**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 264 OF 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CONSTITUENCY DEVELOPMENT BOARD.....RESPONDENT**

**AND**

**KENYA ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY**

**EX PARTE APPLICANTS:**

**THOMAS MONGARE MOINDI, PHILEMON M. APIEMI,**

**MARY K. ONDIEKI AND JOHN A. ONYANCHA**

**Suing as Officials of THE MILLENNIUM FORUM FOR UNITY AND DEVELOPMENT**

**RULING**

**The Application**

1. The *ex parte* Applicants herein, Thomas Mongare Moindi, Philemon M. Apiemi, Mary K. Ondieki and John A. Onyancha, suing as officials of the Millennium Forum for Unity and Development, filed an application by way of a Notice of Motion dated 18th May 2020, seeking the following orders:

> **a) The ruling delivered on 19th December 2019 by Hon. L. Mumassabba, the Deputy Registrar on the Respondent's bill of costs dated 17th March 2017 be set aside**
>
> **b) This Court be pleased to assess the quantum of costs payable to the Respondent afresh.**
>
> **c) In the alternative, the bill of costs be remitted to a different Deputy Registrar for fresh taxation.**
>
> **d) The costs of this application be provided for**.

2. The application is supported by an affidavit sworn on 18th May 2020 by Thomas Mong'are Moindi, one of the *ex parte* Applicants. He deposed that he is one of the *ex-parte* Applicants who are officials of the Millennium Forum for Unity and Development as the Chairman of the said Society and had the requisite authority of the other officials of the said Society. He averred that the *ex-parte* Applicants' commenced these proceedings way back in the year 2010 against the Respondent and that vide a ruling delivered on 8th April 2011, the trial Judge namely, Justice Musinga (as he then was) granted all the orders sought in the judicial review application and awarded the costs of the proceedings to the *ex-parte* Applicants. He deposed that the Applicants' Chamber Summons dated 26th June, 2014, which is the subject of the reference herein, was dismissed on 29th September, 2015 with costs to the Respondent.

3. He further averred that while taxing the Respondent's said bill of costs, the Deputy Registrar failed to limit herself to the costs of the application dated 26th June, 2014 and instead wrongly proceeded to award the Respondent costs of the entire judicial review proceedings as though the same had been dismissed with costs. He contended that the Deputy Registrar fundamentally erred in principle thereby taxing the bill costs at an amount that was highly excessive, exaggerated, erroneous, unjust and untenable. He stated that the costs in respect of the dismissed application is provided under Schedule 6(1) of the Remuneration Order of 2009. In conclusion, he averred that for the foregoing reasons, he verily believed that it is in the interest of justice that the orders sought herein be granted.

**Determination**

4. Arising from the pleadings and submissions filed, the issues in dispute are first, what costs were the subject of taxation by the taxing Master; second, whether the taxation by the Taxing Master of the disputed items in the *ex parte* Applicant's Party and Party Bill of Costs dated 2nd October 2019 was made in error of principle; and third, whether the remedies sought are merited.

5. The applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer's decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in **First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69** by Ringera J. (as he then was) who delivered himself thus;

> **"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".**

6. These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) 1 EA 92,** wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

7. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) e KLR** :

> " 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."**

8. These guidelines were also applied by Odunga J. in **Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd, [2014] eKLR,** and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

9. In the instant application, the first issue raised by the ex parte Applicant's reference is that of the costs that supposed to be taxed in the impugned taxation, and the *ex parte* Applicants urged that the Taxing Master erred in principle by taxing the Respondent's costs as though they were costs of the entire proceedings, whereas the Respondent was only entitled to the costs of successfully opposing the Chamber Summons application dated 26th June, 2014. Lastly, it was submitted that the ruling on the *ex parte* Applicants' application dated 26th June, 2014 was delivered on 29th September, 2015, and that all items subsequent to that date were not applicable to the said application and could not be awarded.

10. It is in this respect notable that section 27 of the Civil Procedure Act provides the entitlement to costs arising from a suit as follows:

> **"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
>
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such. "**

11. As regards the procedure to recover any such costs, section 44 and 45 of the Advocates Act provides that where there is no agreement as regards remuneration, the costs of parties in both contentious and non-contentious matters shall be subjected to taxation in accordance with the Advocates Remuneration Order. Further, section 48 provides for the procedure to be followed in actions for recovery of costs. Paragraph 2 of the Advocates Remuneration Order in this respect provides as follows a regards its application:

> **"This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) and in a Tribunal established under the Rent Restriction Act (Cap. 296)."**

12. Paragraph 52 further provides that the costs awarded by the Court on any matter or application shall be taxed and paid as between party and party, unless the Court in its order shall have otherwise directed.

13. It is therefore evident from the foregoing provisions that the subject of any taxation are the costs as awarded by a Court, in the absence of any agreement between the concerned parties. In the present application, the record shows that the costs awarded by the Court in this matter were as follows.

> a. The Respondents were to bear the costs of the *ex parte* Applicants' substantive application dated 18th August 2010, as per the ruling by J. Musinga (as he then was) on 8th April 2011
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> b. The applicants in the Notice of Motion dated 19th April 2011 were to bear the cost of the said application which were awarded to the *ex parte* Applicants and Interested Party therein as per the ruling by J. Musinga (as he then was) on 19th April 2011.
>
> c. There was no order as to costs as regards the *ex parte* Applicants' Notice of Motion dated 5th June 2012 as per the ruling by J. Odunga delivered on 25th April 2013.
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> d. The costs of the *ex parte* Applicants' Advocate's Notice of Motion dated 26th June 2014 were awarded to the Respondent by J. Korir on 29th September 2015.
>
> e. The costs of the Respondent's Notice of Motion dated 22nd September 2016 were awarded to the Respondent by J. Odunga on 1st March 2017

14. It is also on record that the *ex parte* Applicants' Party and Party Bill of Costs dated 17th February 2017 was taxed in a ruling delivered herein by the Taxing Master on 21st November 2018, although the legal status of the said Bill of Costs and taxation is being questioned by the Respondent. The taxation that is the subject of the instant reference however, is that of the Respondent's Party and Party Bill of Costs dated 17th March 2017, on which a ruling was delivered by the Taxing Master on 19th December 2019.

15. The Taxing Master commenced the impugned ruling by stating that the Bill of Costs that was the subject of taxation was dated 23rd March 2017 for Kshs 667,095/=, and was filed pursuant to the ruling delivered on 1st March 2017 awarding costs of the application to the Respondent. The Taxing Master however failed to address the issue of the various interlocutory applications filed herein in addition to the substantive application, in which orders were made as to costs, and to specify those in which costs were awarded to the Respondents. This was necessary as the costs of the suit were awarded to the *ex parte* Applicants, and the Taxing Master needed to identify which costs had been awarded to the Respondent to be able to properly assess the instructions fees that were required to be paid by the *ex parte* Applicants.

16. In this respect, the instruction fees payable by the *ex parte* Applicants were of the two interlocutory applications in which costs were awarded to the Respondent, namely the *ex parte* Applicants' Notice of Motion dated 26th June 2014 and the Respondent's Notice of Motion dated 22nd September 2016. The identification of the of the costs that are the subject matter of a taxation are also crucial in determining the applicable law, and in this respect the Taxing Master found as follows in the impugned ruling:

> **"I have carefully considered the Bill of Costs filed by the Applicant and the submissions herein. This is a matter that was filed in the year 2010 and concluded in the year 2017 hence the applicable Advocates Remuneration (Amendment) Order is that of 2006 and 2014."**

17. It is evident that in addition to the failure to identify the costs that were subject of the taxation in light of the various rulings herein made as to costs, the Taxing Master also made an error of principle as regards the applicable period of taxation in respect of the Respondent's costs, resulting in the application of the Advocates Remuneration (Amendment) Order of 2006 which was not in force at the time of the hearing of the two interlocutory applications in which costs were awarded to the Respondent. By the date of the two applications the applicable orders were the Advocates Remuneration Order of 2009 as amended by the Advocates Remuneration (Amendment) Order of 2014.

18. Coming to the second issue on the errors made in taxation of the instruction fee, the *ex parte* Applicants submitted that under Schedule 6(1) of the Remuneration Order, the instruction fees to present or oppose an application filed during proceedings is Kshs. 5,000/-. Therefore, that the Taxing Master thus erred in law by failing to consider the said provision, and there no basis for awarding the Respondent Kshs. 250,000/- as instruction fees merely for opposing an application.

19. Reliance was placed on the decision in **John Paul Miheso Shikuta -vs- Leonard Kamau Njuguna**, **Kiambu HC Misc Civil Application No. 32 of 2017,** wherein it was held that the applicable provision on fees for presenting or opposing any application not otherwise provided for is the one found in Schedule 6 of the Advocates Remuneration Order 2014, and which pegs such instructions fees as "such sum as may be reasonable but not less that Kshs. 5000."

20. A perusal of the impugned ruling discloses contradictory and erroneous observations made by the Taxing Master as regards the item on instruction fees that was being taxed. The Respondent in this respect sought instruction fees of Kshs 250,000/= in its Party and Party Bill of Costs dated 17th March 2017, and the Taxing Master in her ruling initially observed as follows:

> **"Items No.1**
>
> **As stated above, instructions in this matter commenced in the year 2010.The Applicant seeks Kshs.250,000/=. I have carefully considered the Bill of Costs filed by the Applicant and the submissions herein. This is a matter that was filed in the year 2008 and hence the applicable Advocates Remuneration (Amendment) Order is that of 2006. Item No.1-Instruction Fees The Applicant seeks Kshs.10,000.000/= .The applicable law is Schedule 6 (5) of the Advocates Remuneration Order 2006 which provides prerogative orders - "TO present or oppose an Application for a Prerogative Order such sum as may be reasonable but not less than Kshs.28,000/="**

21. There was an obvious error and contradiction in the ruling as to the amount of instruction fees sought by the Respondent, with two differing figures of Kshs 250,000/= and Kshs 10,000,000/= being stated by the Taxing Master. In light of the earlier findings by this Court in this ruling, the Taxing Master also erroneously found that instructions were given in 2020, and that the applicable law is Schedule 6(5) of the Advocates Remuneration Order 2006. In this respect as noted in the foregoing, the relevant instructions were given to the Respondent's advocates at the time of filing the *ex parte* Applicants' Notice of Motion dated 26th June 2014 and the Respondent's Notice of Motion dated 22nd September 2016.

22. After considering the applicable principles and citing various legal authorities on taxation of instruction fees, the Taxing Master then observed as follows in the said ruling:

> **"The Applicant in the said Application was merely seeking for prerogative orders. No monetary value was claimed in the Application. The Applicant's Application was dismissed with costs to the Respondent. 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 Applicant has not demonstrated or shown me or satisfied me as to the number of hours they have devoted for taking instructions from the time they were employed. However, I have carefully considered the factual and legal issues with a view to gauge complexity of issues, importance of the matter, the amount involved, perusal of entire paper work, studying and preparing for the matter, responsibility shouldered based on the nature and importance' of the subject matter. 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 amount sought by the Applicant is grossly excessive, astronomical and a figurement of imagination."**

23. The Taxing Master then concluded and made her finding on the taxation of the instruction fees as follows:

> **" 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 reasonable I am fairly convinced that the basic fee applicable is governed by Schedule 6 (5) G) of the Advocates Remuneration Order, 2006 and the fee provided is Kshs.28,000/= On question of increase on the aforesaid basic fee and this being an Advocates Client Bill of Costs, I am of the view that Kshs.250,000/= as suggested by the Applicant is reasonable instruction fees taking into account the time taken in this matter, scope of the work done and the nature of the dispute herein.**

24. It is evident that as a result of the error made as regards the amount of instruction fees sought, various contradictory findings as regards the reasonableness of the said amount was made by the Taxing Master. In addition, the Taxing Master applied an erroneous law, to the item on instruction fees, in that she used the wrong Advocates Remuneration Order as already found by this Court, namely the Advocates Remuneration Order, 2006, and also the wrong schedule and paragraph namely Schedule 6 (5) G) which is on basic instruction fees when presenting or oppose an application for Constitutional and Prerogative Orders .

25. In this regard, and as already found by this Court, the costs awarded to the Respondent was only with respect to two interlocutory applications and not of the main substantive application that was seeking prerogative orders. The applicable law in this regard was Schedule 6 paragraph 1 of the Advocates (Remuneration) (Amendment) Order of 2014, which provides for instruction fees in party and party costs in

proceedings in the High Court.

26. The operative paragraph of the said Schedule was the paragraph after the section on appeals on "Matters arising during proceedings", which provides in clause (c)(viii) for instruction fees to present or oppose any other application not otherwise provided for. It is notable that instruction fees in interlocutory applications are not specifically provided for in the schedule. The said paragraph states that where the application is opposed, such sum may be awarded as instruction fees as may be reasonable but not less than Kshs 5,000/=.

27. The second disputed item in the Respondent's Party and Party Bill of Costs was that on getting up fees, and the *ex parte* Applicants submitted that getting up fees is only applicable in trial of suits or hearing of appeals but not in presenting or opposing applications filed during proceedings. Consequently, that the sum of Kshs. 83,333.30 awarded by the taxing master as getting up fees was erroneous, unjustified and untenable, particularly so considering that the application was not *sui generis*, that is, it was not a self-standing cause.

28. Paragraph 2 of Schedule 6 of the Advocates (Remuneration) (Amendment) Order of 2014,provides for getting up fees as follows:

> **"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.**

29. The said paragraph must be read together with paragraph 1 of the said Order, as getting up fee that are awarded are dependent on the instruction fees that are taxed, to the extent that it should not be less than one-third of the instruction fees. In this respect, it is evident from paragraph 1 that interlocutory applications are not only absent from the specific categories of cases provides for, but are considered incidental in nature as arising during proceedings on a substantive case. This is also the buttressed by the fact that some interlocutory applications are purely procedural, and are not capable of raising any substantive issue for trial. Getting up fees were therefore not payable on the instruction fees awarded to the Respondent for the subject interlocutory applications for these reasons.

**The Orders**

30. In the premises, I find that the entire decision of the taxing master in was erroneous for applying the wrong provisions of the law. In addition, the award of instruction fees of Kshs 250,000/= was made in error of fact and the law. Likewise, the taxation of the getting up fee at Kshs 83,333.30 was also erroneous as the item is not applicable to fees awarded in interlocutory applications.

31. These errors of law and principle by the Taxing Master therefore justify interference by this Court, and the remedies sought are therefore merited. The *ex parte* Applicants' Notice of Motion dated 18th May 2020 is accordingly allowed to the extent of the following orders:

> **i. The entire ruling delivered on 19th December 2019 by Hon. L. Mumassabba, on the Respondent's Party and Party Bill of Costs dated 17th March 2017 be and is hereby set aside**
>
> **ii. The Respondent's Party and Party Bill of Costs dated 17th March 2017 shall be remitted to another Taxing Master in the Judicial Review Division of the High Court at Nairobi for fresh taxation.**
>
> **iii. Each party shall meet their respective costs of the *ex parte* Applicants' Notice of Motion dated 18th May 2020.**

32. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF OCTOBER 2020**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING**

**In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the *ex parte* Applicants' and Respondent's counsels email addresses.**

**P. NYAMWEYA**

**JUDGE**