



**Kenya Motor Sports Federation Limited v Mckean & another (Suing Through Parents and Next Friends Noelle Christine Mckean ) & another (Judicial Review Miscellaneous Application 22 of 2020) [2023] KEHC 23729 (KLR) (Judicial Review) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23729 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 22 OF 2020  
JM CHIGITI, J  
OCTOBER 18, 2023**

**BETWEEN**

**KENYA MOTOR SPORTS FEDERATION LIMITED ..... APPLICANT**

**AND**

**RORY HUGH THOMAS MCKEAN AND JOSH BRADLEY HALDANE  
MCKEAN (SUIING THROUGH PARENTS AND NEXT FRIENDS NOELLE  
CHRISTINE MCKEAN ) ..... 1<sup>ST</sup> RESPONDENT**

**RODERICK MCKEAN ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This reference is brought by way of a Chamber Summon dated 10<sup>th</sup> March, 2023—under Section 1A, 1B & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Paragraph 11 of the Advocates Remuneration Order—seeking orders that:
  1. The decision of the Taxing Master, the Hon. C.A. Okello, taxing the Bill of Costs dated 19<sup>th</sup> July 2022 at KES. 778,642.67 contained in the Ruling dated 27<sup>th</sup> February, 2023 be varied and/or set aside.
  2. This Honourable Court does order that the Bill of Costs dated 19<sup>th</sup> July, 2022 be placed before another Taxing Master for taxation.
  3. This Honourable Court do make any additional orders as the demands of justice dictate.
  4. The costs of this Application be provided for.



2. The Application was accompanied by a Supporting Affidavit evenly dated and sworn by Mercy Waliaula. The Application was based on the grounds on the face of it, and on the Supporting Affidavit. The basis was that the Taxing Master applied the wrong legal principles in taxing items 1 of the Respondent's Party and Party Bill of Costs dated 19<sup>th</sup> July, 2022 with respect to instruction fees.
3. According to the Applicant, the Kes. 500,000.00 awarded by the Taxing Master as instructions fees is inordinately high and against the principles of taxation in judicial review matters, as the judicial review proceedings the subject of the Bill of Cost, did not raise a novel question of law.
4. Further, that there was no justification given by the Taxing Master for increasing instruction fees beyond Kes 100,000 as prescribed by the Advocates Remuneration Order (ARO) at schedule 6A paragraph 1 (j) (ii) as there were no extraneous factors to justify an increment of the prescribed basic instruction fees.
5. Additionally, there was equally no justification by the taxing master and or specificity in awarding the instruction fees at Kes 500,000/- based on time taken in the subject matter, scope of work, and the nature of dispute.
6. As per the Applicant, the increment of instruction fees to Kes. 500,000 in the circumstances went against the principle that costs in litigation must be kept at such level as to ensure that parties can access court and seek justice and therefore discouraging the public from accessing justice under any circumstance.
7. To the Applicant, the Taxing Master erred by allowing item 46, 49, and 56 of the Bill of Costs, and considering the same as un-opposed yet, the said items were opposed by the Applicant. That the taxing master equally erred by finding the said items as provided in the Advocates Remuneration Order 2014, when the said items are not provided in the ARO.
8. The Applicant averred that the Taxing Master further erred in fact and in law in allowing Items 45,50,52, 55, 58, and 59 of the Bill of Costs; contrary to the provisions of the Advocates Remuneration Order and well-established principle that the burden of proof lies on the party seeking recovery of its costs.
9. In sum, it was the Applicant's position that the Taxing Master's decision contained in the Ruling dated 27<sup>th</sup> February, 2023 is manifestly wrong both in law and fact.
10. In response, the Respondent opposed the Application, and filed a Replying Affidavit dated 18<sup>th</sup> March, 2022 deponed by Victor Muthuri. It was averred that the Taxing Master's ruling dated 27<sup>th</sup> February, 2023 allowing the Respondent's Instruction fees at KES 500,000 is sound, based on law, and in line with the legal principles on taxation of instruction fees.
11. That the award of Kes. 500,000 as instruction fees cannot be termed as manifestly excessive, or inordinate in the circumstances of this case considering the urgency, importance, complexity, novelty of the matter, and the time expended by the advocates for the Respondents to prepare and present JR No. 22 of 2020.
12. Also, that the Taxing Master's ruling was made in consideration of the basic principles of taxation for the reason that the Taxing Master correctly relied on schedule 6 (j) (ii) of the Advocates (Remuneration) (Amendment) Order, 2014 (hereafter the Advocates Remuneration Order) in taxing the Bill of Costs. The Taxing Master's ruling was made in consideration of the basic principles of taxation for the following below reasons.



13. The Taxing Master set out the basic instruction fees for presenting or opposing the judicial review proceedings as KES 100,000 before venturing to consider whether to increase it. The Taxing Master considered, the time taken in the matter, scope of work and nature of the dispute before increasing the basic instruction fees by KES 400,000 thereby awarding instruction fees totalling to KES 500,000. That in so doing, the Taxing Master taxed off KES 2,000,000 from the amount sought by the Respondents as instruction fees in the Bill of Costs. This was a significant reduction of the amount sought by the Respondents contrary to what the Applicant portrays as an unjustified award of instruction fees.
14. The Respondent claimed that in awarding the instruction fees, the Taxing Master also considered the principles of taxation such as public interest that requires costs be kept at a reasonable level for access to justice and the need to reasonably compensate advocates for professional work done. In balancing those considerations, that the Taxing Master rightfully arrived at instruction fees amounting to KES 500,000 and taxed off KES 2,000,000. Given these considerations, it is clear that the Taxing Master had considered not only the financial position of the Applicant but also public interest element in determining instruction fees.
15. Further, that the Taxing Master did not err in allowing items 46, 49, and 56 of the Bill of Costs as they are provided for in Schedule 6A Paragraph 4(a) (i) and (ii) of the Advocates Remuneration Order which provides the charge for drawing of written submissions, replying affidavits and list of authorities. The Taxing Master, it was claimed, relied on the Court record to confirm the exact number of folios the written submissions, replying affidavits and list of authorities comprised of, as indicated by the Respondents in the Bill of Costs.
16. To the Respondent, the Applicant's contestation over items number 45, 50, 52,55 and 58 of the Bill of Costs is an afterthought, mischievous, and an abuse of the court process; as the Applicant had not disputed these items in its written submissions filed before the Taxing Master.
17. Also, that items number 45, 50, 52,55 and 58 of the Bill of Costs are drawn to scale in accordance with the provisions of Schedule 6A Paragraph 5 (a) of the Advocates Remuneration Order which provides the charge for making copies of pleadings and documents whether for court or the opposing party. The Taxing Master, it is said, relied on the Court record to confirm the exact number of folios of the documents that the Respondents made copies of, as indicated by the Respondents in the Bill of Costs. Therefore, that this instant Application is unmeritorious and ought to be dismissed with costs to the Respondents.
18. To buttress their cases, parties filed their respective written submissions. The Applicant, in submissions dated 28<sup>th</sup> June, 2023 stated that contrary to the legal principle in assessing the instruction fees, the taxing master generalized her justification on the scope of work done, the nature of the dispute before the trial court, and the time taken in the matter.
19. The position supported by the Applicant, is that the law requires a taxing master must apply the laid down principles and give reasons, specify, but not generalize his or her justification for increasing or reducing the instruction fees. That this position was affirmed in the court of appeal case of Joreth ltd vs Kigano & Associates (2012) 1EA 92. and in the high court cases of Kyalo Mbobu T/A Kyala & Associates Advocates vs Jacob Juma (2015) eKLR and Rory Thomas Mckean & Another vs Kenya Motorsport JRAPP NO. E142 of 2021 (unreported).
20. The Applicant asserted that the work, by the Respondent in the substantive matter, entailed a simple legal issue, which did not require exceptionally detailed legal research. Also, the taxing master equally failed to specify and or state any extraneous factor in the application that warranted an increment of the instruction fees.



21. As the Taxing Master failed to demonstrate with precision the justification for the increase of the instruction fees five times more than the basic instruction fees of Ksh 100,000/-. Therefore, she failed to exercise her discretion judiciously and this court should therefore interfere with her decision.
22. According to the Applicant, the Honourable Taxing Master considered items 46,49 and 56 as not opposed and or are drawn up to scale. This is contrary to what the Applicant had submitted. In the Applicant's submissions in opposition to the Bill of cost, under paragraphs 15 and 17, the Applicant indeed contested the said items having not been provided in the Advocates Remuneration Order, thus the Taxing Master erred.
23. Also in contesting items 45, 50, 52 and 55 on grounds that the Taxing master failed to consider the actual printing costs supported by vouchers to that effect subject to the provisions of schedule 6 clauses 5 of the Advocates Remuneration Order, the taxing master made the decision in error.
24. Conversely, the Respondent in written submissions dated 3<sup>rd</sup> July 2023 contended that the taxing officer considered, the time taken in the matter, the scope of work done, and nature of the dispute before increasing the basic instruction fees by KES 400,000 thereby awarding instruction fees totalling to KES 500,000.
25. The taxing officer, it was claimed, exercised judicial discretion and taxed off KES 2,000,000 from the amount sought by the Respondents as instruction fees in the Bill of Costs. This was a significant reduction of the amount sought by the Respondents contrary to what the Applicant portrays as an unjustified award of instruction fees. According, to the Respondent, the Taxing Master applied the principles of taxation set out in *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* (No. 3) [1972] EA 162 and in *Joreth Limited v Kigamo & another* [2002] E.A. 92.
26. The Respondent maintains that the award of KES 500,000 as instruction fees cannot be termed as manifestly excessive or inordinate in the circumstances of this case considering the urgency, importance, complexity and novelty of the matter and the time expended by the advocates for the Respondents to prepare, present and argue JR No. 22 of 2020.
27. That in *First American Bank of Kenya vs. Shah and Others* [2002] E.A.C.A 64, the Court of Appeal (as it then was) laid down the principles to be considered by this Court before interfering with the decision of a taxing officer on taxation. The Court of Appeal held that Court can only interfere with the taxing officer's decision if 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.
28. It was posited that the taxing officer considered Public Law interests that requires Judicial Review suits costs to be kept at a reasonable level for access to justice and the need to reasonably compensate advocates for professional work done; the taxing officer rightfully arrived at instruction fees amounting to KES 500,000 and taxed off KES 2,000,000. Reliance was placed on the case of *Republic v Law Society of Kenya Disciplinary Tribunal; Jacinta Mutheu Antony (Interested Party) Ex parte Applicant Muema Kitulu* [2019] eKLR Where court upheld the taxing officer's decision in that appropriately applied themselves to Schedule 6A of the Advocates (Remuneration) Order and the principles of taxation, by awarding Ksh. 200,000/= from Ksh. 1,500,000/=.
29. On taxation of items 46, 49, and 56 of the Bill of Cost, the Respondent conceded that the taxing officer in her ruling dated 27<sup>th</sup> February, 2023 highlighted opposed items for adjudication of costs but this did not include items 46, 49, and 59 of the Bill of Costs. However, that the same was covered under the statement in the ruling that all other items are either unopposed or drawn to scale, and proceeded to allow them as drawn. Therefore, and in contradiction the items 46, 49, and 56 of the Bill of Cost were thus considered by the Taxing Officer.



30. It is common practice for Advocates to include taxation of other documents aside from pleadings as provided for by Schedule 6A paragraph 4 (d) of the Advocates Remuneration Order, as enumerated on the relied case of *Mugweru & Co Advocates v Santaben Premchard Shah & 2others* [2021] eKLR.
31. On taxing of items 45, 50, 52, 55, 58 and 59 of the Bill of Costs the Respondent, relying on the principle in *Mugweru & Co Advocates v Santaben Premchard Shah & 2others* (supra) asserted that the Applicant in their written submissions dated 18<sup>th</sup> November, 2022 in opposition to the Bill of Costs did not oppose items 45, 50, 52, 55 and 58. It is therefore an afterthought, mischievous and an abuse of the judicial process for the Applicant to dispute items 45, 50, 52, 55 and 58 at this stage after the taxing officer has rendered her decision.
32. That notwithstanding, the Respondents submit that the taxing officer did not err in fact or law by allowing items 45, 50, 52, 55 and 58 of the Bills of Costs as Schedule 6 paragraph 5 (a) of the Advocates Remuneration Order.
33. In the end, the Respondent maintained that the Applicant has not demonstrated any plausible grounds to justify this Court's interference with the decision on taxation, hence the decision on taxation of the Bill of Costs delivered on 27<sup>th</sup> February, 2023 should be upheld and the Application dismissed with costs to the Respondents.

### **Analysis and Determination**

34. It is now trite law that the High Court will only interfere with the decision of a Taxing Master in cases where there has been shown to be an error in principle. In *Republic v Ministry of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna* [2006] eKLR, Hon. Justice J.B. Ojwang (Retired) stated as follows: -

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

35. Differently put, before the court can interfere with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong. This means that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling.
36. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. The court in the case of *First American Bank of Kenya vs. Shah and Others* [2002] 1 EA 64 set the applicable principles. 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. The position was reiterated in *Karen & Associates Advocates vs. Caroline Wangari Njoroge* [2019] eKLR, in which the Court cited the decision of the Court in *Ochieng, Onyango, Kibet and Ohaga Advocates vs. Adopt Light Ltd. HC Misc 729 of 2006* where the court stated that;

“...The taxing master must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject...”

In the same case, it was held that:

“The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in line to the material presented before court.”

37. The nature of the suit to which the subject costs relate was a judicial review application seeking prerogative orders. The fees chargeable thereof are provided for under 6A(1)(j)(ii) of the Advocates Remuneration Order which provides:

“Where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than 100,000.”

38. In her assessment of the instructions fees, the Taxing master expressed herself as follows:

“In determining an instruction fees, it must be related to the value of the work done by an Advocate.

Advocates should be fairly, appropriately, and justly rewarded for their fees bearing in mind the skill they exercised.



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 and has more and no less than reasonable compensation for professional work done.

Bearing in mind all the aforesaid factors and the reasons herein and in exercise of the discretion vested in me, I am fully convinced that the amount sought by the Applicant is excessive.

In Public Law Litigation, the amount involved is not the sole determinant when it comes to costs. Judicial Review suits are not money suits as they merely seek declaratory reliefs and orders.

Taking into account the time taken in this matter, scope of the work done and the nature of the dispute herein, I am of the considered view that the Kshs. 500,000/= is reasonable instruction fees under the circumstances. I proceed to allow item 1 at kshs. 500,000/= kshs. 2,000,000/= is hereby taxed off.”

39. In Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W’njuguna (supra) Ojwang, J (as he then was) while remitting the matter for fresh taxation the learned Judge in the above matter gave the following guidelines:
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 summarised form. (emphasis added).
40. It follows then that it is not enough for a Taxing Master to give a general narrative of complexity of a matter, the scope, the level of responsibility, novelty of the matter, time spent, research done or skill deployed. The Taxing Master must employ some degree of specificity. Only then can the exercise of discretion to increase or decrease fees can be said to have been exercised judiciously as per the demands



of the law. As held in Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W’njuguna & 6 Others (supra);

“... It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant’s firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria.....it was necessary to specify clearly and candidly how she exercised her discretion... it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs...complex elements in the proceedings which guide the exercise of the taxing officer’s discretion must be specified cogently and with conviction...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...”

41. In the instant matter, applying the above criteria, it is clear that the Taxing Officer exercised her discretion; However, she did not make any finding that particular factors rendered the matter complex, but still went ahead to allow an enhanced figure in instruction fees beyond the set Ksh. 100,000 under the relevant remuneration schedule. Without any, specific and not general, justification for enhancement of the instruction fee, the Taxing Officer wrongfully exercised discretion and this creates a fertile ground for this court to interfere with the exercise of the discretion.

Order:

1. The Chamber Summons dated 10<sup>th</sup> March 2023 is successful.
2. The finding made by the Taxing officer in respect of instruction fees payable is set aside. I proceed to tax the instruction fee at Ksh 100,000.
3. All other items in the bill of costs as taxed by the Taxing officer remain undisturbed.
4. Costs in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 18<sup>TH</sup> DAY OF OCTOBER 2023**

.....

**J. CHIGITI (SC)**

**JUDGE**

