



**Republic v Disiplinary Tribunal of the Law Society of Kenya; Musimba  
(Interested Party); Wambugu (Exparte Applicant) (Miscellaneous Judicial Review  
E074 of 2020) [2023] KEHC 20098 (KLR) (Judicial Review) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW**

**MISCELLANEOUS JUDICIAL REVIEW E074 OF 2020**

**JM CHIGITI, J**

**JULY 13, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE DISPLINARY TRIBUNAL OF THE LAW SOCIETY OF  
KENYA ..... RESPONDENT**

**AND**

**PATRICK MWEU MUSIMBA ..... INTERESTED PARTY**

**AND**

**JOHN WACIRA WAMBUGU ..... EXPARTE APPLICANT**

**RULING**

1. The Application before this court is a Chamber Summon dated 7<sup>th</sup> February, 2023 - under Sections 1A, 1B, & 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Rule 11(2) of the Advocates (Remuneration) Order, 2014 – for orders
  1. THAT this Honourable Court be pleased to review and/or vary part of the decision of the Taxing Master, Hon. E.C CHELULE issued in the ruling of 25<sup>th</sup> January, 2023 in respect of the Bill of Costs dated 11<sup>th</sup> February, 2022.
  2. THAT this Honourable Court be pleased to reassess the issue of costs to be awarded to Applicant and make findings on the same.



3. THAT in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to remit the Bill of Cost to another Taxing Officer for review and reconsideration in terms of costs of the suit to be awarded to the Applicant.
  4. THAT this Honourable Court be pleased to make such an order and/or further orders as it may deem fit to grant.
  5. THAT the costs of this Application be provided for.
2. The Application was supported by a Supporting Affidavit sworn by the ex-parte Applicant, and dated 6<sup>th</sup> June 2023. To buttress their case, the Applicant filed their written submissions dated 31<sup>st</sup> March, 2023.
  3. It was the Applicant's /Advocate's case that they filed an Advocate-Client Bill of Costs dated 11<sup>th</sup> February, 2022 against the Respondent/Client seeking costs amounting to Kshs. 7,902,200/=. Subsequently, that the Applicant claim that the taxing master (Hon. E. C Chelule) rendered a ruling on 25<sup>th</sup> January, 2023 wherein, it (ruling by the Deputy Registrar) did not contain reasons thereof.
  4. Further, that the grounds for the award of Kshs. 404,532.20 are extremely excessive, oppressive, contrary to binding legal principles of taxation, without legal basis, punitive, and not compensatory.
  5. According, to the Applicant, the Taxing Officer failed to take into account the scale of fees prescribed under the Schedule VI7(d) of the Advocates Remuneration Order. Also, that the Taxing Officer totally disregarded the comparative authorities that demonstrate what would amount to fair and reasonable compensation - in the circumstances.
  6. To the Applicant, the Taxing Officer made serious errors in principle while taxing the said Bill of Costs, and thereby arrived at a wrong decision, particularly on the item of instruction fees which is vaguely exaggerated in comparison with the work done.
  7. That the Taxing Officer failed to consider that the suit in issue involved a simple and ordinary question of law, and that no complex or novel issues of law were determined - as the parties were not even required to submit on the merits of the case. That the parties only filed written submissions and therefore costs should be commensurate to the work done.
  8. The Applicant averred that the award runs counter to the spirit of the Advocates Remuneration Order, with regard to fair, realistic, and reasonable remuneration of Advocates. Further, that should the decision be allowed to stand, the ex-parte Applicant will continue to languish over excessive and unsustainable fees.
  9. The Applicant beseeched this court to inter alia set aside and vacate the entire decision of the Taxing Officer; in the alternative, to remit the Bill of Costs to another Taxing Officer for re-taxation or make decisions for fresh taxation.
  10. In response to and opposing the Application, the Respondent in their Replying Affidavit dated 20<sup>th</sup> February, 2023 deponed by Steve Kimathi. The Respondent contended that this Reference is misconceived, baseless, and a delaying tactic - meant to delay execution and/or settlement of the taxed costs.
  11. The Respondent posited that for the Applicant to successfully challenge the decision of the Taxing Master, he has to demonstrate that there was an error of principle or that the fee awarded was manifestly excessive, or that there was an inconsistency in the award.



12. Conversely, as per the Respondent, the Applicant has failed to demonstrate that the decision of the Taxing Officer was based on an error of principle - to warrant the setting aside of the decision - or that the assessment made by the Taxing Officer was unfair and unreasonable.
13. The Respondent pointed out that the Taxing Officer in her Ruling stated that she duly considered the submissions of the parties before taxing the bill; therefore, that there is no basis for the Applicant's averment - that the Taxing Master failed to consider the submissions filed on his behalf in respect to the Bill of Costs.
14. The Respondent posited that the Taxing Officer considered the applicable Advocates Remuneration Order, the applicable provisions of the Advocates Remuneration Order, the complexity of the matter, the nature of the proceedings, and all the relevant factors laid out in the Advocates Remuneration Order; and exercised her discretion reasonably in arriving at her decision. Therefore, that the Court should be reluctant in interfering with the decision of the Taxing Officer.
15. Further, to the Respondent, the Taxing Officer properly applied Schedule 6(j) of the Advocates Remuneration Order - the Suit having been filed in 2020 – the Taxing Officer proceeded to award the basic instruction fee of Kshs 100,000/=, which is the minimum fee awarded as Instruction Fees for opposing an application for constitutional and prerogative orders.
16. The Respondent stated that the Taxing Officer in her Ruling also noted that she has the discretion to increase the amount taking into account factors such as the nature and importance of the cause or matter or amount or value of the subject matter, the complexity of issues and novel points of law or the volume of documents involved and time, research and skill expended in the brief which principles are enumerated in the cases of Premchand Rainchand Ltd & Another versus Quarry Services of EA Limited Others [1972] EA PG 162, Republic versus Minister For Agriculture & 2 Others Ex-Parte Samuel Muchiri W'Njuguna & 6 Others [2006]eKLR and Joreth Limited versus Kigano & Another [2002]EA 92.
17. The Respondent maintained that the Taxing Officer in awarding an increment of Kshs. 50,000, was guided by the above principles as well as the factual and legal issues raised, the volume of the pleadings filed, the input by Counsel and the fact that the Suit was determined preliminarily to increase the instruction Fees. It is therefore clear that the Taxing Officer judicially exercised her discretion within the legal principles of taxation and should not be faulted for reaching the said decision.
18. Further, that the Taxing Officer correctly awarded Kshs. 50,000, a third of the Instruction fees awarded, as getting up fees despite the proceedings herein not requiring the preparation for trial involving witnesses and disposed of preliminarily.
19. Resultantly, that having prepared, lodged, and served documents on behalf of the Interested Party, the Taxing Officer correctly awarded Getting Up fees. That the taxing officer considered all the relevant considerations and legal principles of taxation when assessing the Party & Party Bill of Costs, was not irregular and should not be set aside, as demonstrated herein and in her Ruling.
20. The Respondent is of the take that the Applicant's assertion of the costs awarded by the Court being excessive and unsustainable, are unjustified and only meant to delay the execution and/or recovery of the costs awarded to them (Respondent). That this Honourable Court should be reluctant in interfering with the assessment of the taxing officer - as the Applicant has not demonstrated that the taxing officer erred in principle, and/or error substantially affected the decision on quantum.
21. Additionally, the Respondent is of the position that this Application only raised the issue of quantum of the assessed costs, which matters the taxing officer is particularly fitted to deal with. Consequently,



- this Honourable Court should be reluctant in altering the fees allowed by the Taxing Officer - merely because it could have allowed a lower amount.
22. The Respondent averred that this Application does not meet the threshold for granting any of the orders sought, and that the same should be dismissed with cost.
  23. The Interested party did not file their Replying affidavit.
  24. In advancing their cases, parties filed their respective written submissions: Applicant's dated 31<sup>st</sup> March, 2023; while the Interested Party's dated 30<sup>th</sup> May, 2023. The Respondent did not file their written submissions.
  25. On one hand, the Applicant submitted that the Taxing Officers' decision dated 25<sup>th</sup> January 2023 should be reviewed and reassessed, and the Bill of Cost be remitted to another Taxing Officer for review and reconsideration. The applicant has demonstrated sufficient grounds to impugn exercise of judicial discretion by the Taxing Master to warrant the Court's interference. Reliance was placed on Section 11 of the Advocates Remuneration Order, and the cases of Hezekiel Oira T/A H. Oira Advocate v Kenya Broadcasting Corporation [2015] eKLR; Rift Valley Agricultural Contractors Limited v Kenya Wildlife Services [2015] eKLR; and Odhiambo Owiti & Co Advocates v Equator Bottlers Limited [2022] eKLR.
  26. The Applicant posited that Taxing Officer made serious errors in principle in taxing the said bill of costs, and thereby arrived at the wrong decision, particularly on the item of instruction fees, which is vaguely exaggerated in comparison to the work done. He relied on the cases of Ramesh Naran Patel vs Attorney General & Another [2012] eKLR; Republic vs Minister for Agriculture ex parte Samuel Muchiri Njuguna (2006) eKLR, and First American Bank of Kenya Ltd Vs. Gulab P. Shah & 2 Others [2002] 1 E.A. 64.
  27. It was the Applicant's submission that the taxing master failed to consider that the suit in issue involved a simple and ordinary question of law and that no complex or novel issues of law were determined and therefore, the ruling of the taxing master ought to be revised. The Applicant urged this court to exercise its discretion judiciously and not award any instruction fees to the Respondents and the Interested Party, or reduce the same to Kshs 50,000. Peter Muthoka & another v Ochieng & 3 others [2019] eKLR case was relied upon. The Applicant, in the end, sought this application to be allowed.
  28. On the other hand, the Interested Party contended that for this Honourable Court to interfere with the decision of the Taxing Master, the Ex-parte Applicant has to demonstrate that the decision of the Taxing Master was based on an error of principle, or that the fee awarded was so manifestly excessive. Reliance was placed on the cases of First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR; Kenya Power & Lighting Co. Ltd v Msellem (Miscellaneous Civil Application E056 of 2021) [2022] KEELC 2764 (KLR) (8 July 2022) (Ruling); and Premchand Raichand Ltd Another vs Quarry services of East Africa Ltd and Another
  29. The Interested Party posited that the ex-parte Applicant having filed a Judicial Review application, and the same having been opposed by the Interested Party, vide a Replying Affidavit dated 26<sup>th</sup> January, 2021; that as such the Taxing Master properly applied Schedule 6A Paragraph j(ii) of the Advocates Remuneration Order 2014 while taking note of the basic instruction fees of Kshs. 100,000.00.
  30. Further, that the taxing master exercised her discretion to increase the instruction fees from Kshs. 100,000 to Kshs. 150,000, despite the subject matter value being ascertained at kshs 11,279,286 - which value if considered, would have meant that the instruction fees awarded would have been higher.



31. That the Taxing Master properly and correctly exercised her discretion as the increase was made after due consideration of the principles enumerated in the cases of Premchand Rainchand Ltd & Another versus Quarry Services of EA Limited & Others [1972] EA PG 162, Republic versus Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'Njuguna & 6 Others [2006] eKLR and Joreth Limited versus Kigano & Another [2002] EA 92.
32. The Interested Party maintained that, guided by Schedule 6A Paragraph 2 of the Advocates Remuneration Order, the Taxing Master considered Getting Up fees and allowed the same at Kshs. 50,000 which amounts to one third (1/3) of the Instruction Fees awarded; considering that the Ex-Parte Applicant's Judicial Review Application was opposed and the Replying Affidavits filed in response thereto formed the defence. In addition, that the discretion was also exercised within the reasonable limits of three to four times. Relied on the case of Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited [2017] eKLR.
33. Additionally, that the Taxing Master has the discretion to increase the Instruction Fees, however, that the discretion is guided by clear principles, it is subject to reasonableness, and must be exercised judiciously Relied on Court of Appeal case of Otieno, Ragot & Company Advocates v Kenya Airports Authority [2021] eKLR.
34. The Interested Party holds the position that in the decision of the Taxing Master, it is evident that she took each and every item on the Bill of Costs into consideration on its merits, and allowed some items - as drawn where the same was drawn to scale. Further, that it is also discernible that the Taxing Master disallowed some items for reasons that she could not verify the authenticity of the items; and that the Taxing Master proceeded to tax off the excess amounts on some items on the Bill of Costs.
35. Resultantly, that the Taxing Master taxed the Bill of Costs on its merits, and that this Honourable Court should be reluctant in allowing the Applicant's application. Additionally, that the Taxing Master took public interest into consideration while taxing the contested Bill of Costs - and did not award costs that were high and/or excessive, as averred by the Ex-Parte Applicant.
36. To the Interested Party, the Ex-Parte Applicant has not demonstrated, that the taxing officer erred in law and in principle while assessing the Bill of Costs; more so, that the instruction fees as the increment of one third in instruction fees, is fair and just given the reasons advanced by the Taxing Master in her ruling.
37. The Interested Party urged the Honourable Court to uphold the decision of the Taxing Master, as she correctly applied the legal principles, and that the court should be reluctant in reassessing the Bill of Costs. Relied on the Court of Appeal case of R. Billing & Co. Advocates v Kundan Singh Construction Limited (Now KSC International Limited) [2020] eKLR.
38. On cost of this Application, the Interested Party urged this Honourable Court to be guided by Section 27 of the *Civil Procedure Act* - which provides for the general rule which ought to be followed, unless for good reasons to be recorded. That the Applicant should be dismissed, and the Applicant to bear the cost of this Application.

#### **Analysis and determination:**

39. In 1<sup>st</sup> American Bank of Kenya v Shahs and others the Court of Appeal held as follows:

“First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of



principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle”.

40. The Court of Appeal in *Premchand Raichand Ltd. and Another v. Quarry Services of East African and Others* [1972] EA 162
- a. That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
  - b. that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,
  - c. that the general level of remuneration of Advocates must be such as to attract recruits to the profession and
  - d. so far as practicable there should be consistency in the award made and
  - e. The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.

**Issues for determination:**

- i. Whether this court should assess/tax the costs lawfully payable to the Applicant on the said Bill of Costs and
  - ii. Whether in the alternative, the Bill of Costs dated should be taxed afresh by a different taxing officer other than Hon.Chelule.
41. The Applicant argues that the Taxing Officer failed to consider that the suit in issue involved a simple and ordinary question of law, and that no complex or novel issues of law were determined - as the parties were not even required to submit on the merits of the case. That the parties only filed written submissions and therefore costs should be commensurate to the work done.
42. The Applicant argues that the Taxing Officer made serious errors in principle while taxing the said Bill of Costs, and thereby arrived at a wrong decision, particularly on the item of instruction fees which is vaguely exaggerated in comparison with the work done.
43. It is also his case that the Taxing Officer failed to consider that the suit in issue involved a simple and ordinary question of law, and that no complex or novel issues of law were determined - as the parties were not even required to submit on the merits of the case. That the parties only filed written submissions and therefore costs should be commensurate to the work done.
44. In Judicial review proceedings advocates have to take instructions, research, draft pleadings, file submissions and appear before a judge for mentions and highlighting just like they do in other matters under The Civil Procedure Rules. The quality of counsels’ input and involvement in the proceedings cannot be down played. It is a uniquely heavy legal assignment in counsel’s hands.
45. In the case of *Vipul Premchand Haria vs Kilonzo & Co Advocates /2020 eKLR*, this Court outlined the nature of the taxing officer’s discretion thus;

“Once the client was dissatisfied with the bill, it fell upon the taxing master to tax it. Such taxation, much as it lies in the taxing Officer’s discretion, is governed by clear principles. In other words, the discretion is a judicial one to be judicially a judiciously exercised. It is not to be exercised whimsically or capriciously in accordance with personal inclination. And the matters the taxing officer takes into consideration should be apparent from the reasons



that she gives for her decision. It is the reasons that give an indication whether or not the discretion reposed in the taxing officer was properly exercised."

46. With these principles in mind, the issues for determination are whether, the taxing officer rightly exercised her discretion to determine the appellant's instruction fees in the Advocate and client bill notwithstanding the existence of a taxed party and party bill of costs; whether in determining the appellant's instruction fees, the taxing officer's decision as upheld by the High Court took into account the right considerations in arriving at the Advocate and client costs and whether interest on the Advocate and client bill was payable from the date of demand or from the date the Bill of Costs was taxed.

47. In justifying her finding the taxing master in the matter before this court observed as follows:

"The court has discretion to enhance instructions fees considering the complexity of the matter, responsibility by counsel, time spent, reason done and skill deployed by counsel.

The court must ensure that the Advocates instructions fees is to seek reasonable compensation for professional work done. The Court should consider the nature and importance of the subject matter, the responsibility placed on the Counsel and the general conduct of proceedings, time spent, research done and skills deployed by counsel.

The suit herein was filed in 2020 and was subsequently dismissed for want of prosecution on the 4<sup>th</sup> of October 2021 after the exparte applicant failed to deposit in court the directed amount. The suit herein did not therefore proceed to the substantive stage.

Courts have severally held that costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case. It is important that advocates should be well motivated but it is also in the public interest that costs be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

I have carefully considered the factual and legal issues raised. I have also perused the pleadings herein and acknowledge the volume of the same and the work input by the counsel. Bearing in mind all the aforesaid factors and the reasons herein and in exercise of discretion vested in me, I am fully convinced that the instruction fees of Kshs 150,000/- is reasonable and in line with the provisions of Schedule 6 (J)(ii) of the Advocates Remuneration Order, 2014."

48. This court finds that after making a finding that the suit was dismissed for want of prosecution on the 4<sup>th</sup> of October 2021 and that the suit herein did not proceed to the substantive stage there was no justification for her to award a sum over and above Kshs. 100,000. Her ruling is in the circumstances reduced to Kshs. 100,000.

49. In the case of *Joreth Ltd vs Kigano & Associates /2002| 1 E.A. 92*, this Court addressed the issue thus;

"We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not 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 the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."



50. *Moronge & Company Advocates vs. Kenya Airports Authority (2014) eKLR*, a judgment of this Court from which I find it necessary to quote at great length:

“The record of the taxing officer shows that he determined instructions fees under schedule VI (1) (b) of the Advocates (Remuneration) Order which gives a guide on how the value of the subject matter of a suit may be determined. The value may be found from the pleadings, judgment or settlement between the parties.”

51. In exercising its discretion, the Taxing Officer is required to consider the matters specified in proviso (i) of schedule VIA (1) which states:

“

“(i) the taxing officer, in the exercise of his discretion shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a discretion by the trial judge, and all other relevant circumstances.

On the issue of getting up fees in Item 2 in her ruling, the taxing master made the following findings:

Schedule 6 (2) of the Advocates Remuneration (Amendment) Order 2014 provides that a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation.

I have allowed instruction fee herein at kshs. 150,000/=. The fees for getting up shall therefore be a third of the instructions fee. I proceed to allow item no. 2 as drawn at kshs. 50,000/-.”

52. In the case of *Republic vs Minister for Agriculture, ex-parte W’Njuguna & Others [2006] e KLR* was held that:

“Thus, in a direct manner, the proceedings sought only the public law remedy of judicial review- for the purpose of ensuring the Minister’s compliance with the governing law as enacted by Parliament.”

53. From the above reasoned position, it is clear that judicial review proceedings attract getting up fees which must be related to the instructions fees, where there was preparation for trial of the matter which was defended.

54. In this case, I have no hesitation in finding that the Judicial Review proceedings were adequately prepared for hearing as is expected of an advocate, and that the proceedings were defended by the respondent at a hearing by way of written and oral submissions.

55. There is nothing in the Advocates Remuneration Order that disentitles an advocate who has represented his client in a judicial review matter and conducted the hearing in a matter which was defended from being awarded a getting up fee.

56. In *Nguruman Ltd vs Kenya Civil Aviation Authority & 3 Others [2014] e KLR* where the taxing master ruled that the fees for getting up was properly charged because the case was heard, and whether



the hearing was by way of affidavits only or by viva voce evidence was immaterial, which case on a reference was upheld by Lenaola J, was a sound decision.

57. The judicial review suit herein was dismissed for want of prosecution. There is no justification and or reason why the getting up fees should be awarded. The taxing masters' award of Kshs.50, 000 is set aside.

**Disposition:**

58. The Applicant has partly succeeded in its application.

**Order:**

1. The decision of the Taxing Master, Hon. E.C Chelule issued in the ruling of 25<sup>th</sup> January, 2023 in respect of the Bill of Costs dated 11<sup>th</sup> February, 2022 is hereby reviewed and varied to the extent that the instructions fees is reassessed at Kshs. 100,000 and the award of the getting up fees is set aside.
2. The Applicant is awarded costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY JULY OF 2023**

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**J. CHIGITI (SC)**

**JUDGE**

