REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 101 OF 2016

In the matter of an application for Judicial Review Proceedings

and

In the matter of Sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya

and

In the matter of an application for orders of Mandamus, Prohibition nd Certiorari

and

In the matter of the Universities Act

and

In the matter of the suspension of Wellington Kihato Wamburu on Examination irregularities

and

In the matter of Articles 22 (1),2(a) (b) (c),23(1),27 (1) (2) of the constitution of Kenya,2010

and

In the matter of Kenyatta University and Vice Chancellor, Kenyatta University

Republic...Applicant

versus

Kenyatta University...1stRespondent

The Vice-Chancellor, Kenyatta University......2nd Respondent

Ex parte Applicant........................Wellington Kihato Wamburu

RULING

1. By a Chamber Summons dated **14th** December 2017 expressed under the provisions of Rule **11 (4)** of the Advocates Remuneration Order, 2009 and Section **51 (2)** of the Advocates Act,[1] the Respondent moved this Court seeking orders:-

a. Spent

*b. Pending the hearing and determination of this Application, the Honourable Court be pleased to stay the taxing decision made by the Hon. S. Mwayuli on 9th October 2017 on the **ex parte** applicants Bill of Costs dated **24th** February 2017.*

c. That the Honourable Court be pleased to extend the time for filing the instant application and that it be deemed to have been properly filed.

*d. The decision of **9th** October 2017 by the learned Deputy Registrar on the ex parte applicant's Bill of Costs dated **24th** February 2017 be set aside and the matter be remitted to a different Deputy Registrar for taxation.*

*e. In the alternative to **(4)** above, the honourable Court be pleased to set aside the decision of **9th** October 2017 by the learned Deputy Registrar on the ex parte applicant's Bill of Costs dated **24th** February 2017 and tax the said Bill of Costs.*

f. The Costs of this application be provided for.

2. The application is premised on the grounds stated on the face of the application and the annexed affidavit of **Mr. Aaron Tanui**, the applicant's legal officer sworn on **14th** December 2017. Essentially, the grounds are:- ***(a)*** *having held that the matter was neither complex nor time-consuming, the learned Deputy Registrar erred when she increased the instruction fee payable from the scale of **Ksh. 100,000/=** to the sum of **Ksh. 1,000,000/=** without justifying the basis for that increase;* ***(b)*** *although the learned Deputy Registrar correctly set out the basic instruction fees, she did not indicate the reason why it had to be increased by ten (10) times to arrive at instruction fee of **Ksh. 1,000,000/=; (c)** The learned Deputy Registrar erred in taxing the getting up fees at the amount of Ksh**. 333,334/=** on the basis of the said instruction fees;* ***(d)*** *although respondent requested for the ruling and reasons for taxation at the time of their delivery by the learned Deputy Registrar on **9th** October 2017,the same were not forthcoming until the ex parte applicant's advocates shared them with the Respondent's advocates;* ***(e)*** *it is in the interests of justice that the learned Deputy Registrar's decision of **9th** October 2017 be set aside and the Bill of Costs dated **24th** October 2017 be taxed before another Deputy Registrar or by this honourable Court.*

Respondent's grounds of opposition and Replying Affidavit

3. The Respondent's counsel filed grounds of opposition stating that:- *(i) the application is fatally defective having been filed out time without the leave of the Court; (ii) that the taxing Master gave reasons for the taxation; (iii) that the application is made in bad faith.* Additionally, the *ex parte* applicant filed a Relying Affidavit sworn on **29th** December 2017 averring that*:- (i) that the ruling containing the reasons was delivered in the presence of both parties, hence, the applicant was aware of the said ruling as early as on **9th** October 2017 and ought to have filed the application within **14** days from the said date; (ii) that the Deputy Registrar did inform both counsels that the ruling and reasons would be ready on **11th** October 2017, but on the said date the ruling and reasons were not available, prompting the ex parte applicants counsel to write to the Court asking for the same; (iii) that the applicants counsel has not demonstrated that they took steps to obtain the ruling; (iv) that the applicant only filed this application after he was served with the certificate of taxation and a demand letter; (v) that the Taxing Master arrived at the amount she considered fit and fair compensation for fees and or work done.*

4. Both counsels filed and adopted their written submissions.

Issues for determination

5. Upon analysing the above facts, and upon studying the entire record, I find that the following issues distil themselves for determination:-

> ***a. Whether there are grounds for this Court to admit this application out of time.***
>
> ***b. Whether there are grounds to interfere with the discretion of the Taxing Master.***

6. Before addressing the above issues, I find it necessary to point out that the Court record shows that on **19th** December 2017, both counsels appeared before Odunga J. Mr. Ruiru, counsel for the *ex parte* applicant who is the Respondent in the application under consideration informed the Court that he had only managed to serve grounds that morning and sought time to file a Replying Affidavit. Mr. Mungai for the applicant in this application prayed for a temporary stay. The Court granted a temporary stay on condition that the Respondent/applicant pays **Ksh. 200,000/=** to the *ex parte* applicant within **21** days. The Respondent/applicant did not comply with the said order nor did they apply to either vary it or set it aside or prefer an appeal.

7. Curiously, the counsel for the Applicant did not address this issue at all in their submissions. The *ex parte* applicants advocate described it as an act of bad faith.

8. This Court would be failing in its duty as the custodian of the law and justice if it fails to address this issue of disobedience of its orders. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs, otherwise the very cornerstone of our Constitutional scheme will give way and with it will disappear the rule of law and a civilized life in the society.

9. The order issued on **19th** December 2017 still remains in force. The applicant herein was obliged to comply with it or apply to review or vary it of appeal.**It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.[2]**

10. **It is the duty of the Court not to condone deliberate disobedience of its orders or waiver from its responsibility to deal decisively and firmly with contemnors.**[3] **The Court does not, and ought not to be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.**[4] A Court order is binding on the party against whom it is addressed and until set aside remains valid and is to be

complied with.

11. Rule of law makes it incumbent for all persons, without exception to respect court orders at all times. The whole purpose of litigation as a process of judicial administration is lost if court orders are not complied with. A party who knows of an order whether null or valid, regular or irregular cannot be permitted to disobey it.***[5]*** There is need to emphasize that the principle of law is that the whole essence of litigation as a process of judicial administration is lost if orders issued by court through the set judicial process in the normal functioning of courts are not complied with.

Whether there are grounds for this Court to admit this application out of time.

12. The applicants argue that although they requested for the ruling and reasons for taxation at the time of the delivery of the Ruling by the learned Deputy Registrar on **9th** October 2017, the same were not forthcoming until the *ex parte* applicant's advocates shared them with the Respondent's advocates.

13. In response to the above assertion, the *ex parte* applicant argues that the ruling containing the reasons was delivered in the presence of both parties, hence, the applicant was aware of the said ruling as early as on **9th** October 2017 and ought to have filed the application within **14** days from the said date. The *ex parte* applicant also argues that that the Deputy Registrar did inform both counsels that the ruling and reasons would be ready on **11th** October 2017, but on the said date the ruling and reasons were not available, prompting the *ex parte* applicants counsel to write to the Court asking for the same. It also argued that the applicants counsel has not demonstrated that they took steps to obtain the ruling and that the applicant only filed this application after he was served with the certificate of taxation and a demand letter.

14. The Court record shows that the Ruling was delivered in the presence of both counsels on **9th** October 2017. A copy of the Ruling annexed to the applicants application shows clearly that the Ruling contains reasons for the determination. It follows that the applicants counsel was fully aware of the reasons as early as at the date of the delivery of the Ruling. I have perused the Court record. There is no letter or correspondence by the applicants counsel requesting for a copy of the Ruling. I find merit in the argument by the *ex parte* applicants counsel that the applicants only woke up after they were served with a Certificate of Taxation and a demand letter.

15. Rule **11** of the Advocates Remuneration Order provides as follows:-

"11. Objection to decision on taxation and appeal to Court of Appeal

(1) Should any party object to the decision of the taxing officer, he <u>may within fourteen</u> days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds for his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge time fixed by subparagraph (1) or (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as may be so made notwithstanding that the time sought to be enlarged may have already expired."

16. Clearly, there is a limitation period with respect to the time when a reference should be filed. My understanding of the scheme of Rule **11 (1)** of the Advocates Remuneration Order is that the expiration of the period of limitation prescribed above for filing a reference gives rise to a right in favour of the Certificate of Taxation to treat the same as binding between the parties. In other words, when the period of limitation prescribed has expired the holder of the Certificate of Costs obtains a benefit under the law to treat it as beyond challenge, and this legal right which accrues by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the reference out of time. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice.[6]

17. However, it is necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court. If sufficient cause is not proved nothing further has to be done; the application for excusing delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its *bona fides* may fall for consideration.

18. Far away from home but in a jurisdiction like ours, a common law jurisdiction, there is a case authority that is instructive on what a court user should do where there has been a delay before such delay is condoned. Thus, in ***Union of India vs. Tata Yodogawa Ltd*.,[7]** the Court while granting some latitude in relation to condonation of delay, still held that there must be some way or attempt to explain the cause for such delay, and in absence of an explanation, the application for condonation of delay was therefore dismissed.

19. In Kenya, the provisions of Rule **11** of the Advocates Remuneration Order have been the subject matter of judicial scrutiny for considerable time now. Sometimes the courts have taken a view that delay should be condoned with a liberal attitude, while on certain

occasions the courts have taken a stricter view and wherever the explanation was not satisfactory, have dismissed the application for condonation of delay. Thus, it is evident that it is difficult to state any straight-jacket formula which can uniformly be applied to all cases without reference to the peculiar facts and circumstances of a given case. It must be kept in mind though that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to provisions which would render the provision ineffective or odious.

20. Once the legislature enacted the above provisions, in my view, the provisions have to be given their true and correct meaning and the Court must apply and interpret the provisions wherever called upon. The Ruling complete with reasons was rendered in the presence of both counsels. There is no letter or correspondence by the applicants advocates applying to be supplied with the Ruling. If we accept the applicants contention that they only received the Ruling with reasons from the *ex parte* applicants advocates without any explanation on the steps if any they took to secure the Ruling with reasons, that to me amounts to asking the Court to take a very liberal approach and interpret the provisions of Rule **11** of the Advocates Remuneration Order in such a manner and so liberally, irrespective of the period of delay and absence of an explanation and disregard the evident failure to act, which to me amounts to practically rendering all the provision redundant and inoperative, and above all, it is a clear invitation to this Court to improperly exercise its discretion. Such an approach or interpretation would hardly be permissible in law. Discretion must be exercised judicially and upon sound legal grounds.

21. As I understand it, a liberal construction of the expression, the High Court may, for good cause, extent time, although the periods of limitation prescribed in a provision have elapsed is to begin with merely permissive and intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of *bona fides* is imputable. There is un contested evidence that the applicant only woke up after they were served with the Certificate of Costs and a demand letter. This Court accepts that there can be instances where the Court should tolerate a delay; equally there would be cases where the Court must exercise its discretion against an applicant for want of any of these ingredients or where it does not reflect “good cause” as understood in law. [8] It is the understanding of this Court that the expression “for good cause” implies the presence of legal and adequate reasons. And, the word means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The “good cause” should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. The provision give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated. The person applying for extension of time to file a reference out of time should show that besides acting *bona fides*, the applicant had taken all possible steps within his/ her power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is good enough that it could not have been avoided by the person by the exercise of due care and attention.

22. This Court is of the view that above are the principles which should control the exercise of judicial discretion vested in the Court under the provisions of Rule **11** of the Advocates Remuneration Order. As it were, where the periods of limitation prescribed in this Rule have elapsed the explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Indeed, delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the applicant as well as the other party to the proceedings, *bona fide* reasons for condonation of delay and whether such delay could easily have been avoided by the applicant acting with normal care and caution. Established precedents dictate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the reference, should be rejected unless good reason is shown for condonation of delay.

23. Thus, it is the requirement of law that these applications should not be allowed as a matter of right and even in a habitual manner. An applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to excuse the delay. As alluded to earlier, “the applicants have not even given valid reasons to explain the delay. This Court has a discretion to grant an extension of time for filing a reference, provided there are:- (a) good and substantial reasons for the failure to file the reference within the prescribed period, and (b) there are grounds in the application which, *prima facie*, show good cause why the applicant should be heard. In this context, it is trite that what would constitute “good and substantial reasons” is a question of fact, and the phrase must be construed literally and the words given their ordinary meaning. It is trite further that as regards point (b) above, the essential consideration is whether, on the grounds presented, there are prospects of the reference succeeding; frivolous and vexatious grounds will not do. And as I understand it, even where there are “good and substantial reasons” for the failure to file the reference within time and even where the grounds for setting aside are good, the court would be perfectly entitled in its discretion to refuse to grant an extension if the delay in filing the reference is excessive or inordinate or has not been explained or there is evidence of failure to act. In the circumstances of this case, I find that no good reasons have been offered for this Court to condone the delay.

Whether there are grounds to interfere with the discretion of the Taxing Master.

24. The applicant's counsel submitted that where the value of the subject matter is not ascertainable from the pleadings, the taxing officer is entitled to exercise discretion in the assessment of the instruction fees, which must be exercised judicially, taking into account factors such as the nature and importance of the case, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all relevant circumstances.[9]He cited *Kyalo Mbobu t/a Kyalo & Associates Advocates vs Jacob Juma*[10] whereby it was held that the taxing officer must demonstrate in his ruling the reasons for increase of fees such as:- **(i)** care and labour by the advocates, **(ii)** specify the number and length of the papers to be perused, **(iii)** the nature and importance of the matter, **(iv)** the value (where ascertainable) of the subject matter, **(v)** interests of the parties, **(vi)** novelty of the matter.

25. Counsel argued that the taxing master only listed some of the factors to be taken into account in determining instruction fees and that there was no demonstration as to how each individual factor contributed to or otherwise affected her discretion. He also argued that by failing to give reasons, the taxing master did not exercise her discretion judicially[11] and that reasons for taxation are a mandatory requirement.[12] Further, he argued that where a taxing master decides to increase the scale fees, he places it what he considers a fair value upon the work and responsibility involved.[13] He cited *Danson Mutuku Muema vs Julius Muthoka Muem & Others**[14]*** whereby the amount allowed being ten times more was held to be excessive. He argued that failure to give reasons for the taxation of the instruction fees and the increase thereof amounts to an error of principle and a ground for this Court to interfere.[15]

26. The *ex parte* applicant's advocate described this reference as an after-thought because the application was filed after the applicant was served with the Certificate of Costs and a demand letter. He submitted that the taxing master delivered a very detailed and reasoned ruling and reasons for the taxation and explained how she arrived at the sum of **Ksh. 1,000,000/=** as the appropriate instruction fees and **Ksh. 333,334/=** as the getting up fees.

27. On the assertion that the sum of **Ksh. 1,00,000/=**is excessive, counsel submitted that the taxing master stated how she arrived as the said sum,[16] and argued that this court can only interfere with the discretion of the taxing master if it is shown that he or she did not exercise his discretion judiciously.[17]

28. I find it appropriate to reproduce the relevant excerpts from the Ruling of Learned Deputy Registrar so as to appreciate how she exercised her discretion. She stated:-

> *"Before the Taxing officer is a Party and Party Bill of costs dated **24th** February, 2017 drawn at **Kshs.22, 610, 425/=.***
>
> *The issue of costs arises from the trial courts Judgment of 19th September, 2016 where inter alia the court stated;*
>
> *"….The costs of this application are awarded to the Applicant to be borne by the Respondent"*
>
> *The Respondent filed his submissions in opposition to the Bill of costs on 9th June, 2017. The same were dated 8th June, 2017 claiming that the costs by ex-parte Applicant were manifestly excessive.*
>
> *The ex-parte Applicant in reply also put in submissions dated 22nd June, 2017 in support of the Bill of costs at hand.*
>
> *The Taxing officer has considered the Party and Party Bill of costs at hand, submissions for both the Respondent and the Applicant and state as follows;*

Applicable Law

This being a matter filed in 2016, the Advocate Remuneration Order 2014 is the applicable statute. It being a Judicial Review ably defended mater then the Remuneration Order is clear in schedule 6(i) (j) (ii)

> *"j) Constitutional petitions and prerogative orders*
>
> *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-*
>
> *i) Where the matter is not complex or opposed such sum as may be reasonable but not less than*
>
> *ii) Where matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than Kshs.100, 000/=*
>
> ***Instruction Fees***
>
> *The Applicant herein seeks instructions fees of Kshs.15, 000, 000/= a figure that is vehemently opposed by the Respondent who proposes the minimum amount of Kshs.100, 000/=.*
>
> *The Taxing officer takes cognizance of the fact that the Advocate Remuneration Order provides a minimum of Kshs.100, 000/= for Constitution and Petitions and Prerogative orders where a matter is opposed.*
>
> *The Taxing officer has considered the submissions by Respondent and also keenly considered the case law attached to both submissions and appreciates that the Taxing officer has discretion to increase the minimum fees provided by statute taking into account several establishment factors amongst them;*
>
> ***1) Nature and importance of the cause***
>
> ***2) The amount or value of the subject matter***
>
> ***3) The general conduct of the parties***
>
> ***4) The complexity of the issues raised and the novel points of law***
>
> ***5) The time, research and skill expended in brief***
>
> ***6) The volume of documents involved***

The Taxing officer is of the view that though the matter was of immense interest to the parties involved, it was not such a complex matter, nor was it time consuming to warrant the proposed amount of Kshs.15, 000, 000/= as instruction fees. The proposed amount is a total rip off to the Respondent.

The case law is very clear that costs are meant to adequately and reasonably compensate parties for the expenses they have incurred and not be used as a scheme to milk parties' dry of their finances.

Having taken into consideration the applicable law and the above factors, the Taxing officer is of the considered opinion that Kshs.1, 000, 000/= is reasonable instructions fee under the circumstances thus item 4 is taxed and Kshs.1, 000, 000/= while Kshs.14, 000, 000/= is taxed off.

Getting Up Fees

By law getting up fees is charged at one-third of the instruction fees hence 1/3 of 1, 000, 000/= gives us Kshs. 333, 334/= rounded off to the nearest whole number.

Item 5 is therefore taxed at Kshs.333, 334/= while Kshs.4, 666, 666/= is taxed off."

29. The above excerpt is from the Ruling this Court is being invited to set aside on the grounds stated earlier. Before commenting on the grounds propounded by the applicant, I find it appropriate to restate the well-known general principles relating to considering applications for review or set aside taxing masters decisions.

The principles applicable to a review of a taxing master's decision

30. The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court***[18]*** as follows:-

"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

31. Before the court interferes with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates 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.[19]

32. It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision.[20] This means that:-

*" . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by 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 Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.**[21]***

33. The taxing master is required to take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The ultimate question for review/setting aside the taxation is therefore whether the taxing master struck this equitable balance correctly in the light of all the circumstances of this particular case.

34. The scope of the application before me requires this court be satisfied that the taxing Master was clearly wrong before interfering with her decision.[22]The quantum of such costs is to be what was reasonable to prosecute or defend the proceedings and must be within the remuneration order. The determination of such quantum is determined by the taxing master and is an exercise of judicial power guided by the applicable principles.

35. It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he has not exercised his discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.'[23]

36. Guidance can also be obtained from the Canadian case of *Reese v. Alberta****[24]*** McDonald J. sets out the **general principles** applicable to awarding costs, at page 44:-

"While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice....,the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of

fees ….plus reasonable disbursements….

37. In principle, costs are awarded, having regard to such factors as:- **(a)** the difficulty and complexity of the issues; **(b)** the length of the trial; **(c)** value of the subject matter and **(d)** other factors which may affect the fairness of an award of costs. The law obligates the taxing master to take into account the above principles. Restating these established principles of taxation of costs, the Ugandan Supreme court stated as follows:-[25]

"Save 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 with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

***Secondly**, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.*

***Thirdly**, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."*

38. Back at home, in *Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others**[26]***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 interference 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 authorizing 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………"

Applying the above principles to the issue under consideration

39. The above excerpt from Ruling of the tax master and indeed the entire ruling stating the reasons leaves me with no doubt that the Taxing Master addressed her mind to the complexity of the case and all the relevant considerations. In fact she listed the considerations as follows:- *Nature and importance of the cause; The amount or value of the subject matter; The general conduct of the parties; The complexity of the issues raised and the novel points of law; The time, research and skill expended in brief and The volume of documents involved.*

40. It should be noted that the applicant has not demonstrated that the matter was not complex. Instead the applicants acknowledge that the taxing master listed the considerations sand then proceed to state that she did not show how she applied each one of them in her ruling. As shown in the Ruling, the Taxing Master clearly stated the considerations which guided her in her determination including the basis upon which she arrived at the instruction fees and the getting up fees.

41. One of the applicable principles laid down in precedents is that the Court will interfere with an award of costs by a taxing officer if such costs are so low or so high that they amount to an injustice to one of the parties.[27] This argument was not seriously advanced nor was it demonstrated to be present in the present case.

42. I find nothing in the taxation ruling to demonstrate that the taxing master did not take into account the relevant principles. In *Joreth Ltd vs Kigano & Assoc.**[28]*** the Court of Appeal observed as follows:-

"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."

43. The applicant has failed to demonstrate that the calculation of instruction fees was erroneous and was not based on any discretionary powers vested on the taxing master. Secondly when it comes to instruction fees, there is discretionary power to take into account the subject matter of the suit, the complexity of the matter and the amount of work invested in handling the suit for the taxing master to award a reasonable fee. In the present case, it is has not been shown beyond argument that the subject matter of the case was not properly ascertained, hence there is nothing to show that the amount allowed by the taxing master on the instruction fees was excessive and not within the scale fees.

44. As demonstrated by the authorities cited above, this court cannot substitute its views in place of those of the taxing master. Accordingly, I find that the application dated **14** December 2017 lacks merit and I hereby dismiss it with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **7th** day of **June** 2018

John M. Mativo

Judge

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[1] Cap 16, Laws of Kenya.

[2] See **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** ***Ibrahim, J*** (as he then was)

[3] See **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458,**

[4] See **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431.**

[5] Wild Life Lodges Ltd v. County Council of Larok and anor, {2005} Vol 2 EALR p.344.

[6] As was observed in ***Chiume vs The Attorney-General*** {2000–2001} MLR 102 and ***Mwaungulu vs Malawi News and others*** {1995} 2 MLR 549

[7] [1988] (38) Excise Law Times 739 (SC); similarly, in the case of Collector of Central Excise, Madras v. A.MD. Bilal & Co., [1999 (108) Excise Law Times 331 (SC)], the Supreme Court declined to condone the delay of 502 days in filing the appeal because there was no satisfactory or reasonable explanation rendered for condonation of delay.

[8] P. Ramanatha Aiyar, *Advanced Law Lexicon*, 2nd Edition, 1997.

[9] Counsel cited *Joreth Ltd vs Kigano & Associates* {2002} 1 EA 92.

[10] {2015} eKLR.

[11] Counsel cited *Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd*,{2014} eKLR.

[12] Counsel cited *R. vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna & 6 Others* {2006} eKLR.

[13] Counsel cited Thomas James Arthur vs Nyeri Electricity Undertaking {1961}EA.492.

[14] Machakos High Court Civil Appeal No. 6 of 1991.

[15] To buttress his argument counsel cited Premchand Raichand Ltd & Another vs Quarry Services of East Africa Ltd & Another {1972} EA 162 and First American Bank of Kenya vs Shah and Othes {2002}1 EA 64.

[16]Counsel relied on R vs Kenya Revenue Authority Ex parte Middle East Bank Kenya Ltd {2012} eKLR and R. vs Public Procurement Complaints Review and Appeals Board & Another Ex parte East African Cables Ltd {2012} eKLR.

[17] Ibid.

[18] In *Visser vs Gubb* 1981 (3) SA 753 (C) 754H – 755C

[19] See *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* [1984] ZASCA 2; 1984 (3) SA 15 (A) and *Legal and General Insurance Society Ltd vs Lieberum NO and Another* 1968 (1) SA 473 (A) at 478G.

[20]*Johannesburg Consolidated Investment Co. vs Johannesburg Town Council* 1903 TS 111.

[21]*Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18F C G.

See also the discussion by Botha J in *Noel Lancaster Sands (Pty.) Ltd. vs Theron and Others* 1975 (2) SA 280 (T) at 282D C 283D for a discussion of the nature and limits of the judicial function in this context.

[22] (See: *Ocean Commodities Inc vs Standard Bank of SA Ltd* [1984] ZASCA 2; 1984 (3) SA 15 (A) at 18E-G)

[23] Per SMIT AJP in *Preller vs Jordaan and Another* **1957 (3) SA 201** (O) at 203C - E

[24] {1993} 5 A.L.R. (3rd) 40

[25] *Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC).*

[26]**{2006} eKLR).**

[27] *Premchand Raichand Ltd. and Another vs. Quarry Services of East African and Others [1972] EA 162.*

[28] Civil Appeal No. 66 of 1999 (unreported).