



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**JR MISCELLANEOUS APPLICATION NO. 6 OF 2009**

**IN THE MATTER OF AN APPLICATION BY THE COUNTY COUNCIL OF KIAMBU FOR A JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION**

**REPUBLIC..... APPLICANT**

**VERSUS**

**THE COMMISSIONER FOR COOPERATIVE DEVELOPMENT.....1<sup>ST</sup>  
RESPONDENT**

**MWIRUTI SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD.....2<sup>ND</sup>  
RESPONDENT**

**EX-PARTE: COUNTY COUNCIL OF  
KIAMBU**

**(Being a reference from the decisions of the Taxing Officers, L W Gicheha, (Mrs) DR and A N Ongeru (Mrs) DR on 18<sup>th</sup> April, 2012 and on 3<sup>rd</sup> December, 2013 respectively)**

**RULING**

1. By a Chamber Summons dated 9<sup>th</sup> May 2012 expressed to be brought under the provisions of Paragraph 11(2) of the *Advocates (Remuneration) (Amendment) Order 2006* (hereinafter referred to as “the Order”) the applicant herein, **County Council of Kiambu**, seeks the following orders:

**1. THAT the Honourable court be pleased to set aside the decision and/or ruling of the Taxing Officer and/or Principal Deputy Registrar delivered on the 18<sup>th</sup> April 2012 in respect of the following items of the Ex-parte Applicants Party and Party Bill of Costs and proceeded to tax the bill filed herein and/or direct that the same be referred back to the taxing officer for taxation in the said items.**

**Items 3, 4, 15, 16, 43, 44, 52, 61, 63, 70,72, 83, 88, 90, 98, 100, 101, 103, 105, 106, 118, 119, 125, 128, 129, 137, 138, 139, 143**

**2. THAT the costs of this application be provided for.**

## Applicant's Case

2. The Application was supported by a supporting affidavit sworn by **Joseph Kuria Kiruthi**, the Applicant's County Clerk on 9<sup>th</sup> May, 2012.
3. According to the deponent, on the Applicant's instructions counsel on record filed the Party and Party Bill of Costs dated 10<sup>th</sup> August, 2011 and the same came up for taxation on the 23<sup>rd</sup> November 2011 whereof the court ordered counsel for all parties to file and serve written submissions. Thereafter on the 25<sup>th</sup> January 2012 and 12<sup>th</sup> March 2012 parties Advocates attended court to highlight the submissions aforesaid and the taxing officer gave her Ruling on the 18<sup>th</sup> April 2012.
4. According to the deponent, it was common ground that the suit before the court involved intensive research, a fact which the taxing officer acknowledged at page 4 of her Ruling and it was also common ground that this was not just an ordinary Judicial Review for the reason that the same indeed had to go to trial and an expert witness called to testify on matters of the voluminous accounts involved. The suit however, was commenced by way of a Notice of Motion after leave to do so was duly granted by the court. In the application for leave to file the Judicial Review motion, the *ex-parte* Applicant explicitly stated that its accounts had been seized by the 1<sup>st</sup> Respondent in a bid to recover an amount of Kshs 993,449,441/94 purportedly owing to the 2<sup>nd</sup> Respondent and it took the court's intervention to re-open the *ex-parte* Applicant's accounts and eventually quash the 1<sup>st</sup> Respondent's decision to recover the said amount.
5. According to him, the court's decision to quash the decision to cover the amount of Kshs. 993,449,441/94 from *ex-parte* Applicant followed an intensive and rigorous forensic audit by the firm of K. Njoroge & Company. Both the Respondents in their reply to the Application sought to justify the accrual of the figure of Kshs. 993,449,441/94 and affidavits were sworn as to the veracity of the amount demanded and this figure was widely quoted in all the court papers including ultimately the judgment of the court hence the value of the subject matter was never in doubt.
6. It was therefore contended that instructions fees should have been correctly assessed on the basis of the subject matter, which is clearly determinable from the court record and in particular the pleadings and the submissions of parties. Further, the 1<sup>st</sup> Respondents' submissions on the Party and Party Bill of Costs also admits that there was a trial and indeed allows a figure at item 119 of Kshs. 17,000/= for getting up for trial. Whereas some items are not disputed like item 98 of the Party and Party Bill of Costs whereof the 1<sup>st</sup> Respondent conceded the amount Kshs. 16,296/= yet the taxing officer gives only Kshs. 3,528/= and during the taxation she had awarded the full amount. Further, item 3 is clearly erroneously taxed off as the same consists of perusal fees on a letter that is a matter of record and may be physically ascertained and verified and awarded in accordance with Schedule V1A 8(b).
7. With respect to items 15, 16, 43, 52, 125, 128, 129, 138 and 139 it was deposed that the same have been erroneously taxed off and there is no basis for the taxing officer to tax off Kshs. 2,940/= from each of the said items.
8. According to the deponent, he instructed the Applicant's Advocates on record to file the Notice of Objection and a letter requesting for the Reasons as provided for in the Order and he believed that the Applicant has strong reasons warranting a review of the Taxing Officer's decision. To him, the taxing officer in interfering with item 4 of the Bill of Costs ignored and/or disregarded the Provisions of Schedule VIA 1 (a) and (b) of the Order.
9. He was therefore of the view that it is in the interest of justice and fairness that this Honourable Court be pleased to set aside the said order and/or decision of the taxing officer as the same is oppressive and without any legal basis at all.
10. In a further affidavit sworn by **Daniel Karuru Mwaura**, the applicant's advocate on 13<sup>th</sup> September, 2013, it was deposed that the reference herein by way of Chamber Summons dated the 9<sup>th</sup> May 2012 was filed in court on the 15<sup>th</sup> May 2012 by which time no reasons for the Taxation had been given in writing by the taxing master though the same had been requested for by the letter of the 25<sup>th</sup> April 2012. When the Reference first came up for mention on the 28<sup>th</sup> June 2012, the court ordered the Applicant to follow up the reasons for the taxation and file a further affidavit

upon receiving the same and after several mentions, a copy of the reasons for taxation was finally given on the 13<sup>th</sup> September, 2013.

### **1<sup>st</sup> Respondent's Case**

11. In response to the application the 1<sup>st</sup> Respondent filed the following grounds of opposition:

- 1. THAT the Taxing Officer rightly and judiciously exercised her discretion to tax the *Ex-parte* Applicant's Bill of Cost at Kshs 1,243,361/=, in consideration of the principles of law involved, the nature of the matter, the subject matter involved, the general conduct of the pleadings and industry employed by counsel etc.**
- 2. THAT the decision arrived at by the Taxing officer is reasonable and that it is trite law that unless such decision is manifestly unreasonable, the superior court shall have no reason interfering with the same.**
- 3. THAT this Application is scandalous, vexatious and otherwise an abuse of the process of this Honourable Court.**
- 4. THAT this matter concerns public-law proceedings as opposed to private law proceedings where issues of profit making and amounts in contention are key considerations which taxing officer takes into account.**
- 5. THAT the *Ex-parte* Applicant's application is premised on profiting from public law and hence unjustly enrich itself by setting out usurious claim as against the 1<sup>st</sup> Respondent.**

### **Applicant's Submissions**

12. With respect to item 3 it was submitted that since there was no dispute that the letter contained 36 folios of audited accounts, under Schedule VIA8(b) of the Order which provided for Kshs 63/= per folio, the taxing master erroneously awarded Kshs 756/= based on Kshs 21/=. It was therefore submitted that the taxing officer ought to have allowed Kshs 2,268/=.
13. On instructions fees it was submitted that having reached the conclusion that counsel did a lot of research and bore a lot of responsibility due to the amount involved, the learned taxing master erred by not taking into account the monetary value of the applicant's claim which was the sum in respect of which the 1<sup>st</sup> Respondent had attached the Applicant's bank accounts for recovery of Kshs 993,479,441/94. Further the amount of work was immense and the pressure on counsel was massive. Since an audit of the status of remittances to the Respondent by the *ex parte* applicant was carried out, it was submitted that this was clearly a full trial. That the matter was not a simple straightforward matter was appreciated by the award of Kshs 200,000/= as getting up fees. In support of the submissions the applicant relied on **Samshudin Kholisa & 2 Others vs. Kenya Revenue Authority Mombasa HCMA No. 10 of 2010**. According to the applicant the circumstances of this case show that this was clearly a monetary action with monetary considerations for profits.
14. It was submitted that as long as the subject matter can be ascertained from the pleadings there should be no hesitation in awarding costs based on the said value and that the amount of Kshs 14,978,712/= should be allowed under item 4.
15. On items 15, 16, 42, 43, 125, 128, 129, 138 and 139 dealing with appearances, it was submitted that whereas the taxing officer interfered on the same on the ground that the appearances could not have been for more than one hour yet she did not indicate her view on the period for appearances.
16. While conceding that 6 copies of the letter in item 63 consisting of 4 folios were made and while Schedule V allow for 126/= per folio the taxing master was accused of forgetting or ignoring to multiply the 6 copies by the number of folios by the amount of Kshs 21/=.
17. Whereas item 137 was taxed at Kshs 5,040/= without any explanation, it was submitted that there

- was no explanation how this figure was arrived at and not for items 15, 16, 43, 52, 125, 128, 129, 138 and 139 more so in light of the failure to offer any explanation or alternative durations.
18. Since item 71 was allowed in totality, item 7 which was derived therefrom ought to have been similarly allowed. With respect to item 83 it was contended that the learned taxing master failed to capture the number of folios in calculating the figure while item 98 dealing with making 6 copies of an affidavit and annexures being 752 folios at Kshs 21/= per folio hence the learned taxing master by only arriving at 28 folios denied the applicant 724 folios of Kshs 91,224/=.
  19. With respect to item 98, it was submitted that the same fell under Schedule VIA 5(a) yet there was no explanation for taxing off the amount hence the award was less than conceded. Item 99 though was conceded to be 8 folios and 2 copies were made, no reasons were given for ignoring the size of the letter. Similarly item 103 with 6 folios were not verified from the court file and the number of folios was omitted with respect to item 105.
  20. With respect to item 143, it was submitted that whereas the taxing master allowed drawing of the said 64 folios under item 142 at Kshs 8,064/= she declined to give copies which she acknowledged were 6 without any reason. It was therefore submitted that the item should have been allowed at 64 folios x 6 copies x 21 to make it Kshs 8,064/=Item 101 being for receiving and perusing the auditor's report similarly should have been allowed as well as the draft report under item 106 since the two were separate documents.
  21. On item 119 getting up fees, it was submitted the same would depend on item 4, instructions fees. However the same ought to have been 1/3 and not 1/4 of the instructions fees.
  22. Relying on **Joreth Ltd vs. Kigano & Associates Civil Appeal No. 66 of 1999**, it was submitted that the decision of the taxing master should be set aside.

### **Respondent's Submissions**

23. According to the respondent, the grounds for objection were filed way back before the reasons for taxation were availed to the objector contrary to the order of things provided under rule 11(2) of the Order.
24. It was further submitted that it is trite that the taxing master's discretion is seldom interfered with unless it is apparent that the decision is premised on an error in principle and that the fee awarded was manifestly excessive. In this case, it was submitted that the Order provided for a sum that is reasonable but not less than Kshs 28,000/= on advocate's fee on prerogative matters which was enhanced to Kshs 800,000.00 by the taxing master based on the decision in **Republic vs. Minister of Agriculture ex parte Samuel W'njuguna Civil Appeal No. 621 of 2004 [2006] eKLR**.
25. It was submitted that the complexity of the matter was addressed by **Musinga, J** in his judgement in which the Judge was not convinced that the matter was complex hence the objector was not entitled to a sum more than the amount awarded.

### **Determinations**

26. I have considered the foregoing and this is the view I form of the matter.
27. The first issue for determination is the effect if any of the filing of the objection before the reasons were furnished to the objector.
28. In a further affidavit sworn by **Daniel Karuru Mwaura**, the objector's advocate on 17<sup>th</sup> September, 2013, it is clear that by the time of filing the reference, no reasons for taxation had been given in writing by the taxing master despite the same having been requested for and it was not until 13<sup>th</sup> September, 2013 that the reasons for the taxation were finally given. This reference was however filed on 15<sup>th</sup> May, 2012.
29. A similar situation arose in **Evans Thiga Gaturu, Advocate vs. Kenya Commercial Bank Limited [2012] EKLR**, in which this Court expressed itself *inter alia* as follows:

**“In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles. However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not**

necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of *Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005*, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent. In the present case, the ruling on taxation was made on 6<sup>th</sup> July 2011. If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he could request for the same in writing, in which case, he would be bound to wait for the same. If, however, at a later stage he decided to prefer the reference notwithstanding the failure by the Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons which, according to the decision in *Kipkorir, Titoo & Kiara Advocates (ibid)*, is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference, the said reasons have not been furnished. I, accordingly, find that as the client filed the reference outside the 14 days of the delivery of the decision and before being furnished with the reasons, the reference is incompetent for being out of time and/or being prematurely instituted. I accordingly strike out the Chamber Summons dated 18<sup>th</sup> January, 2012 but make no order as to costs since the problem has been partly caused by inaction on the part of the court.”

30. In this case, it is clear that at the time of the delivery of the taxing master's decision a detailed ruling was delivered spanning 8 pages, in fact longer than the reasons for the ruling which were given later. What has however caused me anxiety is that whereas the taxation was conducted by one taxing master, the reasons for the taxation were later given by a different taxing master. Had the taxing master who conducted the taxation not written a detailed ruling this Court would have had no hesitation at all, based on *Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board Civil Appeal No. 220 of 2004 [2005] 1 KLR 528*, in allowing the reference.
31. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of *First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64*.
32. Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as

that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

33. Further guidance if necessary may be obtained in the case of Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92 where the Court of Appeal held that the value of the subject matter 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 matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.
34. In Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others (supra), Ojwang, J (as he then was) expressed himself *inter alia* as follows:

**“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised 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...”

35. While remitting the matter for fresh taxation the learned Judge in the above matter gave the following guidelines:

1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
2. the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;
3. the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
7. where responsibility borne by advocates is taken into account, its nature is to be specified;
8. where novelty is taken into account, its nature is to be clarified;
9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.

36. In my view the complexity of a case is not necessarily determined by the value of the subject matter in terms of the amount of money involved. It may well be that the amount of money involved may be high but the issue may be a very simple legal issue. However, it cannot be gainsaid that where the amount is high the issue is likely to be very important for the parties. In this case, the amounts demanded was Kshs 993,449,441/94 which in my view is by any standard not a small amount. Having considered the submissions of counsel I have no doubt that the matter was very important for the parties.

37. In her ruling, the learned Taxing Master was the view which view I agree with that in judicial review application the subject matter is not the basis of determining the instructions fees though it is one of the factors to be considered. In her view, although the complexity of the matter is a relevant consideration, this was an ordinary matter, it was not complex nor did it raise any novel point of law and her view was in consonance with the view expressed by the trial Judge, **Musinga, J.** She however conceded that counsel did a lot of research in the preparation of the matter and took into account the sum involved. She then proceeded to award Kshs 800,000.00 in respect of instructions fees.

38. In this case no serious arguments have been advanced with respect to the other items apart from the instructions fees to justify my interfering with the same. As was held by **Ojwang, J** (as he then was) in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra):

**“The taxing officer was wrong in law to incorporate profit levels of the tea production sector as an element in her taxation of costs in a judicial review matter...Although the taxing officer referred to the complexity of issues in judicial review proceedings, the judgement has not shown anything in the application to have risen at all above the work a day chores of legal practitioners. It follows that the responsibility entrusted to counsel in the proceedings was**

quite ordinary and called for nothing but normal diligence such as must attend the work of a professional in any field...There was nothing novel in the proceedings on such a level as would justify any special allowance in costs. There is nothing to indicate any time-consuming, research-involving or skill engaging activities as to justify an enhanced award of instruction fees. There is also no great volume of crucial documents which counsel for the judicial review applicants had to refer to, to prosecute their cause successfully. Further the matter was not urgent, for urgency would have mainly attached to prayers for orders of prohibition...The taxing officer was not properly guided when she conducted the taxation. Her exercise of discretion was done perfunctorily and as a mere formality. It is necessary to specify clearly and candidly how she had exercised her discretion since discretion as an aspect of judicial decision-making is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs...Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer should avoid the possibility of unjust enrichment for any party and ought to refuse any claim that tends to be usurious; so far as possible the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of the matter to the parties, or importance of the matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the court and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel...Private law claims do not fall in the same class as public law claims such as those in judicial review, in constitutional application, in public electoral matters. Such matters are in a class of their own and the instruction fees allowable in respect of them should not, in principle be extrapolated from the practices obtaining in the private law domain which may involve business claims and profit calculations.” [Underlining mine]

39. Taking cue from the above decision, a decision which I associate myself with, it is my view and I hold that in judicial review, constitutional applications and in public electoral matters, the amount in dispute is not necessarily the determinant factor in deciding the quantum of costs payable though the same may be taken into account in considering the interest and importance of the matter to the parties.
40. The Applicant's position was that since oral evidence was taken in the matter, the fees payable ought to have been calculated based on a private law claim. With due respect that cannot be correct. There was no order transmuting the judicial review proceedings into ordinary private law claim assuming that was even legally tenable. Therefore the Court fees payable herein had to be calculated based on the principles guiding public law claims and any enhancement ought to be considered in light thereof. Any unusual steps taken in the proceedings could only be considered as going towards the complexity and the interest involved and nothing else. In my view it is not out of the ordinary for deponents of affidavits even in judicial review proceedings to be cross-examined on their depositions and the mere fact that such course is adopted by the Court does not change the nature of the proceedings before the Court. I do not therefore read much into the viva voce evidence taken in the course of the proceedings.
41. In this case the basic instructions fees payable was Kshs 28,000.00. As was held in **First American Bank of Kenya vs. Shah & Others Nairobi (Milimani)** (supra), the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it. Although in this case the learned Taxing Master did not set out the basic fee, such fee is clear from the Order. She similarly did not indicate the reason why the said basic fee had to be increased from

Kshs 28,000.00 to Kshs 800,000.00 which was more than 20 times the basic fees. In **Opa Pharmacy Ltd vs. Howse & McGeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233**, it was held:

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

42. In **Danson Mutuku Muema vs. Julius Muthoka Muema & Others Machakos High Court Civil Appeal No. 6 of 1991** which was cited in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others** (supra) Mwera, J (as he then was) held that whereas the Court was entirely right to give the costs within its discretion, the amount allowed being ten times the sum provided for, the Court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The Court further found that since the Taxing Officer was bound to give reasons for exercising his discretion and as none were given in his ruling save to say that he simply exercised his discretion, it was just and fair to set aside the sum he allowed.

43. In this case I have found that the amount of money involved clearly showed what was at stake and was evidence of the interest the parties had in the matter and the importance of the case to them. I am therefore not prepared to hold that in the circumstances of this case the increase of the basic instructions by more than 20 times was so high as to justify interference. In any case, the Respondent has not challenged the award.

44. In **Butt & Another vs. Sifuna T/A Sifuna & Company Advocates Civil Appeal No. 45 of 2005 [2009] KLR 427**, the Court of Appeal while appreciating that the basic instructions fees was Kshs 9,000.00 in a winding up petition nevertheless awarded Kshs 150,000.00 in respect of instructions fees which was 17 times the basic instructions fees. However the mere fact that this Court or any other court being in the position would have awarded a slightly higher or lower figure does not necessarily justify interference with the taxing master’s undoubted exercise of discretion.

45. I have considered the objections raised with respect to the other items and based on the fact that this Court on a reference is not entitled to interfere with the taxing master’s decision simply because the Court would have arrived at a different figure, I am not prepared to interfere therewith. I am not satisfied that the decision was based on an error of principle, or the fee awarded was manifestly excessive or low as to justify interference. In the result I find no merit in this reference which I hereby dismiss with costs to the respondent.

**Dated at Nairobi this day 2<sup>nd</sup> day of March, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Mwaura for the Applicant***

***Cc Patricia***