



**REPUBLIC OF KENYA**

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

**Constitutional Application 1 of 2009**

**RAMESH NARAN PATEL.....APPLICANT**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KISHOR KUMAR DHANJI VARSANI.....2<sup>ND</sup> RESPONDENT**

**RULING**

By a Chamber Summons dated and filed on 27th June 2011 (*the Reference*), the Applicant sought the following orders -

**(1) THAT this Honourable Court be pleased to order that the reasons sought for in the applicant's letter dated 19th October, 2009 be deemed to be contained in the ruling delivered on 8th October, 2009 and that the said ruling be typed and supplied to the applicant's Advocates within 14 days.**

**(2) THAT the Honourable Court be pleased to set aside the Taxing Officer's ruling delivered on 8th October, 2009 as it relates to the reasoning and determination of items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of the 2nd Respondents bill of costs dated 10th day of June, 2009.**

**(3) THAT this Honourable Court be pleased to adjust the figures, and reassess the fees due to the 2nd Respondent.**

**(4) THAT costs of this application be provided for.**

The Reference is brought under Rule 11(2) and 11(4) of the Advocates (*Remuneration*) Order and Section 1A, 1B and 3A of the Civil Procedure Act (*Cap. 21, Laws of Kenya*). The Application is supported by the Affidavit of Gladys Mwangi, Advocate of the firm of Kamau Kuria and Kiraitu Advocates sworn on 25th June 2011 and the grounds on the face thereof.

The Reference follows the Ruling by Hon. J. Kingori, the Taxing Officer on 8th October 2009, in which the learned Taxing Officer taxed the 2nd Respondent's Bill of Costs dated 10th June 2009 at Ksh 575,097.00 out of which Ksh 400,000/= was allowed as instruction fees. I allowed prayer 1 of the application on 4th November 2011. In his written submissions, the applicant abandoned his objections on 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24 and 25, but retained objection to items 1 and 22, which comprise, Instruction Fees (Item 1), and Getting Up Fees (Item 22) of the Bill of Costs.

The Reference was opposed by the 2nd Respondent whose counsel, Odhiambo and Odhiambo filed on 20th March 2012, written submissions dated the same day.

The issue raised by the Application is as perennial as the practice of law, the taxation of Advocates Party and Party Costs where the value of the subject matter is not disclosed and is not readily ascertainable. The starting point is however, what does the law say on the twin subjects of “**Instruction Fees**” and “**Getting Up Fees**”.

### **INSTRUCTION FEES**

Instructions fees for contentious matters are charged under Schedule VI of the Advocates Remuneration Order 2009 and the relevant rule is rule 2(1) which sets the instruction fee for any case not provided for above; such sum but not less than shs 8,400/=. Under the proviso to Schedule VI, the Taxing Officer, in exercise of his discretion in matters arising during proceedings, shall take into consideration the other fees and allowances of the Advocate (*if any*) in respect of the work to which such allowance applies, the nature and importance of the cause, the amount involved, the interest of the parties, the general conduct of proceedings, a direction by the trial judge, and all relevant circumstances.

The Applicant's case is that the Taxing Officer failed to give weight to the relevant factors on record and well settled principles of law in considering the quantum pertaining to Item I (*of the Bill of Costs, Instruction Fees*) and consequently awarded a fee that is manifestly excessive as to justify interference by this court. Counsel for the Applicant contended that the Taxing Officer applied wrongly (*if at all*), the principles of taxation laid in the case of **JORETH LIMITED VS. KIGANO & ANOTHER [2002] 1 E.A. 92**, a case relied upon by both the Applicant's and Respondent's counsel. In that case, the Court of Appeal set out the following factors to be considered in determining an instruction fee -

- (a) *the importance of the matter,*
- (b) *general conduct of the case,*
- (c) *the nature of the case,*
- (d) *time taken for its dispatch,*
- (e) *the impact of the case on the parties.*

The subject matter in this case was an application seeking injunctive and supervisory orders against the 2nd Respondent. The Taxing Officer therefore rightly held that the value of the subject matter cannot be ascertained from the pleadings, judgment or settlement between the parties.

The Applicant is consequently aggrieved in the award made by the Taxing Officer on instruction fees and that the taxing officer failed to take into account two important factors. The first of these factors is that the suit was heard expeditiously as it was dismissed upon the 2nd Respondent's raising a Preliminary Objection, and the suit was consequently not heard on merit. **Secondly**, the Applicant's counsel argued, the Taxing Officer failed to consider the work done by the 2nd Respondent's counsel, namely, filing a Replying Affidavit and a Notice of Preliminary Objection which was heard in one day and upheld. Without reference to these factors the Taxing Officer in his Ruling at p. 2 said that he had -

***“considered the nature and importance of the cause and particularly the complexity of the matter, research and preparation required in preface and the interest of the parties. I would tax instruction fees at Kshs 400,000/=”***

The Appellant's counsel contended that there were no factors to justify the award of that sum which amounted to an increase of 47 times over the minimum fee of Ksh 8,400/= under Schedule VI para 1(l) of the Remuneration Order.

Citing the case of **REPUBLIC VS. THE MINISTER FOR AGRICULTURE, ex parte SAMUEL MUCHIRI W'NJUGUNA, [2006] eKLR**, the Applicant's counsel argued that the Respondent's counsel's work did not go beyond the ordinary work of a counsel to warrant increase of fees as provided in the above Schedule para 1(l) by almost 50 times. The Applicant had invoked this court's supervisory powers in Nakuru Chief Magistrates Court Case No. 583 of 2008. The 2nd Respondent was the Plaintiff in that suit, and that as such all the facts raised in this suit were already within the knowledge of the 2nd Respondent's counsel who did not need to go beyond his file in the lower court to respond to the issues raised in the Application to this court.

In **REPUBLIC VS. MINISTER FOR AGRICULTURE ex parte Samuel Mburu Njuguna W'Njuguna (supra)** the court held at p. 14 -

***“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 clarified, 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.”***

and at p. 15 of the same case, the court added -

***“It follows in my view, 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. I have to state that there was nothing novel in the proceedings on such a level as would justify any special allowance in costs.”***

The court came to the same conclusion in the case of **FIRST AMERICAN BANK OF KENYA LTD VS. GULAB P. SHAH & 2 OTHERS [2002] 1 E.A. 64**, at p. 70 – 71 -

***“As regards the increase of instructions fees, I accept that this is a matter of discretion of the Taxing Master. However the discretion must be exercised rationally. Now the only reason given by the Taxing Officer there to increase the fees is that the Defendants had done some research on the law and they had put a well researched defence – I AM OF THE OPINION THAT IF A DEFENDANT DOES RESEARCH BEFORE FILING A DEFENCE INFORMED BY SUCH RESEARCH HE HAS DONE NO MORE THAN EXPECTED. THE RESEARCH IS NOT NECESSARILY INDICATIVE OF THE COMPLEXITY OF THE MATTER. IT MAY WELL BE INDICATIVE OF THE ADVOCATE'S UNFAMILIARITY WITH BASIC PRINCIPLES OF LAW. SUCH UNFAMILIARITY SHOULD NOT BE TURNED INTO AN ADVANTAGE AGAINST THE ADVERSARY.”*** (capital added for emphasis).

It was the Applicant's counsel's submission that this was an ordinary suit which did not require counsel to go beyond his normal duties, and further the taxing officer, did not state why in his view the matter was complex, beyond making a general observation to that effect, but without supporting material or facts. The taxing officer does not specify what research if any was undertaken by counsel to justify the increase in instruction fees.

Counsel for the Applicant also contended that the taxing officer failed to consider that costs should not impede access to court which is a fundamental right. Unlike the old Constitution, Article 148 of the Constitution of Kenya 2010 guarantees a fundamental right to access to justice, the Article states -

***“148. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”***

Although upon a narrow construction this Article may be understood to refer to filing fees merely, (*as indeed it does*), a broader and purposive construction would include fees chargeable by Advocates would be such that will facilitate access to justice by both the indigent and the well-endowed in things material.

In **PREMCHAND RAICHAND VS. QUARRY SERVICES E.A. LTD (NO. 3) [1972] E.A. 162**, the Court of Appeal held -

- (a) *that costs should not be allowed to rise to a level as to confine access to the courts to the wealthy;*
- (b) *that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;*
- (c) *that the general level of remuneration of Advocates must be such as to attract recruits to the profession and,*
- (d) *so far as is practicable there should be consistency in the awards made.*

In opposing the Reference, Mr Kisilah learned counsel for the Respondent submitted that the question of the exercise by the Taxing Officer of his discretion, is a perennial problem, and has perennially exercised and excited the minds of judges without a defective answer. He too relied upon the guidelines set out in the case of **JORETH VS. KIGANO & ANOTHER** (*supra*).

From the above case, the court may draw the conclusion that the guidelines or principles to be applied by a Taxing Officer in exercise of his discretion to increase the instruction fee are clear. He must demonstrate in his Ruling the reasons for increase of fees -

- (I) *care and labour required by the Advocate,***
- (II) *specify the number and length of the papers to be perused,***
- (III) *the nature and importance of the matter,***
- (IV) *the value (where ascertainable) of the subject matter,***
- (V) *interest of the parties,***
- (VI) *complexity of the matter,***
- (VII) *novelty of the matter.***

Each of these elements must however be broken down cogently with specificity (*and not generalizations*), as stated in the cases cited above and in particular, **REPUBLIC VS. MINISTER FOR AGRICULTURE, ex parte Samuel Muchiri W\Njuguna**(*supra*).

It is noted that in case the Applicant in the Application dated 8th January, 2009 sought injunctive and supervisory orders as against the 2nd Respondent. The Taxing Officer correctly held that the value of the subject matter cannot be ascertained from the pleadings. Nonetheless thinking that the matter was complex, without saying why, that research was carried out, without stating on what novel aspects beyond drawing up fairing and having the Replying Affidavit sworn and filed, and likewise, drawing up and fairing and filing the Notice of the Preliminary Objection, no other documents are cited to show complexity so that in the final analysis, it had to justify the increase of the minimum fee of Ksh 8,400/= by 47-50% to Ksh 400,000/=.

Probably what was at the back of the mind of the learned Taxing Officer while taxing the 2nd Respondent's Bill of Costs is that the fee of Ksh 8,400/= is too low the labour in these matters.

It is common knowledge among Senior Legal Practitioners that none of them will touch an Election Petition upon the new few of Ksh 42,000/=. This thinking equally applies in cases with a minimum basic fee. The remedy lies in increasing these minimum fees, unless in matter of public interest, the State guarantees minimum basic fees subject to a basic ceiling. So to compensate these low minimal fees. Counsel usually inflate the Bill in order to recover for their time, notwithstanding they could also elect to charge on an hourly rate under Schedule V of the Advocates Remuneration Order.

Therefore taking the above considerations into account what ought to be the fair remuneration for an Advocate and a party who has had to meet costs in the hiring of counsel? A balance has to be struck between the minimum fee of Sh 8,400/= and increased fee of Ksh 400,000/=. I think the latter fee is too high, and the former is too low. I would also think than an increase by 10% to Ksh 84,000/= is too low. A more accurate increase would be about 25% which would balance out against the low minimum figure of shs 8,400/= and 50 times increase to Ksh 210,000/=. An increase of 25% would in my calculation yield an instruction fees of shs 210,000/=.

I would therefore reduce the instruction fees of shs 400,000/= to shs 40,000/=.

### **GETTING UP FEES**

Schedule VI para. 2 is entitled – **FEES FOR GETTING UP OR PREPARING FOR TRIAL** and says -

***“In any case in which a denial of liability is filed or in which issues for trial are joined by pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one third of the instruction fee allowed in taxation.”***

The Applicant contends that this matter was disposed of by way of a Preliminary Objection, and that no trial was conducted by way of calling witnesses, and that even if the matter were heard it was to proceed by way of affidavits. Counsel therefore submitted that **Getting Up Fees** contemplates where there is a full hearing or trial and where counsel is involved in preparation of witnesses and witness statements. Counsel relied upon the case of **MITS ELECTRICAL COMPANY LIMITED VS. NATIONAL INDUSTRIAL CREDIT BANK LTD [2005] eKLR.**

In that case, counsel for the Respondent objected to the allowance of the Item on Getting Up Fees, considering that the contempt proceedings were interlocutory and “**Getting up Fees**” contemplates where there is a full trial,

I would also agree with the conclusion reached in the matter of **REPUBLIC VS. NATIONAL ENVIRONMENTAL TRIBUNAL ex parte SILVERSTE N. ENTERPRISES LIMITED [2010] eKLR** that on a matter of judicial review getting up fees could not be allowed as evidence was contained only in Affidavits.

The Item in the Advocates Remuneration Order – **on Getting Up Fees** – contemplates involvement by counsel in the preparation of witnesses, witness statements and determination of the matter by *viva voce* evidence.

This was certainly not the case here. The Notice of Preliminary Objection is raised and determined on a pure point of law, and no *viva voce* is either adduced or required. I would therefore disallow the award on Getting Up Fees.

Finally, I do recognize as it has been held in a long series of cases stretching back and earlier than **THOMAS JAMES ARTHUR VS. NYERI ELECTRICITY UNDERTAKING [1961] E.A. 492**, that a judge is not nearly an expert in taxation of bills as the Taxing Master/Officer, and the practice is to refer the matter to the Taxing Officer to relook at the Bill of Costs and tax it in accordance with the directions of the judge.

In this case, I elect not to follow that route for two reasons. **Firstly** this Reference involves only two related items. Instruction Fee and Getting Up Fee. **Secondly**, I elect not to follow that route because of my own contention that the minimum fees (even if intended to allow the indigent to access justice), set out in Schedule VI, para 1(1) are so low as not to constitute a fair reimbursement for the costs incurred by a successful litigant, and a level where they fail to attract recruits to the profession.

In summary and conclusion, and for reasons given, I would set aside the award of Ksh 400,000/= made by the learned Taxing Officer, and substitute therefor the sum of Ksh 210,000/= as instruction fees, and disallow any fees in respect of the item on Getting Up.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of October, 2012**

**M. J. ANYARA EMUKULE**  
**JUDGE**