



Musembi & 13 others ((Suing on their own behalf and on behalf of 326 Persons formerly residing in City Cotton Village and Upendo City Cotton Village and their 90 School Going Children)) v Moi Education Center Company Limited & 4 others (Petition 264 & 274 of 2013 (Consolidated)) [2024] KEHC 13394 (KLR) (Constitutional and Human Rights) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13394 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 264 & 274 OF 2013 (CONSOLIDATED)
EC MWITA, J
OCTOBER 25, 2024

BETWEEN

WILLIAM MUSEMBI 1ST PETITIONER
FRED NYAMORA 2ND PETITIONER
VINCENT ONYUNO 3RD PETITIONER
ELIJAH MEMBA 4TH PETITIONER
JOSHUA KIBE 5TH PETITIONER
MONICA WANJIRU 6TH PETITIONER
MWENI KISINGU 7TH PETITIONER
PAMELA ATIENO 8TH PETITIONER
PURITY WAIRIMU 9TH PETITIONER
BEATRICE WANJIRU 10TH PETITIONER
GETRUDE ANGOTE 11TH PETITIONER

(Suing on their own behalf and on behalf of 326 persons formerly residing in City Cotton Village and Upendo City Cotton Village and their 90 school going children)

AND

MOI EDUCATION CENTER COMPANY LIMITED 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE 2ND RESPONDENT



ATTORNEY GENERAL 3RD RESPONDENT

AS CONSOLIDATED WITH

PETITION 274 OF 2013

BETWEEN

MARGARET KANINI KELI 1ST PETITIONER

ROSELINE MISINGO 2ND PETITIONER

JOSEPH MWAURA KARANJA 3RD PETITIONER

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF 15 RESIDENTS OF
UPENDO CITY COTTON VILLAGE AT SOUTH C WARD, NAIROBI**

AND

MOI EDUCATION CENTRE CO. LTE 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

**CABINET SECRETARY FOR LANDS, HOUSING & URBAN
DEVELOPMENT 4TH RESPONDENT**

RULING

Background

1. The petitioners filed two constitutional petitions before the High Court; petition No. 264 of 2013 and petition No. 274 of 2013 which were subsequently consolidated and heard as petition No. 264 of 2013. In a judgment delivered on 14th October 2014, the court (Mumbi Ngugi, J (as she then was) allowed the petition with costs of the consolidated petition.
2. Aggrieved, the respondents lodged an appeal in the Court of Appeal, (Civil Appeal No. 363 of 2014). In a judgment delivered on 15th December 2017, the Court of Appeal allowed the appeal partially and directed parties to bear their own costs in the High and the Court of Appeal.
3. The petitioners were aggrieved and lodged an appeal in the Supreme Court, being Petition No. 2 of 2018. In a judgment delivered on 16th July 2023, the Supreme Court allowed the petition affirming the costs as awarded by the High Court, plus interest.
4. The petitioners then filed their party and party bill of costs dated 12th September 2022 for taxation by the taxing officer of this court. The bill of costs was for the Kshs. 17,550, 816. In a ruling delivered on 28th March 2023 the taxing officer taxed and allowed the bill at Kshs. 1,528,121.33.

Reference

5. The petitioners were aggrieved and filed this reference dated 20th April 2023, seeking to review the taxing officer's decision on items 1(a), (b) and (c) and 2 of the bill of costs set them aside and have bill of costs taxed afresh by another taxing officer. In the alternative, the petitioners urge this court to



reassess or tax afresh the costs payable under those items. Item 1(a), (b) and (c) were on instruction fee for 22nd May 2013, 28th July 2013 and (c) overall instructions fee on the consolidated petitions. Item 2 was on getting up fee.

6. The reference is predicted on the ground that the taxing officer failed to consider the nature of the petition; determine and take into account the factor that instructions fee is chargeable at the time of receiving instructions and consider the number of petitioners that went into determining the work and labour expended.
7. The petitioners asserted that the taxing officer failed to disclose the actual total amount of damages that weighed on her discretion in arriving at the instructions and getting up fees awarded and consider the importance of the proceedings to the petitioners.
8. The petitioners argued that the amount awarded for instruction fee and getting up fee was inordinately low and out of sync with precedents. The petitioners blamed the taxing officer for not identifying and setting out the peculiar factors of the consolidated petition she was working with thus, arrived at an erroneous assessment of instructions fee.
9. The petitioners asserted that having noted that instructions fees are static and charged once, the taxing officer in taxing the instruction fees at Kshs. 1,000,000 did not support this principle with regard to items 1(a) (b) and (c) or give reasons for the lump sum assessment on these items.
10. The petitioners argued that the consolidated petition was originated by two separate petitions taken out by the petitioners who resided in two different villages affected by the underlying eviction. They were thus, entitled to an assessment that considered the two originating petitions as charged in items (1) (a) and (b).
11. According to the petitioners, the number of petitioners was a relevant factor for consideration and therefore, the taxing officer should have determined the number of petitioners encompassed in the order of costs. The petitioners relied on the decision in *Nguruman Limited v Kenya Civil Aviation Authority & 3 others* [2014] eKLR.
12. The petitioners again urged that the amount of value of the suit was a relevant factor. They asserted that although isolating the value of the suit as an important consideration, the taxing officer failed to determine the actual monetary value that was basis of the instruction fee. They relied on *Republic v Commissioner of Domestic Taxes Ex Parte Ukwala Supermarket Ltd & 2 others* [2018] eKLR.
13. The petitioners submitted that the taxing officer isolated only the monetary awards of damages as the basis of assessment of instruction fee and failed to take into account the declaratory order of violation of fundamental rights of the petitioners generally, and in their various categories. The taxing officer thus, failed to give due weight to the nature of the petition, its importance and interest to the petitioners, and the complexity and novelty of the matter, as the primary considerations in assessing instruction fees.
14. The petitioners took the view, that having failed to factor in the declaratory order of violation of fundamental rights of the petitioners, the taxing officer did not give a fair assessment of the complexity of the petition, the work done and the importance and interest of the proceedings to them.
15. In that respect, the petitioners argued, the taxing officer failed to appreciate that the bill of costs was pursuant to the order of costs as affirmed by the Supreme Court. The taxing officer, therefore, arrived at an erroneous and underassessed instruction fees that was not in sync with the precedents in similar cases.



16. The petitioners cited several other decisions, including; *Rose Wangui Mambo & 2 others v Limuru Country Club & 15 others*; *Federation of Women Lawyers (FIDA) & another (Interested Parties) [2021] eKLR*; *OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board*; *Kenya Electricity Generating Company Limited & another (Interested Parties) [2019] eKLR* and *University of Nairobi & another v Moses [2022] KECA 45 (KLR)*, to support their position.

Response

17. The reference is opposed through a replying affidavit sworn on behalf of the respondents and written submissions. The respondents argued that the taxing officer correctly addressed the issue of instruction fee that it is an independent and static item and is charged once.
18. The 1st respondent contended that the consolidated petitions were a public law claim and the prayers sought in the petitions were declaratory in nature, falling under Schedule 6(1) (j) of the Advocates Remuneration Order 2006. The applicable principles in such claims were different from those applicable when taxing costs in private law claims and should not be imported into petitions.
19. The 1st respondent reiterated that public law claims such as those in this case, is in a class of their own and the instruction fee allowable should not be extrapolated from the practice obtaining in the private law domain which may involve business claims and profit calculations to arrive at the value of the subject matter.
20. The 1st respondent maintained that in the circumstance of this matter, the value of the subject matter in the consolidated petitions was not pegged on the total sum of damages awarded to the petitioners but the fees provided by Schedule VI 1(j) of 2006 Remuneration Order.
21. The 1st respondent argued that the taxing officer considered all relevant facts and correctly found that the petition was not complex and novel. The taxing officer thus, exercised judicious discretion and the decision was well founded in law.
22. The respondents relied on the decisions in *First American Bank of Kenya v Shah & Others [2002] 1 EA 64* and *Violet Ombaka Otieno & 12 others v Moi University [2021] eKLR* for the argument that the taxing master correctly applied schedule 6 (1) (j) of the Advocates Remunerations Order 2006.
23. According to the 1st respondent, the issue for determination in the consolidated petitions was whether the respondents had violated the petitioners' constitutional rights which was not a novel issue having been resolved in *Mitu-Bell Welfare Society v Attorney General & 2 others [2013] eKLR*.
24. The 1st respondent submitted that the decision of the taxing officer is clear that the taxing officer considered the factual and legal issues with a view to gauging complexity of issues, importance of the matter, the amount involved, perusal of entire paperwork, studying and preparing for the matter, responsibility shouldered based on the nature and importance of the subject matter.
25. The taxing officer, therefore, properly considered that the issue before court was a public law matter and applied the provisions of article 48 of *the constitution*. The 1st respondent relied on *DK Law advocates v Zhong Gang Building Material Co. Ltd & another [2021] eKLR* for the argument that while two separate petitions were filed, they were consolidated by consent of the petitioners who had the same advocate on record. The petitioners were thus, entitled to one set of instruction fee as allowed by the taxing officer.
26. In the 1st respondent's view, the taxing officer properly considered the age of the petition; the pleading filed by parties and novelty of the matter, the general damages awarded by the court and submissions



by parties and taxed the party-to-party bill of costs at Kshs. 1,528,121.33. The petitioners were fairly reimbursed for costs in prosecuting their case.

27. The 1st respondent again relied on the decisions in *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR; *Kamunyori & Co Advocates v Development Bank of Kenya Limited* [2015] eKLR and *Lucy Waithira & 2 others v Edwin Njagi T/A E. K Njagi & Company Advocates* [2017] eKLR, to argue that the number of petitioners was not a factor that should have been considered in arriving at the instruction fee to allow and ultimately getting up fees. The taxing officer took into consideration the damages awarded to the petitioner by the High Court.
28. The 1st respondent again relied on *Peter Muthoka & another v Ochieng & 3 others* (supra) to argue that the taxing officer properly exercised her discretion in increasing the instruction fees from the statutory amount of Kshs. 28,000 to Kshs. 1,000,000.
29. On the correctness of the amount awarded, the 1st respondent relied on *Republic v Kenya Revenue Authority Ex parte Middle East Bank Kenya Limited* [2012] eKLR, that the taxing officer properly exercised her discretion, taking into account all the relevant matters. The claim that the amount awarded was low and out of sync with precedents is not true.

Determination

30. I have considered the reference and arguments by parties. The issue for determination is whether the taxing officer erred in determining the award on instruction fee and getting up fee with the result that the awards were inordinately low to amount to an erroneous exercise of discretion.
31. The petitioners challenged the decision of the taxing officer made on 28th March 2023. In that decision, the taxing officer allowed instruction fee in the party and party bill of costs at Kshs. 1,000,000 and getting up fee at Kshs. 333,333.33. The petitioners' main complaint is on instruction fee and getting up fee.
32. According to the petitioners, the taxing officer applied a wrong principle in assessing instruction fee and ultimately, getting up fee. In the bill of costs, the petitioners had sought Kshs. 13,000,000 for instruction fee and Kshs. 4,333,333 for getting up fee. However, the taxing officer allowed instruction fee at Kshs. 1,000,000 and Kshs. 333,333.33 getting up fee, respectively.
33. The petitioners' grievance is that in allowing instruction fee, the taxing officer failed to take into account the amount awarded in general damages and the fact that there were two petitions that had been filed separately but later consolidated. The taxing officer failed to take into account the number of petitioners and the damages awarded as the value of the subject matter for purposes of determining instruction fee. The petitioners relied on the decision in *Peter Muthoka & another v Ochieng & 3 others* (supra) to support the argument that the amount in the judgment should be the value of the subject matter.
34. The principle underlying award of costs was explained in *Manindra Chandra Nandi v Aswini Kumar Acharaya* ILR (1921) 48 Cal. 427 as follows:

We must remember that whatever the origin of costs might be, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected to, or as Lord Coke puts it, for whatever appears to the court to be the legal expenses incurred by the party in prosecuting the suit or his defence...The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him and to the defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a



party against the expense of successfully vindicating his rights in court and consequently, the party to blame pays costs to the party without fault.

(See also *Vinod Seth v Devinder Bajaj & another* (C. A. No. 481 of 2010))

35. As parties engage in court, they often incur costs. They instruct advocates to represent them and, therefore, a party is entitled to recoup the costs necessarily incurred in the proceedings. In other words, the successful party is entitled to fair and adequate compensation for what has been incurred in the course of the litigation but not as a way of enriching the party. This is done through taxation of party and party bill of costs. Remuneration Orders thus, fix the amount a party is to charge based on the subject matter of the dispute or other factors and considerations.
36. Instruction fee is the amount party pays to the advocate during instructions. For that reason, the principle is that costs recompense and indemnify a party for what appears to the court to be the legal expenses incurred by the party in prosecuting the suit or his defence. In that respect, Taxation of a bill of costs is an exercise of discretion by the taxing officer.
37. The law is settled that this court will not interfere with exercise of the taxing officer's discretion unless the taxing officer has erred in principle. (*Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another* [1972] EA 162); *Rogan-Kemper v Lord Grosvenor* (No.3) [1977] KLR 303; [1977] eKLR: *Bank of Uganda v Banco Arabe Espaniol*, (Civil Application No. 29 of 2019)).
38. In *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, it was held that:

[T]he court will not interfere with the exercise of the taxing master's discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue.

I fully agree.

Instruction fee

39. There is no doubt that the matter was filed in 2013 and determined in a judgment delivered on 14th October 2014. The applicable remuneration on instruction fee is Advocates Remuneration Order of 2006.
40. I have perused the impugned decision by the taxing officer, dated 28th March 2023. There can be no doubt that the taxing officer considered the matter generally as well as the guiding principles laid down in binding decisions on taxation of bills of costs.
41. With regard to instruction fee, the taxing officer stated:

Public law claims such as the instant one are in a class of their own, and the instruction fee, allowable in respect of them should not, in principle, be extrapolated from the practices obtaining in the private law domain which may involve in business claims and profit calculations.
42. The taxing officer then went on to consider the issues that were in the consolidated petitions as being on claims of infringement of fundamental rights. The taxing officer further warned herself that taxation



of instruction fee should avoid the prospect of unjust enrichment that may hinder the right of access to justice. The taxing officer further bearing in mind those factors, considered the amount sought as excessive and astronomical.

43. The taxing officer then having taken into account the age of the petitions, the pleadings filed, weight and novelty of the matter and the “general damages awarded” by the court in the judgment as well as submissions by parties, the taxing officer awarded Kshs. 1,000,000 on instruction fees and taxed off Kshs. 12,000,000.
44. The petitioners’ argument is that the court was in error for not considering the damages awarded. That cannot be true from what this court has just stated that the taxing officer considered the damages awarded.
45. The petitioners further argued that the taxing officer should have considered the number of petitions as well as the number of parties involved.
46. I have seen the parties named in the petition. One petition had 11 petitioners while the other had 3 petitioners making a total of 14 petitioners. The court awarded Kshs. 150,000 for each petitioner in the consolidated petitions against 1st respondent and Kshs. 100,000 each the attorney General. The total amount awarded was Kshs. 3,500,000 for the 14 petitioners. The petitioners’ argument that they were suing on behalf of other parties and therefore the total award of damages was higher cannot be correct for the reason that the other parties’ names were not disclosed and therefore were not primary parties before the court.
47. Even if the court applied the total amount of damages awarded which was Kshs. 3, 500,000, instruction fee could not have been more than Kshs. 1,000,000 that the taxing officer allowed on this item. I also find it necessary to add, that once the petitions were consolidated, they became one petition and that was why the award of damages was made in one petition.
48. I therefore find no merit in the petitioners’ argument that the taxing officer fell into error by failing to apply the value of the subject in the amount awarded in the judgment. The taxing officer was aware of the principle in *Joreth Ltd v Kigano & Associates Advocates* [2002] eKLR, with regard to the value of the subject matter for purposes of taxation of a bill of costs as well as her discretion to assess such instruction fee as she considered just.
49. Given what has been stated above, I am unable to fault the taxing officer on her finding on instruction fee.

Getting up fee

50. The amount for getting up fee is a fraction of the instruction fee allowed. Having found that the taxing officer did not err in determining instruction fee, the challenge on getting up fee becomes moot. I find no fault on the part of the taxing officer respecting getting up fee.

Conclusion

51. Having considered the reference, the response and arguments by parties, the conclusion I come to is that the taxing officer properly considered the items of instruction fee, applied the principle of law and properly exercised her discretion in arriving at the amount allowed on this item. Regarding getting up fee, I see no fault on the part to the taxing officer since getting up fee flows from the determination of instruction fee.



52. Consequently, and for the above reasons, the reference is declined and dismissed. Since costs are discretionary, and given the nature of this matter, each party will bear their own costs of this reference.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2024

E C MWITA

JUDGE

