REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: G.V Odunga J.

MISCELLANEOUS APPLICATION NO. 416 OF 2019

C.N KIHARA & COMPANY ADVOCATES.....APPLICANT

VERSUS

MAENDELEO YA WANAWAKE ORGANIZATION (MYWO).....RESPONDENT

RULING

1. By a Chamber Summons dated 2nd June, 2020 the Applicant/Advocates seek the following orders:

> **(1) THAT the Honourable court be pleased to certify this application as urgent and allocate it an early hearing date.**
>
> **(2) THAT the Honourable court be pleased to review, vary increase and/or set aside the decision of the Deputy Registrar-High Court of Kenya at Machakos (Hon. E.M. Analo) dated 22nd October, 2020, when he taxed the Advocate/Applicant's Advocate-Client Bill of Costs dated 17th October, 2019, and allowed a sum of Kshs. 201,751.66/= and failed to take into consideration rules and principles of the taxation of an Advocate-Client Bill of Costs and the Applicant's written submissions on the Bill of Costs .**
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> **(3) THAT in the alternative and/or in addition, the Honourable court do review, vary increase and/or revoke the taxation decision of 22nd October, 2020, and do grant an Order that Advocate/Applicant's Advocate-Client Bill of Costs dated 17th October, 2019, be allowed as prayed.**
>
> **(4) THAT in the further alternative to the above, the Honourable court do revoke and/or set aside decision on the taxation as concerns the Advocate and Client Bill of Costs dated 17th October, 2019 and directly re-tax item number 1 thereto to such a sum as may meet the interests of justice and/or direct that the Bill of Costs be re-taxed by any other Deputy Registrar (Taxing Master) other than the Deputy Registrar Hon. E.M. Analo.**
>
> **(5) THAT the Honourable court does make any further Orders, or directions as it may find necessary, to meet the interest of justice.**
>
> **(6) THAT the costs of this application be provided for.**

2. The said application was supported by the supporting affidavit sworn by **Charles Njuru Kihara**, an advocate of the High Court of Kenya practicing as such in the firm and style of Messrs C. N. Kihara and Company Advocates. According to the deponent, the firm of advocates acted for the Respondent/Client in the Machakos Constitutional Petition No. 13 of 2014.

3. The deponent averred that the Applicant/Advocates Bill of costs dated 17th October, 2019 should have been taxed in accordance with Schedule 6 of the Advocates (Remuneration) (Amendment) Order 2014 in particular under Part B where it is required that the taxing officer should increase by 50% the taxed costs and not pursuant to Schedule 6 Part A- Party and Party costs (1) (j) of the same Order, 2014.

4. According to the deponent, the Petition raised complex and important issues of the Respondent's elections hence the Deputy Registrar's taxed costs were not commensurate to the amount of work done by the firm of advocates. Reliance was placed on **Joreth Limited vs. Kigano & Associates (2002) EA** and ***Halsbury's Laws of England IV Edition Volume 37 at paragraph 732***. According to the deponent, they took up instructions from the Office of the President to assist the Respondent's Electoral Board amidst political tension to ensure that the Respondent/Client elections in Machakos were held in secure and peaceful environment and facilitation of credible officers to preside over the elections across the country.

5. The deponent averred that the instruction fees were manifestly low and unreasonable.

6. The deponent urged this court to review, vary, increase and or set aside the Deputy Registrar decision for being marred with errors on the face of the record.

7. The Respondent/Client through the replying affidavit sworn on 18th January, 2021 by **Rahab Mwikali Muiu**, the Chairperson of the Respondent, supported the Deputy Registrar's award on instruction fees and getting up fees in the sum of Kshs. 133,333.33, VAT in the sum of Kshs. 21,333.33 and attendances, service, drawings copies, receiving and disbursements in the sum of Kshs. 46,135.00 totaling Total Kshs. 201,751.66. According to the deponent, the amount was proper and arrived at after applying the guiding principles.

8. The deponent however took issue with the award of Kshs 33,333.33 as getting up fees, being 1/3 of the instruction fees of Kshs 100,000/= since there was no response to the Petition and that the matter was not confirmed for hearing.

Applicant/Advocates Submissions

9. On behalf of the Applicant/Advocates, it is submitted that the applicable provision under the Advocates Remuneration Order, 2014 is Part B of Schedule 6 which prescribes that for an Advocate-Client Bill of Cost fees are to be increased by half (1/2) of the value determined in Part A of Schedule 6 of the same Order,2014. It is further submitted that Schedule 5, Part II empowers the taxing officer to increase or diminish the charges for any special reasons he sees it fit.

10. It is submitted that the Petition involved complex issues and the amount of work done by the Advocates. Reliance was placed in **Nguruman Limited vs. Kenya Civil Aviation Authority & 3 Others [2014] eKLR** where **Lenaola J**.(as he then was) in approving the amount taxed quoted **Warsame J**. decision in **Ochieng,Onyango, Kibet and Ohaga Advocates vs. Adopt A Light Limited Milimani HC Misc.Cause No.729 of 2006**.

11. According to the Applicant/Advocates the nature and importance of the organization's country wide election spurred political tensions which heightened and elevated the sensitivity and importance of elections, election procedures and overall credibility is a fact that ought to have been considered by the taxing officer in exercise of discretion to compensate the Applicant/Advocates for the work done.

12. It is submitted that the Applicant/Advocates are entitled to getting up fees in accordance with Schedule 6 (2) (i) and (iii) of the Order, 2014. According to the Applicant/Advocates, they filed a response and prepared for the trial hence expended time and efforts towards effectively representing the Client.

13. As regards the basic instruction fees, it is submitted that in Constitutional and Judicial Review matters, the instruction fees are not pegged on the value of the subject matter since it is not certain. Reliance was placed on the case of **Republic vs. Minister of Agriculture & 2 Others Ex parte Samuel Muchiri W'Njuguna & 6 Others** where the court summarized the applicable guidelines to be; *the importance of the matter to the parties, the volume of the work done by looking at the documents that were prepared or perused; the period of time the matter was in court; and time expended by the advocate, the complexity of the matter and the research that was to be carried out by the Applicant to prepare the defence/reply*.

14. According to the Applicant/Advocates the Deputy Registrar erred by placing reliance only on the documents filed in court instead of looking at the complexity and sensitivity of the matter and its importance to the Respondent/Client. It is submitted that the Applicant's advocate had to hurriedly peruse through the Client's Constitution and substantive issues as well as the procedure involved. To the Applicant/Advocates the instructions were taken in midst of a political tension and unconstitutional clamour for elections in the management of elections hence the applicability of Schedule 5, Part II of the Order, 2014.

15. It is submitted that the instruction fees awarded by the Deputy Registrar is manifestly so low and unreasonable and not based on the constitutional decisions of the court. To the Applicant/Advocates, Kshs.3, 500,000/- is reasonable and in accordance with the Advocates scale for instructions to defend such a Constitutional Petition. Reliance was placed on the taxation awards in **Rose wangui Mambo & 2 Others vs. Limuru Country Club & 19 Others[2014]eKLR** awarded Kshs.4,800,000/-**,** HCCC No.246 of 2001-**Boniface M.Kabaka & Associates vs. Labh Singh Harnam Singh Ltd** awarded Kshs.4,000,000/-, **Butt & Another vs. Sifuna & Company Advocates Civil Appeal No.45 of 2005** awarded Kshs.150,000/-**, Muriithi Wanjau & Caesar Ngige Wanjau t/a Wanjau & Wanjau Advocates vs. Telkom Kenya Ltd [2011]eKLR** awarded Kshs.18,420,886.62/- and in **Hamzah Musuri Kerogo vs. IEBC & 3 Others [2017] eKLR** awarded Kshs.3,000,000/-.

16. As regards the disbursements, it is submitted that the Deputy Registrar erred in taxing off the expenses in particular Items 43-46 and Items 50-53 for apparent lack of evidence. To the Applicant/Advocates, the Deputy Registrar ought to have taken judicial Notice that of the fact that any matter filed before court does generally encompass transport expenses since counsel has to move to and from court in defence of his clients claim. According to the Applicant/Advocates, their offices are based in Nairobi hence their advocate faced challenges like not resuming to work in the office after attending court at Machakos for a hearing as well as their court clerks to file the pleadings.

17. According to Applicant/Advocates the Deputy Registrar failed to take in due regard, in taxing items 10 and 15 the distance travelled by the advocates. The Applicant/Advocates urged the court to increase, review and or vary the amount noting that the said items have been drawn as per the Order, 2014.

18. On the question of Value Added Tax, reliance was placed on the case of **A.M Kimani & Co. Advocates vs. Kenindia Assurance Co.Ltd [2010] eKLR** where **Koome, J** (as she then was) opined that under the VAT an advocate is entitled to charge VAT on instructions fees and also disbursement.

19. According to the Applicant/Advocates, the ruling of 22nd October, 2020 had few errors apparent on the face of the record. It is submitted

that the heading of the typed ruling indicated to be in respect of Constitutional Petition No. 21of 2014 instead this case Miscellaneous Application No.416 of 2019 arising from Constitutional Petition No.13 of 2014. Further that the name of the Deputy Registrar who delivered the ruling is not indicated despite it being signed.

20. In summation, it is submitted that the amount awarded by the Deputy Registrar on the Bill of cost dated 17th October, 2019 was not commensurate to the amount of work done by the Applicant/Advocates. Further, it is submitted that the Bill of Costs was taxed under the Party and Party and not as an Advocate-Client Bill of Costs as regards the instruction fees thereby exposing a reviewable error on the face of the record. According to the Applicant/Advocates, the Deputy Registrar misdirected himself in taxation.

Respondent/Client submissions

21. On behalf of the Respondent/Client, as to whether the court should interfere with the decision of the Deputy Registrar, it is submitted that Schedule 6.1(j) (ii) of the Order, 2014 provides for minimum of Kshs. 100,000/- for opposing application for constitutional and prerogative orders which are complex or novel. According to the Applicant/Advocates, the Deputy Registrar in awarding instruction fees of Kshs. 100,000/- was guided by the cases of **Nguruman Limited vs. Kenya Civil Aviation Authority & 3 Others (2014) eKLR** and in **Kenyariri & Associates vs. Salama Beach Hotel Ltd & 3 Others (2015)eKLR**.

22. As regards whether the basic instruction fees should be increased or reduced reliance was placed on the case of **Republic vs. Competition Authority Ex parte Ukwala Supermarket Limited & Another [2017] eKLR**.

23. It is submitted that the Deputy Registrar erred in awarding fees for getting up or preparing for the trial in the sum of Kshs. 33,333.33 which is 1/3 of the instruction fees of Kshs. 100,000/-. According to the Respondent/Client, getting up fees are only allowed where a denial of liability is filed and matter has been confirmed for hearing. To the Respondent/Advocates, the matter was not confirmed for hearing. Reliance was placed on Schedule 6.2(ii) which provides that no fee under the paragraph is chargeable until the case has been confirmed for hearing. According to the Respondent/Client, the Applicant/Advocates only represented the Respondent in the hearing of the interlocutory application and did not file any response to the main Petition in Machakos Constitutional Petition No. 13 of 2014and that the matter was not confirmed for hearing as envisaged by Schedule 6.2(ii) of the Order, 2014 thus Kshs.33, 333.33 awarded as getting up fees should be set aside.

24. The Respondent/Client urged the court to find the Chamber Summons lacks merit and dismiss it.

Determination

25. I have considered the written submissions filed.

26. 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 vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna [2006] eKLR, Ojwang J.** (as he then was) expressed himself inter alia 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 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 case 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…A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved…Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising 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…"**

27. **Mativo J.** in **KANU National Elections Board & 2 others vs. Salah Yakub Farah [2018] eKLR** held that:-

> **"19. It is trite that the 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."

28. The Supreme Court of Uganda (**Mulenga, JSC**) in **Bank of Uganda vs. Banco Arabe Espaniol, Civil Application No. 29 of 2019** stated that:

> **"…[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount… Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."**

29. It is not in dispute that the Applicant/Advocates represented the Respondent/Client in the Constitutional Petition No. 13 of 2014 wherein the Respondent/Client had been sued as 2nd and 3rd Respondent. The Applicant/Advocates seek to challenge the Deputy Registrar's taxation decision of 22nd October, 2020.

30. The issues that emerge for determination are:-

> ***a. Whether the Deputy Registrar applied a wrong provision under Schedule 6 of the Advocates Remuneration Order, 2014***
>
> ***b. Whether the minimum instruction fees of Kshs.100,000/- awarded by the Deputy Registrar was manifestly low and unreasonable***
>
> ***c. Whether the Applicant/Advocates are entitled to getting up fees***
>
> ***d. Whether the Deputy Registrar was correct to tax off some items under the disbursement***
>
> ***e. Whether the Deputy Registrar failed to consider item 10 and 15 of the Bill of costs***
>
> ***f. Appropriate orders on costs.***

31. As regards the first issue, the Applicant/Advocates faults the Deputy Registrar for applying Part A Schedule 6(j)(ii) where the minimum instruction fees is Kshs. 100,000/- and failed to increase it by 50% as required under PART B of Schedule 6(a).

32. Under Schedule 6 (J) Part A-Party & Party Costs:

> ***"(j) Constitutional petitions and prerogative orders***
>
> ***a. To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—***
>
> ***b. (i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000***
>
> ***c. (ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000."***

33. Under the Part B of Schedule 6 provides:-

> ***"Schedule 6 PART B-ADVOCATE AND CLIENT COSTS***
>
> ***a. As between advocate and Client the minimum fess shall be-***
>
> ***(a) the fees prescribed in A above, increased by 50%; or***
>
> ***(b) the fees ordered by the court, increased by 50%; or***
>
> ***(c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.***

34. A clear reading of the above two provisions, leads to the conclusion that the fee prescribed in Part A is to be increased by 50%. The Bill of costs dated 17th October, 2019 is an Advocates-Client Bill of Costs hence the applicability of Part B of Schedule 6.

35. According to **Tuiyott J.** in **National Bank of Kenya v Rachuonyo & Rachuonyo Advocates [2021] eKLR**:-

> **"…..the process of taxing an advocates fees is by applying fees prescribed in schedule 6(A) and then increasing it by 50%. It is not as suggested by the client that actual party and party costs should first have been assessed. The language in Schedule 6(B) is unequivocal. It is by simply applying the fees prescribed in A and increasing it by 50%. The Reference in that regard is disallowed."**

36. I have perused a copy of the Deputy Registrar's ruling. I note that the prescribed fee in Part A was not increased by 50% as required under Part B hence an omission by the Deputy Registrar. The Respondent/Client has not opposed the applicability of Part B.

37. In my view the Deputy Registrar failed to consider Part B of Schedule 6.

38. As regards the instruction fees, the Applicant/Advocates submitted that the Deputy Registrar erred in placing reliance only on the documents prepared and failed to consider the inherent complexity and sensitivity of the matter and its importance to the Respondent/Client. According to the Applicant/Advocates the matter raised complex issues of law. The Applicant/Advocates submitted that their advocate had to hurriedly peruse through the Respondent's Constitution and substantive issues as well as the procedural aspects involved.

39. It is not in dispute this taxation emanated from a constitutional Petition hence the value of subject matter cannot be determined from the pleadings, judgment of settlement.

40. In **Joreth Ltd vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] EA 92,** the Court had this to say:

> **"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, judgement or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances." See Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR."**

41. **Ojwang, J** (as he then was) in **Republic vs. Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 Others [2006] eKLR** had this to say:-

> **"In the said judicial review matter, are there specific complex elements which in particular weighed in the mind of the taxing officer? What level of responsibility did the canvassing of the application place upon counsel? What was the novel element in the proceedings, which guided the exercise of discretion by the taxing officer? How much time, how much research, how much skill was necessary for the prosecution of the application? What volumes of documents did counsel have to classify, to analyse, to rationalise and to simplify for possible adoption in the judgment ultimately rendered? And must this item on "quantity of documentation" be provided for in the bill of costs under "advocate's instruction fees"? Was there a real urgency in the judicial review application?"**

42. According to the court in ***Joreths Case***, where the value of subject matter cannot be ascertained, 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*.

43. To fortify his decision, the Deputy Registrar observed and stated as follow:-

> **"I wish to note that the Petitioner herein moved the court alleging that their fundamental rights had been infringed and stated that the Respondent were not conducting free and fair elections. I have analyzed the pleadings and the issues canvassed in this matter. I do find that the issues were not relatively complex compared to other matters normally canvassed before the same court. The Petition was filed on 8th July, 2014 and court determined the application dated 10/07/2014 on 11/07/2014 and since the 18/6/2016 no action has been taken by either party. The court record indicate that the documentation involved was not much. However parties certainly conducted research on the matter and considering as well as the importance of the matter to the parties, the nature and conduct of the proceedings herein and considering that the same falls under paragraph (j)(ii) whereof the minimum instructions fees is Kshs. 100,000/-. I find that an award of Kshs.100, 000/- would be reasonable……."**

44. According to the Applicant/Advocates the instruction fees awarded was manifestly low and unreasonable. It is submitted that there were complex issues involved in the Petition and the importance of the matter to the Respondents hence an amount of Kshs.3, 500,000/- was reasonable and the award of Kshs. 100,000/- should be set aside.

45. The Applicant placed reliance on Schedule 5, Part II of the Advocates Remuneration Order, 2014 whereof the taxing officer is conferred with discretion to increase or diminish the instruction fee.

46. In **Makula International vs. Cardinal Nsubuga & Another [1982] UGSC 2**, the Court of Appeal in Uganda expressed the approach to taxation as follows:

> **"The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the**

basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it."

47. In **Opa Pharmacy Ltd vs Howse & Mc George Ltd [1972] EA 233** it was stated:

"Whereas the taxing officer is given discretion of taking into account other fees and allowance to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instructions fees, the taxing officer in this case gave no reason whatsoever for doubling the instructions fees. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The failure to give any reason for the choice, surely, must therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."

48. In **Republic vs. Minister of Agriculture & 2 others Exparte Samuel Muchiri W Njuguna & others (supra)** the court held that:-

"The complex elements in the proceedings which guide the exercise of the taxing officers 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 specifity. 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, 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 clarified, assessed and simplified, the details of such initiative by counsel must be specifically indicated apart of cause from the need to show if such works have not already been provided for under a different head of costs."

49. I note that the Deputy Registrar gave reasons why he taxed the instruction fees at Kshs.100, 000/- which was the minimum fee under Schedule 6.1(j). It is not in doubt that the Applicant/Advocates opposed the Respondent's Notice of Motion dated 8th July, 2014 seeking temporary injunction against the ongoing Respondent's national elections.

50. Were the reasons given by the Deputy Registrar based on the taxation principles enunciated in **Joreth's case**?

51. In my view I have no doubt that the matter was of great importance to the Respondent/Client as it involved nationwide election of the Respondent's leadership. The Applicant/Advocates on behalf of the Respondent/Client were required to respond to the Petitioners allegations that the elections were being conducted unfairly. The right to free and fair elections is a constitutional right guaranteed to a party under our Constitution, 2010.

52. The Applicant's advocate Ms. Kibera seem to have only been involved in opposing the amended Notice of Motion dated 10th July, 2014. The Applicant were appointed on 9th July, 2014 vide their Notice of Appointment filed on the same day. The ruling in respect of the Preliminary Objection as well as the Amended Notice of Motion was delivered on 11th July, 2014. It took the court one day to deliver its Ruling. I note on record vide a Notice of Change of advocates filed on 14th August,2014, the firm of Mwakio, Kirwa & Company Advocates came on record for the Respondent/Client. The firm simultaneously file a Notice of preliminary Objection to the Petition. It is therefore clear that the Applicant/Advocates were only involved in opposing the Petitioners Amended application seeking temporary injunction against the ongoing election.

53. In my view the issues were not relatively complex as alluded by the Applicant/Advocates and less time was spent in court by the Applicant's advocates hence I find no reason to disturb the Deputy Registrar's of Kshs.100, 000/- as instruction fees save that the award has to be increased by 50% as stipulated under Part B of Schedule 6.

54. As regards the award of getting up fees in the sum of Kshs. 33,333.33 being 1/3 of the instruction fees, it is contended by the Respondent/Client that the Applicant/Advocates only represented the Respondent in the hearing of the interlocutory application and not in the main Petition. According to the Respondent the matter was not confirmed for hearing as envisaged by Schedule 6 paragraph 2(ii) of the Advocates Remuneration Order, 2014.

55. Based on the decision of **Nguruman Limited vs. Kenya Civil Aviation Authority & 3 others [2014] eKLR**, the Deputy Registrar held that the Respondent herein was entitled to getting up fees which he taxed at Kshs. 33,333.33/- being 1/3 on Item 1.

56. In **Nguruman Limited vs. Kenya Civil Aviation Authority & 3 others (supra)** **Lenaola, J** (as he then was) agreed with the Taxing Master who stated as follows;

"The Respondent argued that the Applicants ought not have charged fees for getting up for trial because this matter did not go to hearing but was determined based on Affidavit evidence and Submissions. According to the Respondent 'hearing of a Matter' denotes the calling of witnesses and adduction of oral evidence in Court. Culminating into a judgment at the conclusion of the case. Counsel for the Respondent referred this Court to the case of National and Grindlays Barik (Civil Case No.1076 of 1964) and also quoted the book 'Judicial Hints on Civil Procedure' at page 147 and 148. I have gone through the same but I do not agree with the Submissions by the Respondent herein that fees for getting up is only allowable where the matter has gone to full hearing. I also do not agree with his Submission that hearing only entails the calling of witnesses and adduction of viva voce evidence.

Schedule VI paragraph 2 of the ARO (2009) states as follows on fees for getting up:-

'In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed …...'

The rule only envisages a situation where in a case, there is denial of liability. That was the case in this matter when the Applicants herein field their response to the Petition. It matters not in which manner the matter was subsequently disposed off.

As such, I find that fees for getting up was properly charged. I tax the same at Kshs. 200,000.00 (One third of the instruction fees allowed at Items 1 and 2 above).”

57. Under Schedule 6 PART A-PARTY & PARTY COSTS at paragraph 2, provides:-

“2. Fees for getting up or preparing for trial

In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, 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:

Provided that—

(i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

(ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;

(iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.”

58. Based on the above provision, it is clear under Schedule 6 paragraph 2 of the Advocates Remuneration Order, 2014 that no fees is chargeable for getting up and preparing for trial until the case is confirmed for hearing and in case where the case is not heard, the taxing officer must be satisfied that the case has been prepared for trial.

59. As to what connotes *‘getting up’* I resonate with **Ojwang J.** (as he then was) in **Shamshudin Khosla as Chairman, Abdul Gafur Pasta as Honorary Secretary & Mohamed Bayusuf as Treasurer (On their own behalf and on behalf of) the Members of Kenya Transport Association vs. Kenya Revenue Authority [2011] eKLR** where the Learned Judge stated:-

“From the foregoing authority, I would draw the inference that “getting-up” fees, in ordinary litigation, partially overlaps with instruction fees. Whereas instruction fees represent the formal commitment of the Advocate to a new client who thereafter gives sufficient instructions, in a process of hearing-and-receiving by the Advocate, getting-up fees relate to the first step (and possibly, later, equally-significant steps) which the Advocate takes, in preparing the pleadings and other vital process-documents, for lodgment and service.”

60. In **Republic vs. Egerton University Exparte Patel Maulik Prasun [2020] eKLR Ngugi J**. held at paragraph 13 that:-

“The Taxing Master taxed off the entire sum claimed as getting up fee. Her reasoning is that this was a Judicial Review Application that did not require preparation for trial involving witnesses. However, getting up fees are payable even for trials or court cases which do not require preparation of witnesses. For example, the Schedule envisages getting up fees for appeals which, obviously, do not involve preparation of witnesses. There is no good reason why getting up fees should not be payable for preparing for trial for Judicial Review Applications.”

61. **Nyamweya, J** (as she then was) in **Republic vs. Kenya Medical Supplies Authority & Another; Medox Pharmaceuticals Limited (Interested Party); Ex parte Nairobi Enterprises Limited [2019] eKLR at** paragraph 32 held:-

“As regards the taxation of item on getting up fees and award of Kshs 166,666.66/= by the taxing master for this item, paragraph 2 of Schedule 6A of the Advocates (Remuneration) Order 2014, only requires denial of liability in a case for getting up fees to payable. In addition, a close reading of the paragraph shows that contrary to the ex parte Applicant’s arguments, the matter need not proceed to full hearing, and it is sufficient that it is ready for and has been confirmed for hearing. It is not disputed that the present application was contested and proceeded to hearing.”

62. The Respondent/Client was represented by Ms. Kibera in court on 9th July,2014 at 4.15 pm where the advocate sought for time to file a Preliminary Objection to the Petitioners Notice of Motion dated 8th July,2014 that sought temporary injunction against the ongoing Respondent’s national elections. On 10th July, 2014 Ms. Kibera was present for the hearing of the Preliminary Objection and the Notice of Motion.

63. Based on the facts, it is clear that the Applicant's advocate participated in a hearing of the Notice of Motion dated 8th July, 2014 which the Respondent/Client was opposing.

64. In my view the Deputy Registrar did not err to award an amount for getting up. Accordingly, the objection to the taxing officer's decision to award getting up fees to the Applicant/Advocate is found to have no merit. The same is dismissed.

65. As regards the taxed off items number 43 to 46 and 50-53, it is submitted that the Deputy Registrar ought to have taken judicial notice that the expenses which included transport to court are inevitable as counsel must move from one court to another in pursuit of the Respondent/Client claim and/or defence.

66. I note at page 5 of 6 of the Deputy Registrar's ruling, he taxed off the items on the basis that they had not been supported with evidence. Item 43 to 46 and 50 show that they were transport expenses to Machakos by Taxi from Machakos at a cost of Kshs. 9,500/- each while item 53 show it was an expenses for Photostat of pleadings, exhibits, annextures and other sundries at a cost of Kshs. 20,000/-.

67. **Ochieng J**. in **Mumias Sugar Company Limited vs. Tom Ojienda & Associates [2019] eKLR** stated that as regards disbursements generally, it is good practice for the taxing officer to verify that the party claiming the same had actually remitted payments.

68. In my view the Deputy Registrar was correct to tax off the items since no proof was attached in support of the expenses.

69. The Applicant/Advocates contend that item 10 (attending court on 9/7/2014) and Item 15 (attending court on 10/7/2014) were not considered by the Deputy Registrar. I have perused the ruling. I note that the Deputy Registrar in his conclusion taxed the attendances together with services, drawings, copies, receiving at a total cost of Kshs.46, 135. It is therefore difficult for the court to discern whether the items were considered or not by the Deputy Registrar since in his analysis there was no indication whether the attendances were taxed.

70. From the forgoing, I am satisfied that the Applicant/Advocates Chamber Summons has succeeded partially.

71. The Applicant/Advocates has asked the court to re-tax the bill or direct that the bill be re-taxed by any other Deputy Registrar other than **Honourable Analo E.M Analo**.

72. The Court of Appeal in the **Joreth Limited case** (supra) held that:

> **"…. it is not really in the province of a judge to retax the bill. If the judge comes to the conclusion that the taxing master has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate direction on how it should be done. It was stated by the predecessor of this Court in the case of Steel Construction & Petroleum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd (1970) E.A. 141 per spry JA at page 143:**
>
> **"Counsel for the appellant submitted, relying on D'Souza vs. Ferao [1960] EA 602 and Arthur vs. Nyeri Electricity Undertaking [1961} EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re-assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion."**

73. In the premises, I am inclined to remit back for taxation the items dealing with attendances services, drawings and copies separately. Since there is only one Taxing Officer in this Court the said items will be taxed by **Hon. Analo.**

74. The Applicant/Advocates Chamber Summons has succeeded partially hence the Applicant/Advocates are awarded half of the costs.

75. It is so ordered.

RULING READ, SIGNED AND DELIVERED AT MACHAKOS THIS 14TH DAY OF DECEMBER, 2021.

G.V ODUNGA

JUDGE

In the absence of the parties.

CA Susan: