

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

JUDICIAL REVIEW NO. E009 OF 2022

JOSEPH MUCHIRI GICHERU.....
.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NYERI1ST
RESPONDENT

COUNTY SECRETARY NYERI COUNTY.....2ND
RESPONDENT

JUDGEMENT

1. Before this Court for determination is the Chamber summons dated **29th July 2024** by which the Applicant **JOSEPH MUCHIRI GICHERU** seeks the following orders:-

“(a)SPENT

(b) THAT by way of reference to the Honourable Judge this

Honourable Court be pleased to review and set aside the taxing officers ruling of 24th July 2024

on the Party and Party Bill of Costs dated 10th November 2023.

(c) THAT costs be provided for.

2. The Respondent being the **COUNTY GOVERNMENT OF NYERI** opposed the application through the Replying Affidavit dated **6th December 2024** sworn by **NJERI KIMUNYO** the County Attorney.
3. The Summons which was premised upon **Rule 11** of the **Advocates Remuneration Rules** was supported by the Affidavit of even date sworn by **Mr. KARWERU** counsel for the Applicant.
4. The reference was canvassed by way of written submissions. The Applicant filed the written submissions dated **8th April 2025**. The Respondent did not file any written submissions.

BACKGROUND

5. The genesis of this reference is the ruling delivered on **24th July 2024** in which the Honourable Taxing Master, taxed the Bill of costs dated **10th November 2023** at **Kshs. 98,400**.

6. The Applicant submitted that in her Ruling the Taxing Officer erred in matters of principle and law. That the Taxing Officer taxed the Bill as if it were an Advocate-client Bill of costs.
7. On their part the Respondent submits that there was no error in taxing the Bill. They urge the court to uphold and confirm the ruling of **24th July 2024**.

ANALYSIS AND DETERMINATION

8. I have carefully considered the chamber summons filed in court, the reply thereto as well as the written submissions filed by both parties.
9. The jurisdiction of a Taxing Officer is set out in **Rule 16** of the **Advocate Remuneration Order 2009**, which provides as follows:-

“Rule 16: Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him 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, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.”

10. The principles under which the High Court may interfere with the decision of a Taxing Officer were set out in the case of **NYANGIITO & Co ADVOCATES -vs- DOINYO LESSOS CREAMERIES LTD 2014 eKLR** in which **Hon. Justice (Retired) A. Makau** held as follows:-

“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 to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause of 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 disclosed 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 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 v Shah and others [2002] 1 EA 64."

11. The general principle therefore is that the High Court ought not interfere with the decision of the Taxing Officer except in cases where there has been an error of principle. That the question of quantum is deemed to be an area in which the Taxing Officer is more experienced and is therefore more qualified. The High Court should only intervene in exceptional circumstances.

12. The factors which a Taxing Officer ought to take into account when conducting a taxation were set out by the **Court of Appeal** in the case of **PREMCHAND RAICHAND LTD -VS- QUARRY SERVICES OF EAST AFRICA LTD [1972] 1 E.A** as follows:-

- “(a) That costs should not be allowed to rise to a level as to confirm access to justice to the wealthy**
- (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.**
- (c) That the general level of remuneration of Advocates must be such as to attract recruits to the profession.**
- (d) So far as practicable there should be consistency in the award made; and**
- (e) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”**

13. The Applicant has challenged the award of **Kshs. 45,000/=** made by the Taxing Officer under the Heading No. 1 of **'Instruction Fees.'** It is submitted that since the Judicial Review application was opposed the lower court ought to have awarded the minimum amount of **Kshs. 100,000.**
14. In determining whether or not a Taxing Officer properly exercised her jurisdiction the factors to be considered were set out in the case of **OTIENO RAGOT & COMPANY ADVOCATES -VS- KENYA AIRPORTS AUTHORITY [2021] eKLR** on the following terms;-

“The beginning point is whether the taxing officer properly exercised her discretion to determine the Advocate and client bill of costs. In the case of Joreth Ltd v Kigano & Associates [2002] 1 E.A 92, this Court addressed the issue thus;

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so

ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

15. The Taxing Officer in taxing a Bill of Costs must be guided by the relevant Schedule in the **Advocates (Remuneration) Order** to make a determination. In **Truth Justice & Reconciliation Commission v Chief Justice of the Republic of Kenya & another [2014] eKLR** the **High Court** pronounced itself as follows:-

“The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale

should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

16. The matter in question which led to the disputed Bill of costs was a Judicial Review application **No. 9 of 2022** seeking an order of mandamus against the **County Government of Nyeri** to compel them to pay the decretal sum of **Kshs. 1,851,100** being general damages, costs and interest awarded to the Applicant in **Nyeri CMCC No. 309 of 2016** vide the judgment delivered on **30th June 2021**. The Judicial Review application was opposed.
17. The Applicant sought an amount of **Kshs. 160,000/=** as Instruction Fees. However the Taxing Officer reduced the amount claimed to **Kshs. 45,000** on the basis that the suit had not raised any complex issues.

18. The Applicant argued that since the matter had been opposed, they were entitled to the minimum of **Kshs. 100,000** as provided for by **Paragraph 1 (J)** of the **Advocates Remuneration Order**.

19. **Schedule 6** on Instruction Fees under **Paragraph 1(i)** provides as follows;-

“To present or oppose an application for a constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate -

- i. Where the matter is not complex or opposed such sum as may be reasonable but not less than Kshs. 45,000/-***
- ii. Where the matter is opposed and found to satisfy the criteria set out above, such sum as***

may reasonable but not less than Kshs.

100,000/=

iii. To present or to oppose application for setting aside arbitral award Kshs. 50,000/=” [Own emphasis]

20. The Applicant herein had sought an amount of **Kshs. 160,000/-** as instruction fees. This figure was opposed by the Respondent on the basis that it was excessive. The Respondent complained that no substantive reason had been supplied for justifying the said amount.

21. In **Republic v Minister for Agriculture & 2 others Ex-Parte Samuel Muchiri W’ NJUGUNA & 6 others [2006]** eKLR it was held that:

“.....It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant’s firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided

by transparent, regular, reliable and just criteria.....it was necessary to specify clearly and candidly how she exercised her discretion.....it is not enough to set 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....complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction.....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....”

22. In reducing the instruction fees to **Kshs. 45,000** the Taxing Officer stated that the Judicial Review application had not raised any complex issues.
23. Applicant submitted that application was opposed thereby it merited the minimum for Judicial Reviews of **Kshs. 100,000** as provided by Paragraph 1 (i) A look at the record indicates that the Judicial Review application was in fact opposed by the Respondents through a Replying Affidavit dated 19th October 2022 sworn by the 2nd Respondent. In that reply the Respondents denied the claim by the Applicants that they were making no effort to settle the decretal amount - it was averred that on the contrary the Respondents were making all efforts to settle the decretal amount through their insurer.
24. It is quite evident that the matter was opposed and the Advocate was called upon to exercise some level of diligence in prosecuting said application.
25. I do find that the learned Taxing Officer erred in applying instruction fees due for an unopposed matter. Although the matter may not have been complex given that it was

opposed I find that the minimum of **Kshs. 100,000** as instruction fees ought to have been awarded.

26. In the premises I find merit in this reference. I set aside the award of **Kshs. 45,000** made under **Item No. 1** and instead award an amount of **Kshs. 100,000**. All other awards will remain as made by the Taxing Officer. Accordingly the Bill of costs dated **10th November 2023** is taxed at **Kshs. 153,400**. Each party to meet its own costs.

Dated in Nyeri this 7th day of November 2025

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MAUREEN A. ODERO
JUDGE