather than **Ksh 3000/=** yet the court appearances lasted only a few minutes; that **items nos 8, 13,31 and 42** on service of pleadings should have been based on the distance between the court and the physical address of the person to be served; thus it is claimed that the amounts awarded were grossly exaggerated, or grossly and manifestly excessive and the matter should be referred to a different taxing master to evaluate it.

8. The respondent filed Grounds of Opposition and oppose the application dated **26/5/2021** on the following grounds:

**(1) That the said application is bad in law and totally incompetent and should be struck out.**

**(2) That the applicant did not write to the taxing officer within fourteen (14) days after the decision giving notice in writing to the taxing officer of the items of taxation to which they object.**

**(3) That the applicant has presented the instant application as an afterthought subsequent to being served with the respondent's application dated 17/5/2021 and has not explained the inordinate delay in filing the reference as a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.**

**(4) That the applicant has not sought leave of the court to enlarge the time fixed for filing the reference against the already taxed costs.**

**(5) That there is a prejudice to be suffered by the respondents if the extension is granted without being sought for as the determined legal fees payable for legal services rendered will remain unpaid for no justifiable reason.**

**(6) That the applicant has not made any attempt to pay the advocate's fees based on admission on affidavit evidence.**

**(7) That the application lacks merit and should be dismissed with costs to the respondent.**

9. The respondent in the application dated **26/5/2021** filed a replying affidavit sworn on **14/5/2021** by one of its counsel, Lucy Nekesa Cheloti. The response given therein is that the court should exercise much restraint in a reference; that a taxing officer's decision should not be interfered with at the slightest provocation; that **Schedule 6** of the ARO provides that instruction fees should be pegged on the value of the subject matter; that the value ought to be ascertained from the pleadings or judgment or settlement; that in any event in the absence of pleadings etc. the taxing master is to apply her discretion in assessing the instruction fee; that in its defence the 1<sup>st</sup> defendant put the value of the subject matter at **USD 20,578,273/=**; that no party contested that value; that it is true that the suit was dismissed for want of prosecution; that by then an application for injunction had been prosecuted on behalf of the defendant; that the advocates had prepared for the hearing but the plaintiff failed to fix the matter for hearing; that the issue of the matter being purely for an injunction is not material as the 1<sup>st</sup> defendant is the party that constructs power lines for the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant's role was not passive hence the hiring of counsel; that had injunctions been granted as sought by the plaintiff the 2<sup>nd</sup> defendant stood to suffer loss of the contractual amount above; that the applicant had already paid an interim fee of **Ksh 694,800/=** in acknowledgment of the immense value of the subject matter; that the respondent incurred travelling expenses going to Kitale from Nakuru for the matter. The respondent implored this court to find that the value of the subject matter of the suit was **USD 20,578,273/=**.

### **Submissions**

10. The applicant and the respondent filed their written submissions in respect of the application dated **17/5/2021** and the one dated **26/5/2021**.

### **Analysis Determination**

11. I have considered the applications together with the supporting affidavits, the responses, the grounds of opposition and the filed submissions.

12. The main issue that arises for determination in the application dated **26/5/2021** is whether the taxing master's decision and the consequent certificate of taxation should be set aside and the matter remitted to a different taxing master for fresh taxation.

13. The submission of the applicant is that by a plaint dated **6/12/2013** the plaintiff Hon Patrick Simiyu Khaemba sought the following reliefs:

a. A permanent injunction restraining the Defendants from commencing and/or proceeding with the construction of an Electricity Power Substation on land parcel KITALE MUNICIPALITY/BLOCK 15/KOITOGOS/3115 in Naisambu area in Kitale in Trans Nzoia County or anywhere in the immediate neighbourhood of the Plaintiff's land parcel KITALE MUNICIPALITY/BLOCK 15/KOITOGOS/1385.

b. An order that the Defendants comply fully with the requirements of the Environment Management and Coordination Act of 1999 as to Environmental Impact Assessment (EIA).

c. A declaration that the Defendants violated the provisions of the Physical Planning Act and the Environmental Management and Coordination Act of 1999 as to Environmental Impact Assessment (EIA).

d. A cancellation of any EIA License so far issued to the Defendants for the proposed High Voltage Electricity Power Substation on land parcel KITALE MUNICIPALITY/BLOCK 15/KOITOGOS/3115 in Naisambu area in Kitale in Trans Nzoia County.

e. Costs in this suit.

f. Any other or further relief(s) as this honourable court may deem fit to grant.

14. They point out that the respondent herein in the proceedings submitted to the court that the project was being implemented by the 1<sup>st</sup> defendant through funding from the World Bank and that there was no evidence that the 2<sup>nd</sup> defendant their client had any connection with the project; that the suit property belongs to the first plaintiff and that in view of these facts there was no cause of action against the 2<sup>nd</sup> defendant and it therefore instructed the applicant legal firm to apply to strike out the suit which was so dismissed for want of prosecution with costs, that the party and party costs of **Ksh 6,789,841.00** have been awarded to the 2<sup>nd</sup> defendant as party and party costs; that this award has bearing on the award of advocate/client costs in this matter between the applicant and the respondent; that the taxing master failed to consider the deposit of **Ksh 694,000/=** paid to the respondent by the applicant; that the taxing master erred in relying on the value of the subject matter the applicant was not privy to, the project being the 1<sup>st</sup> defendant's, and that in any event, without prejudice to that submission, erred in relying on the aggregated value of the whole project while only the Kitale substation was affected by the suit; that the value of the Kitale substation was only **Ksh 224,000,000/=**; that the award was against **Schedule 6B** and that the reasonable instruction fee should have been **Ksh 262,500/=** which is reasonable as provided by **Schedule 6A1(B)**. Citing **Lubullellah & Associates Advocates vs NK Brothers Ltd 2014 eKLR**, it was submitted that the value of the project was not proved and was not an issue before court; citing **R vs Minister for Agriculture Ex parte Samuel Muchiri W' Njuguna, [2006] eKLR** it was submitted that the work involved did not go beyond the ordinary work of counsel in order to warrant the sum awarded. The following passage was cited:

**"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."**

15. The following passage was also cited by the applicant:

**"Although the taxing officer referred to complexity of issues in the judicial review proceedings, my analysis of the judgment has not shown anything in the application to have risen at all above the workaday chores of legal practitioners. It follows, in my view, that the responsibility entrusted to counsel in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field. I have to state that there was nothing novel in the proceedings, on such a level as would justify any special allowance in costs."**

16. It was stated that the taxing master has to date failed to give the reasons for her award.

17. The decision in **First American Bank of Kenya Ltd vs Gulab P Shah & 2 Others [2002] 1 EA 64** was also cited as follows:

**"I am of the opinion that if a defendant does research before filing a defence informed by such research he has done no more than expected. The research is not necessarily indicative of the complexity of the matter. It may well be indicative of the advocate's unfamiliarity with basic principles of law. Such unfamiliarity should not be turned into an advantage against the adversary."**

18. The applicant reiterated the decision in the **R vs Minister for Agriculture** decision (supra) for the position that it is necessary to ascertain how the sum awarded was arrived at.

19. Citing **Article 48** of the **Constitution** the applicant further submitted that the fees chargeable by advocates are facilitative of access to justice.

20. Further it was urged that VAT should have been based on the taxed sum of **Ksh 31,068,084/=** and not **46,602,126/=**.

21. Lack of receipts to support items **7,10,14,21,25,32,34,41,43,47**, and **50** was raised. **Items 9, 20 and 24** were said to have been wrongfully taxed at **Ksh 7100** rather than **Ksh 3000/=** yet the court appearances lasted only a few minutes. The fact that the suit was dismissed at its early stages was also reiterated.

22. Finally the applicant citing **Kanu National Elections Board & 2 Others V Salah Yakub Farah 2018 eKLR** submitted that it was alive to the well-established principle of review that the exercise of the taxing master's decision will not be interfered with "*unless it is found that he/she has not exercised his/her discretion properly.*"

23. In its submissions the respondent averred that by paying **Ksh 684,800** as interim fees the applicant demonstrated it knew the complexity of the matter; that they are thus estopped from urging that the fees ought to be **Ksh 300,000/=**; that the taxing master never erred. The respondent cited **Schedule 6 A paragraph (b)** of the ARO as authorizing reliance on the value of subject matter. It admits that the value of the subject matter can only be deciphered from the 1<sup>st</sup> defendant's defence and the agreement whose copy was annexed to that defence and avers that that value was not disputed by the applicant. It avers that the high value drove the plaintiff to file suit in the ELC rather than in the Magistrates' court. Citing Mativo J in **KANU National Elections Board & 2 Others Vs Salah Yakub Farah 2018 eKLR** it is further urged that the taxation can only be interfered with if the taxing master who is an expert thereat ignored fundamental principles in arriving at her decision. The respondent also cited **Reese Vs Alberta 19935 ALR (3<sup>rd</sup>) 40 Bank Of Uganda Vs Banco Arabe Espanol SC Civil Application No 23 Of 1999, R vs Minister for Agriculture Ex parte Samuel Muchiri W' Njuguna, [2006] eKLR** and urged that the taxing master properly applied her mind to the matter at hand and reached a just and fair decision; that the other factors to consider were the difficulty and the complexity of the issues, the interest of the client in the subject matter, the importance of the matter to the client and to the general public.

24. The respondent's argument is that the 1<sup>st</sup> defendant only transmits electricity while the 2<sup>nd</sup> defendant sells electricity and therefore the 2<sup>nd</sup> defendant's stake in the investment of the value stated in the 1<sup>st</sup> defendant's defence is high and thus the argument that only injunctive relief was being sought is misplaced. It was submitted that the plaint and its prayers evince a complex matter and that the project had great impact in the whole country and success of the suit would have affected the nation; that the project would create jobs and business opportunities, and that the sum paid upfront by the applicant was deducted at the taxation.

25. The applicant is correct that **Schedule 6B (a)** and **Schedule 6 A 1(b)** are applicable.

26. **Schedule 6A (1d)** refers one back to **Schedule 6A (1d)** which provides for where the subject matter can be determined from the "*pleadings judgment or settlement between the parties.*"

27. I must now consider whether the taxing master erred on a matter of principle when she taxed the bill.

28. Much attention has been focused on the instruction fee. The same was based on an amount that was mentioned in a pleading that was not filed by the 2<sup>nd</sup> defendant. The value of the subject matter was not in issue in the suit and the parties never came close to ascertaining that what was stated by the 1<sup>st</sup> defendant as the value was true; the question simply never arose. What was in issue was whether an injunction should issue against the defendants for failure to observe environmental laws in implementation of the project. There is no claim for damages in the plaint. consequently I think that there was no way of ascertaining the value of the subject matter in pecuniary terms on the basis of the contents of the pleadings and the taxing master erred in principle in relying on a figure merely cited by a defendant other than the applicant while no other proof was available.

29. Perchance the value given by the 1<sup>st</sup> defendant was to be applicable in the taxation which this court has found that it was not, **paragraph 20** of the 1<sup>st</sup> defendant's statement of defence states that the Kitale Substation was only one of the three to be constructed by the 1<sup>st</sup> defendant. The value of the Kitale sub-station was not severed from the value of the other two for the purpose of the taxation and the taxing master applied the whole **Ksh 20,578,723.00** as the basis of the taxation. From the foregoing it would appear that she included the value of the other two substations and this is clearly a further error of principle as the two other substations were not the subject of the suit. In the case of **Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR** the court observed as follows:

**"Although such heads of costs-assessment have been invoked, specific description which would import credibility has, in my judgment, basically been lacking. Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot, I will hold, 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."**

30. In the circumstances the taxing master should have considered what was plainly evident from the pleadings: that the suit was for an order of permanent injunction and an attempt to cause the 1<sup>st</sup> defendant to comply with the environmental laws and regulations in implementation of the Kitale part of the project.

31. In the **R Vs Minister For Agriculture** case (supra) it was stated as follows:

“Counsel noted that yet another reason given for the large award of costs was that a lot of research had been done, and a large number of papers perused by counsel. It was submitted that the need to do research is not a reason to increase instruction fees. On this point counsel relied on *First American Bank of Kenya v. Shah & Others* [2002] 1 E.A. 64. In that case Ringera, J (as he then was) made the following remarks:

[p.69]

“...I find that on the authorities, this Court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.... Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. 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.””

(Emphasis mine)

32. I think the taxing master failed to take consequential considerations in the exercise and reached the incorrect conclusion.

33. It is clear that this court has the discretion to order that the matter be taken back for taxation before a different taxing master or to assess the costs itself. This court finds that the more expeditious manner of disposal of the issue before it would be by way of assessing the costs itself.

34. I have examined the provisions of the ARO and come to the conclusion that the matter falls under **Schedule 6 A (j) (i)** and the amount provided for thereunder is **Ksh 45,000/=**. It is the conclusion of this court that judging by the importance of the matter and using **Schedule 6A (j)** as the basis of computation, the sum already admitted to have been received by the respondents is adequate for their labours in the matter.

35. I find the sum already admitted to have been paid by the applicant to the respondent to be in excess of the minimum set by the **Schedule 6 A (9) (j)**. I would award the respondent the sum of **Ksh 100,000/=** as the instructions fee in the matter and add a further increment of **50%** as per **Schedule 6B (a). Item 2** should therefore be **Ksh 50,000/=**.

36. In any event in line with the Court Of Appeal case of **Otieno, Ragot & Co Advocates Vs Kenya Airports Authority (2021)** which held that:

“Once the instruction fee in the party and party costs are ascertained, they become the basis of the computation of the instruction fees in the advocate and client bill. The instructions fees in the party and party bill is then increased by one half to arrive at the instruction fees in the advocate and client bill.”

37. Having perused the file record for the main case, I have found that the 2<sup>nd</sup> defendant’s party and party bill of costs dated **18<sup>th</sup> February 2020** was taxed at **Ksh 176,683/=** on **12<sup>th</sup> October 2020**. The instruction fees were determined to be **Ksh 100,000/=**. The disparity between the party and party costs and the advocate client costs can not be explained. It is therefore appropriate in the instant reference that the instructions fees in the advocate client bill of costs after increasing by one half be **Ksh 150,000/=** as stated above.

38. **Item 3** would then change to **16%** of the aggregate of **Ksh 150,000/=** above to become **Ksh 24,000/=**.

39. I have considered the other submissions of the applicant regarding **items 7,10,14,21,25,32,34,41,43,47, and 50** and I am not inclined to interfere with all the taxing master’s award in respect of the entire bill save in respect of **items nos 8, 13, 31 and 42**; this court is of the view that the same should have been assessed at **Ksh 1400/=** in accordance with **Schedule 6 A (9) (a)**.

40. In the end the advocate/client bill of costs filed by the respondent is hereby taxed as follows:

<u>ITEM</u>	<u>AMOUNT AWARDED</u>	<u>AMOUNT TAXED OFF</u>
a. Item 1: Ksh 100,000		30,968,084
b. Item 2. Ksh 50,000		15,484,042
c. Item 3 Ksh 24,000		7,432,340
d. Item 8 Ksh 1400		8600
e. Item 13 Ksh 1400		5600

f. Item 31 Ksh 1400 5600

g. Item 42 Ksh 1400 5600

**Total : 179,000 53,909,866**

41. The global sum that could have been awarded to the respondents would have therefore been **Ksh 179,000/=** far short of the already paid amount of **Ksh 684,800/**. However as the agreement between the respondent and the client may have been to pay such sum and the considerations taken into account by the parties then contracting were not brought within the knowledge of the court, I would not interfere with the amount already paid. Part of the consideration for the non-interference is that the applicant may have considered the weight of the matter and agreed to pay that sum despite the clear provisions of the ARO. However, in that case payment was voluntary and in contrast to this solemn act of taxation under the strictures of the ARO.

42. Consequently, the respondents shall retain the full amount of **Ksh 684,880/=** as their recompense for all the services rendered to the 2<sup>nd</sup> defendant in the matter. The application dated **17/5/2021** is hereby dismissed with costs to the respondent named therein.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC.**