



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. CAUSE NO. 177 OF 2018**

**In the matter of objection to a party and party Bill of Costs under Rule 11 of the Advocates Act**

**and**

**In the matter of Reference arising from the Political Parties Disputes Tribunal Case No. 53 of 2017**

**KANU National Elections Board.....1<sup>st</sup> Applicant**

**Secretary General.....2<sup>nd</sup> Applicant**

**Kenya African National Union.....3<sup>rd</sup> Applicant**

**versus**

**Hon. Salah Yakub Farah.....Respondent**

**RULING**

1. The applicants herein seek orders setting aside the decision of the Taxing Master dated 11<sup>th</sup> April 2018 taxing the Respondents Party and Party Bill of Costs in the sum of **Ksh. 1,218,710/=**. The applicants further seek orders that this Court taxes the said Bill in accordance with the Advocates Remuneration Order or remit the Bill back to the Taxing Master or a different Taxing Master with directions that the same be taxed afresh.

2. The core grounds in support of the application are:- **(i) that the amount allowed is excessive and unjustifiable; (ii) that the decision was based on an error of principle and amounted to wrongful exercise of discretion; (iii) that no receipts were produced in support of the expenditure on disbursements; (iv) that the applicants requested for reasons for the taxation without delay and filed the reference.**

3. The application is supported by the affidavit of **Edward Kivuva** sworn on 30<sup>th</sup> April 2018. He avers that the Respondent sued the applicants at the Political Parties Dispute Tribunal,<sup>[1]</sup> and that the complaint was allowed with costs to the Respondent. He avers that the dispute was escalated to the High Court by way of an appeal but the High Court never made any orders on costs. He avers that the Respondent filed his Party and Party Bill of costs seeking **Ksh. 12,810,606/=** and the Taxing Master taxed the Bill at **Ksh. 1,218,710/=**. Further, he avers that aggrieved by the said ruling, particularly item 1 which he avers is manifestly high and item 3 which he avers is not provided for, the applicants lodged an objection to the Taxing Master and requested for reasons. He avers that the taxation amounts to wrongful exercise of discretion.

4. The Respondents filed grounds of opposition on 28<sup>th</sup> May 2018 stating that:- **(a) the application is an affront to the clear provisions of Rule 16 of the Advocates (Remuneration) Order which grants the Taxing Master discretion; (b) that the Taxing Master considered all the relevant factors in arriving at her decision; (c) that the Taxing Master took into account the principles of taxation in conformity with Rule 5 of the Advocates Remuneration Order; and, (d) that the application is misconceived.**

5. In his submissions, **Mr. Makau** for applicants argued that the Taxing Master misguided herself by placing reliance on two cases which were election Petitions which were heard and determined in the High Court, as opposed to the dispute herein which was a complaint determined by the Political Parties Dispute Tribunal. He argued that the scale fees provided for instruction fees is **Ksh. 35,280/=**, and faulted the Taxing Master for allowing a sum of **Ksh. 900,000/=** which he argued is unreasonably high. He also argued that the matter before the PPDT was neither complex nor protracted, and that, it was disposed of by way of written submissions as opposed to a full hearing. He also argued that getting up fees was unwarranted since the matter did not proceed to hearing.

6. **Mr. Odhiambo** for the Respondents relied on the grounds of opposition and submitted that the costs awarded were reasonable considering the work done. He argued that the matter was of great importance, that the proceedings were complex, and, that the Taxing Master did not exceed her discretion, but properly addressed her mind to the issues. He urged the Court to dismiss the application.

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

7. The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court<sup>[2]</sup> 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.”*

8. Differently put, 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.<sup>[3]</sup>

9. It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision.<sup>[4]</sup> 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.”<sup>[5]</sup>*

10. 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 raised by the applicant 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.

11. The scope of this application requires this court be satisfied that the Taxing Master was clearly wrong before interfering with her decision.<sup>[6]</sup> 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.

12. 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/she has not exercised his/her 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.’<sup>[7]</sup>

13. Guidance can also be obtained from the Canadian case of *Reese vs. Alberta*<sup>[8]</sup> in which 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....*

14. 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.**

15. Restating the principles of taxation of costs, the Ugandan Supreme court stated:-<sup>[9]</sup>

*“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.”

16. Back at home, in *Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others*<sup>[10]</sup> 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.....”

17. Costs are awarded to a successful party in order to indemnify him/her for the expense to which he/she has been put through having been unjustly compelled either to initiate or to defend litigation. This underscores that a moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds. The taxing master is also enjoined to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case. The ultimate question remains whether the Taxing Master in this case struck this equitable balance.

18. The discretion vested in Taxing Master is to allow costs, charges and expenses as appear to him to have been necessary or proper, not those which may objectively attain such qualities, and that such opinion must relate to all costs reasonably incurred by the litigant which also imports a value judgment as to what is reasonable. The discretion to decide what costs have been necessarily or properly incurred is given to the Taxing Master and not to the Court. This discretion must be exercised judicially in the sense that the Taxing Master must act reasonably, justly and on the basis of sound principles with due regard to the circumstances of the case.

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. The court must be of the view that the taxing master was clearly wrong i.e. its conviction on a review that he or she was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.

20. The principles guiding the review of taxation in this court were settled in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*:

- a. Costs are awarded to a successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.
- b. A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.
- c. The taxing master must strike this equitable balance correctly in the light of all the circumstances of the case.
- d. An overall balance between the interests of the parties should be maintained.
- e. The taxing master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.
- f. And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate the ruling.

21. To illustrate the importance attached to taxation of costs by the Taxing Masters, I would I borrow the words of Ojwang J (as he then was) in the above cited case of *Republic versus The Minister of Agriculture ex parte W'njuguna & Others*,<sup>[11]</sup> where he said:-

“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 that guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. The nature of 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 under a different head of costs.”

22. The principles governing taxation of costs by a Taxing master laid out in the above cited cases were also reiterated in the leading case of *Phemchand Raichand Ltd Another vs Quarry services of East Africa Ltd and Another*.<sup>[12]</sup> The principles laid out are: -

- i. *The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.*
- ii. *The taxing master was expected to tax each bill on its merits;*
- iii. *The value of the subject matter had to be taken into account;*
- iv. *The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;*
- v. *Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.*
- vi. *No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.*<sup>[13]</sup>

23. In the above cited case the court observed that a mere production of a long list of authorities does not necessarily mean that there was protracted research by counsel and that an advocate should not be reimbursed for what he has not spent. As stated earlier, the court will not normally interfere with the taxing master's ruling simply because it thinks it would have awarded a different figure had it been the one taking the bill. The court can interfere if it is proved that the amount taxed was manifestly excessive or low; and The court can interfere if there is proof that the taxing officer followed a wrong principle in reaching his decision.

24. Applying the above considerations, the question that falls is whether the amount taxed is too high or too low. First, the Taxing Master placed reliance on a decision rendered by the High Court in an election Petition<sup>[14]</sup> where the learned judge awarded **Ksh. 2.5 Million** to the respondent.

25. It is settled law that a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-<sup>[15]</sup>

*"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ..., that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides...." (Emphasis added)*

26. The ratio of any decision must be understood in the background of the facts of the particular case.<sup>[16]</sup> A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.<sup>[17]</sup> Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.<sup>[18]</sup> In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.<sup>[19]</sup> To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.<sup>[20]</sup> I need not add that the facts in the above are evidently distinguishable from the case at hand.

27. The case relied upon by the Taxing Master was a protracted election Petition which was heard and determined in the High Court.<sup>[21]</sup> Also, the Taxing Master placed reliance on yet another election Petition which was heard and determined in the High Court<sup>[22]</sup> in which the High Court awarded **Ksh. 6 Million**. The proceedings giving rise to the Bill in this case were before the Political Parties Tribunal. Fees applicable in proceedings before a Tribunal is not the same as in the High Court. The two are prescribed under different schedules.

28. 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.<sup>[23]</sup> The amount provided under Item one is **Ksh. 35,280/=**. The Taxing Master allowed **Ksh. 900,000/=** guided by awards rendered by the High Court in contested election Petitions. Considering the amount allowed by the law, and the sum allowed by the Taxing Master, and the nature of the dispute before the Court, it is my finding that the amount allowed was manifestly excessive. Also, by placing reliance on amounts awarded in Election Petitions heard by the High Court, and placing reliance on them in a dispute heard by a Tribunal, the taxing officer followed a wrong principle in reaching her decision.

29. The quantum of such costs is to be what is reasonable to prosecute the proceedings. Generally, the objective of taxation is to award "the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded. The Taxing Master is required to allow all such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same."<sup>[24]</sup>

30. This Court in the performance of its supervisory function, is entitled to and will interfere with the Taxing Master's rulings: 'If (a) he has not exercised his discretion judicially, that is if he has exercised it improperly; (b) he has not brought his mind to bear upon the question or (c) he has acted on a wrong principle.'<sup>[25]</sup> Justice Maritz expressed this principle as follows:-

*'It should be borne in mind, however, that the review of the Taxing Master's decision on taxation is one going beyond the rather*

narrow common law parameters of judicial review applicable to the acts or omissions of public bodies. It is by its nature a review denoting 'a wider exercise of supervision and a greater scope of authority than those which the Court enjoyed' under either the review of the proceedings of lower courts or of public bodies acting irregularly, illegally or in disregard of important provisions of statute.'

31. It is clear from the authorities cited above that this Court has the power to correct the Taxing Master's ruling not only if he/she has acted *mala fide* or from ulterior and improper motives, if he/she has not applied his/her mind to the matter or exercised his discretion at all, but also when he/she has disregarded the express provisions of a statute.<sup>[26]</sup>

32. It is also my conclusion that the amount taxed was manifestly excessive; and that the taxing officer followed a wrong principle in reaching her decision. Further, it is also my finding the Taxing Master did not properly exercise her discretion judicially, and or acted on a wrong principle.

33. In view of my finding herein above, I find that the application dated 30<sup>th</sup> April 2017 is merited. I allow the said application and make the following orders:-

a. ***That*** the taxation of the Respondents Party and Party Bill of Costs dated 5<sup>th</sup> December 2017 filed in Case Number 53 of 2017 rendered on 11<sup>th</sup> April 2018 and all the consequential orders are hereby set aside.

b. ***That*** the said Bill of Costs be and is hereby remitted back to the Taxing Master to be taxed by a different Taxing Master of this Court.

c. ***That*** each party shall bear its/his own costs for this application.

Orders accordingly

**Signed, Delivered and Dated at Nairobi this 19<sup>th</sup> day of July, 2018**

**John M. Mativo**

**Judge**

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[1] PPDT Case No. 53 of 2017.

[2] In *Visser vs Gubb* [1981 \(3\) SA 753](#) (C) 754H – 755C.

[3] 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.

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

[5] *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.

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

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

[8] {1993} 5 A.L.R. (3rd) 40.

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

[10]{2006} eKLR).

[11] {2006} 1 EA 359.

[12] {1972} EA 162. Their lordships also cited with approval the decisions in the cases of *Attorney General vs Uganda blanket Manufacturers* CA No. 17 of 1993 (SCU); *Bashiri vs Vitafoam (u) Ltd* civil application No. 13 of 1995.

[13] See *Steel construction and Petroleum Engineering (EA) Ltd versus Uganda Sugar Factory Limited* [EA] 141; *Kabanda versus Kananura Melvin Consulting Engineers*, supreme court civil application No. 24 of 1993; *Makumbi and Another versus sole electricians (U) Ltd* [1990-

1994] 1 EA 306 (SCU).

[14] High Court Election Petition No. 2 of 2017, Machakos.

[15] MANU/SC/0047/1967.

[16] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986.

[17] *Bhavnagar University vs. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59).

[18] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats vs University of Delhi & Anr.* (Citing Lord Denning).

[19] Ibid.

[20] Ibid.

[21] The decision was subsequently annulled by the Court of Appeal, hence it is no longer good law.

[22] High Court Election Petition No. 1 of 2017, Homabay.

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

[24] *Pinkster Gemeente van Namibia (Previously South West Africa) vs Navolgers Van Christus Kerk* 2002 NR 14 (HC) at 15I-17E by Maritz AJ (as he then was).

[25] *Kock vs SKF Laboratories (Pty) Ltd* 1962 (3) SA 764 (E) at 765E). See also *Preller v Jordaan and Another* 1957 (3) SA 201 (O) at 203C-E.

[26] *Legal And General Assurance Society Ltd v Lieberum N.O. and Another* 1968 (1) SA 473 (A) at 478.