



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT MERU**

**PETITION 1 OF 2003**

**THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT (CAP.7 OF THE  
LAWS OF KENYA)**

**ELECTION OF NTONYIRI CONSTITUENCY (THE PETITION OF NTOITHA M'MITHIARU)**

**BETWEEN**

**NTOITHA**

**M'MITHIARU.....PETITIONER**

**R**

**AND**

**RICHARD MAOKA MAORE.....1<sup>ST</sup>**

**RESPONDENT**

**BISHOP JOSEPH KYAVOA-RETURNING OFFICER NTONYIRI CONSTITUENCY.....2<sup>ND</sup>**

**RESPONDENT**

**ELECTORAL COMMISSION OF KENYA.....3<sup>RD</sup>**

**RESPONDENT**

**R U L I N G**

The petitioner/applicant through an application dated 11<sup>th</sup> September, 2008 brought under Rule 11(2) of the Advocates Remuneration Order seeks the following orders:-

***a) That the decision of the Taxing Officer the Hon. Mr. W. K. Korir, made on 11/08/2008 on items 3 and 18 in the first respondents Bill of Costs dated 14<sup>th</sup> March, 2008 be set aside.***

***b) That this Honourable court be pleased to review and reduce the Bill of Costs substantially.***

***c) That costs of this application be provided for.***

The application is based on the following grounds;

- 1. The learned Taxing Master erred in law and took into account extraneous and irrelevant matters in taxing Bill of Costs.**
- 2. The learned taxing master erred in law and failed to take into consideration other fees and allowances to the Advocate in respect of the same work.**
- 3. The learned Taxing Officer erred in law and failed to exercise his discretion judiciously.**
- 4. That the learned taxing officer failed to exercise his discretion judiciously and in the final analysis arrived at a figure for items 3 and 18 that is excessive and oppressive to the Petitioner/Applicant.**
- 5. The learned taxing officer erred in law in failing to take into account the fact that the petition was not heard on the merits and was struck out on account of lack or improper service.**
- 6. The learned taxing officer misapprehended the law and the facts and arrived at a decision that is wholly against the weight of the material presented before him.**
- 7. The learned taxing officer erred in law and arrived at a decision that is contrary to principle and public policy.**

The respondent filed his grounds of opposition dated 2<sup>nd</sup> September, 2008. The respondent is opposed to the petitioner/applicant's application dated 11<sup>th</sup> September, 2008 on the following grounds:-

- 1. The taxing officer gave his reasons on the taxation which reasons were sufficient, sound and a reflection of the actual provisions under the law.**
- 2. In taxing the 1<sup>st</sup> respondent's bill of costs, the taxing officer appropriately and judiciously applied his discretion.**
- 3. The taxation was carried out lawfully reasonably and on the basis of relevant facts and circumstances.**
- 4. The taxing officer's decision was made in accordance with the law and established rules relating to taxation of bills of costs.**
- 5. That the application is an abuse of the due process of the law as stay of execution had been granted on the 11<sup>th</sup> August, 2008 yet the applicant did not satisfy the payment and he cannot thus be allowed to seek further stay.**

On 17<sup>th</sup> November, 2011 the Counsel for the petitioner/applicant and counsel for the respondent agreed that the application be determined by way of written submissions supported by authorities. Petitioner/applicant's submissions were filed on 27<sup>th</sup> February, 2012 and those of the respondent on 3/2/2012, subsequently on 5<sup>th</sup> June, 2012 this matter was set down for ruling on 10<sup>th</sup> July, 2012.

The petitioner/applicant in his application is challenging the decision of the Taxing Officer dated 11<sup>th</sup> August, 2008 on items number 3 and 18 in the first respondent's Bill of Costs dated 14<sup>th</sup> March, 2008.

Item No.3 relate to instruction fees for receiving and perusing the petition documents, that is to say in brief, fees for opposing the petition and for presenting an application to strike out the election petition in which the respondent's bill was taxed at Kshs.3,000,000/= and Kshs.300,000/= respectively. The petitioner was aggrieved by those awards and by letter dated 14<sup>th</sup> August, 2008, filed on 15<sup>th</sup> August, 2008 sought the reasons from the Taxing Master on the two items. That reasons were given for the decision on the two items by the Taxing Master on 15<sup>th</sup> August, 2008. That a certificate of the ruling was

provided to Counsel for the petitioner on 12<sup>th</sup> September, 2008.

The Taxing Officer's decision on the two items No's 3 and 18 are challenged on grounds that:-

**(a). Reaching a decision that is contrary to principle and public policy.**

**(b). Taking into account extraneous matters in fixing the bill.**

**(c). Failure to exercise his discretion judiciously and arriving at a figure that is unreasonable and manifestly excessive and unreasonable.**

The petitioner/applicant argued that there is an error of principle in taxing Master's award on the two items which calls for intervention and inference by this court. It is argued the first principle that was not observed by the Taxing Master in taxing the bill is the principle of reasonableness. It is argued that principle of reasonableness is well laid down in the Advocates Remuneration Order 1997. In that regard the petitioner/applicant referred me to Schedule VIA(I)(i) of the Advocates Remuneration Order which provides that to present or oppose an election petition, such sum as may be reasonable may be awarded but not less than Ksh.30,000/=and Schedule VI A(I),(O)(VI) provides that to present or oppose any other application not otherwise provided for, whether by summons in Chambers or by Notice of Motion where application is opposed such sum as may be reasonable may be awarded but not less than Kshs.2500/=.

The petitioner/applicant's Counsel in this regard submitted that it is common ground that items 1 to 5 in the 1<sup>st</sup> respondent's Bill of Costs ought to be taxed in accordance with Schedule VIA (I), (i) and VIA (O) (VI) of The Advocates Remuneration Order 1997 and that the basic minimum scale fees ought to be Kshs.30,000/- and Kshs.2500/- respectively. He further submitted that the Taxing Officer has discretion to award sums that are beyond the basic minimum scale fees provided they observe the Principle of Reasonableness.

The petitioner/applicant Counsel argued the question one may ask is what is meant by the word Reasonable? He then referred me to the case of **ROGAN KAMPER –VS-GROSVENOR(1989) KLR 362**, in which Madan J, as he then was, at page 364 had the following to say about reasonableness in the context of taxation, while construing a provision in paragraph 9(2) third schedule of the defunct Court of Appeal for East Africa Rules which is Para material to the provisions of Schedule VIA I(i) and VIA 1(0) (VIII) and the proviso thereto:-

***“It is fairly easy to, understand the meaning of the word “reasonable”. The dictionary meaning(Cassels P.951) is-“endowed with reason; rational, reasoning, governed by reason: conformable to reason, sensible, proper.” It must mean that which does not outrage or jolt the mind, that which does not rise to confrontation.”***

The petitioner/applicant's Counsel argued in the instant case the minimum scale fees for presenting or opposing election petition is Kshs.30,000/= and for presenting or opposing an application is Kshs.2500/= but the taxing officer increased the sum to Kshs.3,000,000/= and Kshs.300,000/= respectively. He argued increment is about hundred (100) times and ten(10) times respectively.

The petition/applicant's Counsel further argued therefore the process of taxation is admittedly not a mathematical exercise, but it is nevertheless submitted that the increment of the minimum scale fees by approximately 10,000/% and 1000% is on the face of it unreasonable and the said figures are so manifestly excessive as to bespeak of an error of principle warranting the inference by the court with the decision of the Taxing Officer on items 3 and 18 in the 1<sup>st</sup> Respondent's Bill of Costs.

The petitioner/Applicant's Counsel argued the second principle that has been violated is that costs should not be allowed to rise to such a level as to confine access to courts of law to the wealthy. In support of this principle the petitioner/applicant's counsel referred me to the case of **Premchand Rainchand Ltd and Another-V-Quarry Service of East Africa Limited and others(No.3) (1972) EA 162** in which Court of Appeal held:

*“ That costs be not allowed to rise to such a level as to confine access to the courts to the wealthy.*

*That a successful litigant ought to be fairly reimbursed for the costs he has to incur.*

*That the general level of remuneration of advocates must be such as to attract recruits.*

*That so far as practicable there should be consistency in the awards made.”*

The applicant’s Counsel therefore submitted that the sum of Kshs.3,300,000/= awarded by the Taxing Master for both items is a colossal sum of money and above the reach of most citizens of this country. That the Electoral Law, especially the election petitions law is in the domain of public law and is designed to afford the citizens a right of challenging the validity of the election of their representatives.

He submitted that the current trend of making high awards of costs by taxing officers in Election Petitions should be checked by intervention of the court otherwise if not checked would create undesirable effect of restricting access to courts of law to the wealthy which is contrary to public policy. He further argued that generalized statements have been given in the ruling for astronomical scale fees. He stated for example at page 1 of the ruling the taxing master made a generalized statement as follows:-

***“In taking up an Election Petition Counsel is always aware of how sensitive such a brief is. The parties have high stakes in the outcome. The constituents of the constituency want to know who their true representative is.....”***

The petitioner/applicant’s Counsel in his submission averred that though the generalized statement is a good justification for making a case for speedy disposal of Election Petitions is certainly not a justification for burdening the petitioner or any other party to an election petition with unreasonable costs. He submitted the costs do not benefit the Constituents or the leadership of the country as a whole but is a burden to the petitioner as such costs are payable by him directly to the successful party. He further submitted that the taxing Master in stating that earnings of a Member of Parliament are substantial, he submitted to that extent the Taxing Officer took into account irrelevant factors in assessing the amount under item No.3 and 18.

The petitioner/applicant’s Counsel argued that it was incumbent upon the Taxing Officer to give cogent reasons to justify the increment of the scale fees from Kshs.30,000/- to Kshs.3,000,000/- and from Kshs.2500/= to Kshs.300,000/- for the two items respectively. He argued that the giving of reasons for a decision by a Judicial Officer is a cardinal requirement of law. In that regard, the petitioner/applicant’s Counsel referred me to the case of **REPUBLIC-V-THE MINISTER OF AGRICULTURE exparte Samwel Muchiri W. Njuguna and others H.C.Misc.Civil Application No.621/2000** in which it was held that since costs are ultimate expression of essential liabilities attendant on the 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 applicant’s Counsel in addition to the above, argued that under the proviso to Schedule VI A(1) (0) of the Advocates Remuneration Order, the Taxing Officer was obligated to take into account other fees and allowances to the Advocate in respect of the work to which any such allowances applies. He submitted that in the instant case the learned Taxing Officer did not take into account other fees awarded in respect of the work which had been agreed at Kshs.62,735/-.

The petitioner/applicant’s Counsel added that this petition did not present any peculiar challenges that called for a greater industry than that which would ordinarily be required to be exercised by Counsel in election petitions. He contended in the instant petition it was disposed of in a summary manner on one issue of fact and law, namely whether the first respondent had been properly served with the petition within the stipulated statutory period. That only three authorities were cited by the 1<sup>st</sup> respondent, all on a point of proper service. That the point of law taken is not a new point and is one that had been taken over and over again in our country. The petitioner/applicant’s counsel concluded on that point by stating that absolutely there was no proper basis for the Taxing Master’s statement that a lot of research was involved

to justify astronomical increment of the basic/minimum scale fees in this matter.

The petitioner/applicant's lastly submitted that there is a trend of awarding high awards of costs in Election petition matters by the Taxing Officers in our courts. The Counsel submitted the trend is informed by an over emphasis of the importance of election petitions generally and a failure to counter balance that, with the principle of reasonableness as well as the principle that costs should not be allowed to rise to such levels as to limit access to courts of law to the wealthy.

The petitioner/applicant further submitted that the figure of Kshs.3,000,000/= and Kshs.300,000/= awarded in this matter for item No.3 and 18 is way above awards made by Taxing Officers of coordinate jurisdiction who made awards of far less amount in election petitions which had been struck out for want of services. The learned petitioner/applicant's counsel referred me to the following cases:--

**1. ELECTION PETITION NO.5 OF 2003**

**ROBERT NELSON NG'ETHE –VS-MBOGORI NJERU AND ANOTHER**

**KSHS.917,080 WAS ALLOWED ON TAXATION**

**2. ELECTION PETITION NO.31 OF 2008**

**TITUS KIONDO MUYA –VS-PETER NJOROGE BAIYA & 2 OTHERS**

**KSHS.1,076,974 WAS ALLOWED**

**3. EL. PETITION NO.1 OF 2008**

**DICKSON KARABA –VS-JOHN NGATA KARIUKI & 2 OTHERS**

**WHERE A SUM OF KSHS.917,669 WAS AWARDED**

The learned Counsel for the petitioner/applicant in reference to the above-mentioned case, submitted that an award of Kshs.3,300,000/- in the instant case is contrary to the consistency principle and at the very worst the taxing master ought to have made an award in the region of Kshs.1,000,000/ even though in the applicant's Counsel opinion the sum would still be on the higher side taking into account the basic minimum fees allowed in the Advocates Remuneration Order.

The petitioner/applicant's counsel concluded by urging this court to set aside the decision of the taxing officer on the two items and to return the bill to the Taxing Officer for taxation with direction that the taxing Officer do give effect to the principle of reasonableness as well as the principle to that costs in election petition just as in other cases should not be allowed to rise to a level that would limit access to courts of law to the wealthy or in the alternative review and reduce the bill on items 3 and 18 to a level that is fair and reasonable. The applicant also asked for costs of this reference.

The 1<sup>st</sup> respondent counsel on his part relied on the written submissions dated 1<sup>st</sup> February, 2012. The 1<sup>st</sup> respondent submitted that on 11<sup>th</sup> August, 2008, the Taxing Officer awarded a total of Kshs.3.3million on two items, namely item No.3 and item No.18 in the 1<sup>st</sup> respondent's bill of costs dated 14<sup>th</sup> March, 2008. That the taxing master assigned reasons for his decision as follows in awarding Kshs.3million on item No.3. He said as follows:-

**“We submit on behalf of the 1<sup>st</sup> respondent as follows:-**

**On 11<sup>th</sup> August, 2008 the Taxing Officer the Honourable Mr. W. K. Korir awarded a total of Kshs.3.3million on two items, namely, item No.3 and item No.18 in the 1<sup>st</sup> Respondents Bill of Costs dated 14<sup>th</sup> March, 2008.**

*The Taxing Officer assigned reasons for his decision as follows:-*

*In awarding Kshs.3million on item No.3 he said:-*

*“ in taking up an election petition, Counsel is always aware of how sensitive such a brief is. The parties have high stakes in the outcome. The constituents of the constituency in question want to know who their true representative is. The earnings of a member of parliament is substantial.”*

*Further the taxing Officer gave the reasons for awarding Kshs.300,000 on item NO.18, thus:-*

*“This was an application and a lot of research must have gone into its preparation and presentation.”*

That further the taxing officer gave the reason for awarding Kshs.300,000/= on item No.18 thus:-

*“ This was an application and a lot of research must have gone into its preparation and presentation.”*

The learned counsel for 1<sup>st</sup> respondent submitted that it is now trite law that it's within the discretion of taxing officer to award costs and to decide which consideration should bear the greatest weight in assessment of costs and further the principles on which a court can interfere with the sound discretion have well been laid down.

The learned advocate for the 1<sup>st</sup> respondent in support of the above referred me to the case of **REPUBLIC-VS-MINISTRY OF AGRICULTURE, EXPARTE W. NJUGUNA & OTHERS(2006)** eKLR in which its was held:-

*“ The basic principle cited by Counsel is set out in PREMCHAND RAICHAND LTD & ANOTHER – V-QUARRY SERVICES OF EAST AFRICA LTD & ANO(1972) E.A.162. In the words of spry, V-P, (at P.164):*

*“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, and 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.”*

In addition to the above, the learned advocate for the respondent referred me to the case of **FIRST AMERICAN BANK OF KENYA – VS- SHAH & OTHERS(2002) I.R.A64**. In that case Regera J (as he then was) made the following remarks (at page.69).

*“First, I find that on the authorities, this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.....And according to the Advocates(Remuneration) order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount of value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any discretion 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.....”*

Further to the above, the learned Counsel for the 1<sup>st</sup> respondent referred me to : **R. KULOBA’S WORK JUDICIAL HINTS ON CIVIL PROCEDURE VOL.1,**

*“in taxation the Taxing Officer must take into account consideration the nature and importance of the cause of matter. As regards “importance of the cause”, all suits are obviously of importance to both the plaintiff and to the Defendant, but whether a particular case is important in the wide sense(e.g. that it involves matters of law of importance to the commercial community, or that serious points of*

*practice arise, or that its decision will affect the community at large or section of the community or other matters of vital interest) is a matter on which the taxing officer has to decide on the particular facts of each case”(extracted from page 9 of the said attached authority)”*

On top of the above, the learned counsel for 1<sup>st</sup> respondent referred me to the case of:-

**JORETH LTD –VS-KIGANO AND ASSOCIATES CIVIL APPEAL NO.66 OF 1999.**

***The court of appeal reiterated that: - (at page 15)***

***“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, judgment or settlement (if such be the case), but if the same is not so ascertained the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause of matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”***

The learned Counsel for the 1<sup>st</sup> respondent in light of the above mentioned decision urged the court to find that the taxing officer herein took into account the pertinent principles which have been set on in the court decisions cited hereinabove.

Having considered the application, grounds of opposition and submissions and the supportive authorities by both the petitioner/applicant and 1<sup>st</sup> respondent the issues for determination in this application are as follows:-

- 1. Whether the taxing master in taxing the bill herein reached a decision that was contrary to the principles and the public policy?***
- 2. Whether the taxing officer took into account extraneous matters in taxing the bill?***
- 3. Whether the taxing officer failed to exercise his discretion in taxing the respondent’s Bill of Costs?***
- 4. Whether the court can return the bill to the taxing officer for taxation or whether in the alternative the court can review and reduce the bill on items 3 and 18 to a level that is fair and reasonable?***

The first principle to be observed by taxing master in taxing a bill is the principle of reasonableness. The principle is well laid down in the Advocates Remuneration Order. The second principle is that costs should not be allowed to rise to such a level as to confine access to courts of law to the wealthy. Thirdly the taxing master should give cogent reasons to justify the increment. That in the case of **FIRST AMERICAN BANK OF KENYA –V-SHAH & OTHERS**(Supra) it was held court cannot interfere with taxing officers decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle.

Further as per **R. KULOBA’S book, Judicial Hints on Civil Procedure Vol.I in Taxation;**

***The Taxing Officer must take into account the nature and importance of the cause of the matter but the importance of the matter in the wide sense may depend on matters of law or importance to community. The Taxing Officer has to decide each case on its own facts.***

In the instant case the taxing officer quite correctly stated “in taxing up on Election petition Counsel is always aware of how sensitive such brief is. The parties have high status in the outcome. The constituents of the constituency want to know who their true representative is.....”

The taxing master in taxing the bill herein, I find he reached a decision that is not contrary to principles and public policy. His decision is not unreasonable nor was the principle of access to courts breached in

anyway. The matter in reference was an electoral petition and it was an important matter involving a constituency and a large community, however that notwithstanding, the costs taxed cannot be in view of the scale fees be said not to be manifestly excessive.

The respondent claimed Kshs.5, 000,000/= on item No.3 and Kshs.500,000/= on item No.18 under the Advocates Remuneration Order 1997. The basic minimum scale fees on the two items was Kshs.30,000/- and Kshs.2500/= respectively. The amount awarded is manifestly excessive and is about hundred times the basic minimum fees. The amount is unreasonably high and secondly, there must, so far as is practicable, be consistency in the awards made in similar matters. The consistency is also very important as it would enable a person contemplating litigation to be advised by his advocates very approximately what kind of fees is likely to be his potential liability for costs. **Premchand Rainchand Ltd and Another-V-Quarry Service of East Africa Limited and others(No.3) (1972) EA 162 at page 163. (supra).**

In the view of the foregoing the award of costs under item No.3 and 18 ought to be reviewed and reduced to a level that is fair and reasonable. Taking into account of the relevant and recent taxation, in Election Petition, bearing in mind no cases are similar and the amount of work cannot be similar in different matters under any circumstances, the taxing master in the instant case I feel ought to have made an award of costs under item No.3 at least at around Kshs.2,000,000/= and under item No.18 at Kshs.100,000/-

The 2<sup>nd</sup> issue is whether the taxing officer took into account extraneous matters into account taxing the bill. The applicant aver that the taxing officer in stating that the earnings of a member of parliament are substantial to that extent the Taxing Officer took into account of irrelevant factors in assessing the amount payable under item No.3 and 18. The taxation of costs as held in several authorities is not a mathematical exercise, it is a matter of opinion based on experience and the court is not supposed to interfere with the award of a taxing officer, and particularly where he is an Officer of great expense merely because it thinks the award is too high or too low. It will only interfere if it thinks the award too high or so low as to amount to an injustice to one party or the other. Further it should be noted in this matter the taxing officer with his experience did not consider one item to recon at his decision. He indeed considered the circumstances of the case, its sensitivity and the fact that the parties had high stakes in the outcome of the petition hence the need for parties to be thorough and diligent with the matter. In view of the foregoing, I do not find that the taxing master took into account of extraneous matters in taxation of the bill of costs.

Thirdly the other issue for consideration is whether the taxing officer failed to exercise his discretion properly in taxing the Respondent's Bill of Costs. The applicant demonstrated how the taxing officer failed to exercise his discretion judiciously in arriving at the taxed amount. The taxing officer did not give reasons to justify the figure he arrived at. The figure was with all due respect unreasonably high and manifestly excessive taking into account the amount provided for under the Advocates Remuneration(Amendment ) Order 1997.

The petitioner has put forward good reasons to warrant the review and/or reduction of the sum awarded under item no.3 and 18. I find the taxing Officer did not error in principle but made a manifestly excessive award of costs. The petitioner has demonstrated that he will suffer injustice if the application is not allowed as the award made in favour of the 1<sup>st</sup> respondent is manifestly excessive or too high in view of the Advocate Remuneration(Amendment) Order.

In the circumstances the application dated 11<sup>th</sup> September, 2008 is allowed and I proceed to make the following orders;-

***(a). The decision of the taxing officer made on 11<sup>th</sup> August, 2008 on items no.3 and 18 of the first respondent' s Bill of costs dated 14<sup>th</sup> March, 2008 is set aside.***

***(b) The Bill of Costs dated 14<sup>th</sup> March, 2008 be and is hereby reviewed and first respondent's bill of costs is hereby reviewed under item No.3 from Kshs.3,000,000/= to Kshs.2,000,000/= and under item No.18 from Kshs.300,000/= to Kshs.100,000/=***

*(c) Costs of the application to the applicant.*

**DATED, SIGNED AND DELIVERED AT MERU THIS 10<sup>TH</sup> DAY OF JULY, 2012.**

**J. A. MAKAU  
JUDGE**

**Mr. Omayo h/b for Gitonga for Petitioner  
Mr. Munari for respondent(absent)**

**J. A. MAKAU  
JUDGE**

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