

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 430 OF 2018**

**WEST KENYA SUGAR COMPANY LTD.....**  
**PETITIONER**

**VERSUS**

**AGRICULTURE AND FOOD AUTHORITY.....1<sup>ST</sup>**  
**RESPONDENT**

**THE ATTORNEY GENERAL..... 2<sup>ND</sup>**  
**RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT**  
**AUTHORITY..... 3<sup>RD</sup>**  
**RESPONDENT**

**BUSIA SUGAR INDUSTRIES LIMITED.....4<sup>TH</sup>**  
**RESPONDENT**

**RULING\_**

1. The petitioner filed a petition against the respondents in 2018. In a judgment delivered on 25<sup>th</sup> January 2024, the petition was dismissed with costs to the respondents. The 1<sup>st</sup> respondent then filed its party and party bill of costs dated 16<sup>th</sup> February

2024 seeking costs of Kshs. 19,608,043. The Bill was taxed at an all-inclusive amount of Kshs. 4,181,535 in a ruling delivered on 24<sup>th</sup> September 2024. Instruction fee was allowed at Kshs. 3,000,000 and getting up fee of Kshs. 1,000,000.

2. The petitioner being dissatisfied with the taxing officer's decision on items 1 and 2-instruction fee and getting up fee respectively, has filed a reference dated 7<sup>th</sup> October 2024 under paragraph 11(2) and (4) of the Advocates (Remuneration) Order, seeking to set aside that decision with respect to the two items (1 and 2) as well as stay of execution pending determination of this reference.

3. The petitioner contends that the taxing officer erred in principle in arriving at her decision with regard to

items 1 and 2 hence this court has the jurisdiction to interfere with the decision. According to the petitioner, although the taxing officer found that the matter was not complex but of great public importance, she did not use the principles applicable in taxing public interest matters when taxing Item 1.

4. The petitioner claims that the amounts of Kshs. 3,000,000 and 1,000,000 awarded in respect of items 1 and 2 respectively, are manifestly excessive and contrary to the legal principles hence should be interfered with. The petitioner further claims that the 1<sup>st</sup> respondent irregularly initiated execution proceedings by sending auctioneers to attach its assets without first extracting and serving a certificate of costs. Proclaiming against its tools of trade on 4<sup>th</sup> October 2024 for a purported sum of Kshs. 4,676,337.88 before the period for filing a

notice of objection to taxation had expired or the reference being heard and determined was ill intended.

5. The petitioner argues that this court has jurisdiction to hear the reference; the notice of objection to the decision on taxation was filed within the time of 14 days allowed under Paragraph 11(1) of the Remuneration Order and the notice specified items 1 and 2 as the basis of the objection. Paragraph 11(2) of the Order was also complied with since the decision by the taxing officer contained reasons.

6. The petitioner relies on Order 42 rule 6(2) of the Civil Procedure Rules and the decisions in *Northwood Service Ltd v Mac & More Solution Ltd* [2015] eKLR and *Antoine Ndiaye v Africa Virtual University* [2008]

eKLR for the position that it has met the conditions for granting stay of execution. The petitioner also maintains that it has demonstrated that goods had been proclaimed by auctioneers, and it would suffer irreparable loss if they were carted away rendering the reference an academic exercise.

7. The petitioner submits that the reference has been brought without unreasonable delay and in compliance with Paragraph 11(1) of the Remuneration Order. The taxing officer's decision was delivered on 24<sup>th</sup> September 2024, a notice of objection to taxation lodged on 4<sup>th</sup> October 2024 and the reference was filed on 7<sup>th</sup> October 2024.

8. The petitioner further relies on the decisions in *Donholm Rahisi Stores (suing as a firm) v East Africa*

*Portland Cement Limited* [2005] eKLR; *Mbogo & Another v Shah* [1968] EA and *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR regarding when the court can interfere with the taxing officer's decision.

9. The petitioner maintains that it was dissatisfied with the award on items 1 and 2- instruction fees and getting up fees; the taxing officer committed an error of principle by taxing item 1 at Kshs. 3,000,000 based on a finding that the matter was of great public importance as the subject matter would have had a ripple effect on the public, which was a wrong parameter to apply. The taxing officer also failed to consider that the bill of costs was filed by a public body whose actions were impugned on the basis of violation of constitutional rights whose

determination was whether the decision, actions and omissions culminating in the issuance of a sugar manufacturing license to the 4<sup>th</sup> respondent violated its rights under articles 27, 35, 40, 47 and 50 of the Constitution.

10. The petitioner argues that as a public body, and the then regulator of the sugar sector, the 1<sup>st</sup> respondent was a necessary party to the petition. The 1<sup>st</sup> respondent's participation was for defending the legality or otherwise of its decisions, actions and omissions in order to ascertain the dutifulness and protect public interest in the issuance of sugar milling licenses but not to individually benefit as a corporate citizen. The taxing officer therefore erred in finding that instruction fee was determinable by

looking who stood to be affected if the petition had been been allowed.

11. The error is further demonstrated by the fact that despite determining that Schedule VI (1) (j) of the Advocates Remuneration (Amendment) Order 2014 was the applicable law in matters arising out of public law, the petitioner argues, the taxing officer went on to increase instruction fee to Kshs. 3,000,000. The petitioner relies on the decisions *Ratemo Oira & Co. Advocates v Magereza Sacco Society Ltd* [2019] eKLR; *Kagwimi Kang'ethe & Company Advocates O-Lerai Nurseries Limited* [2009] eKLR and *Republic v Minister for Agriculture & 2 others Ex-Parte Samuel Muchiri W'Njuguna & 6 others* [2006] eKLR.

12. The petitioner asserts, therefore, that the taxing officer erred in principle in making a finding that the documents filed in court and the time spent over the matter rendered the matter not an ordinary petition despite earlier determining in the same paragraph that the issues raised were not complex to warrant an award of instruction fees that had been sought. The increase of instruction fee was thus, unreasonable. Reliance is placed on *Rogan Kemper v Grosvenor* [1989] KLR.

13. regarding item 2, getting up fee, the petitioner submits that the item was taxed at Kshs. 1,000,000 being one-third of the instruction fees and should be prorated to whatever reduced instruction fee that may be awarded upon fresh taxation. The petitioner urges the court to allow the reference.

## *Response*

14. The reference is opposed through a replying affidavit. The 1<sup>st</sup> respondent argues that the application is incompetent and fatally defective because the jurisdiction of this court has not been duly properly invoked, hence the Court lacks jurisdiction to entertain it.

15. According to the 1<sup>st</sup> respondent, the application has been filed without first filing a valid notice of objection to taxation within 14 days as required by paragraph 11(1) of the Remuneration Order. The petitioner also failed to obtain reasons from the taxing officer as required by paragraph 11(2) of the Remuneration Order.

16. The 1<sup>st</sup> respondent asserts that the reference does not demonstrate error in principle on the part of the taxing officer when taxing the bill of costs. This court should therefore not interfere with that decision.

17. Regarding stay of execution pending determination of the reference, the 1<sup>st</sup> respondent argues that stay was not sought at the time of delivering the ruling. The 1<sup>st</sup> respondent maintains that it applied for the certificate of costs by letter dated 24<sup>th</sup> September 2024 and it was extracted on 26<sup>th</sup> September 2024. There was also no order prohibiting execution.

18. The 1<sup>st</sup> respondent argues that the petitioner has not met the threshold for granting stay of execution and that this court lacks jurisdiction to grant stay of

execution for costs under the Advocates Act, pending the hearing of a reference.

19. It is the 1<sup>st</sup> respondent's position, that this court cannot interfere with the decision of the taxing officer solely on grounds of quantum since it has not been shown that the decision was based on an error of principle, or that instruction fee allowed was manifestly excessive. The instruction fee allowed was arrived at after consideration of relevant factors, including the nature and public importance of the matter as well as the general conduct of the proceedings.

20. The 1<sup>st</sup> respondent argues that the taxing officer allowed costs that were 76% less than the amount initially sought as instruction fees. Further, that the

taxing office exercised her discretion in arriving at what was fair and just instruction fee in the circumstance.

21. The 1<sup>st</sup> respondent further argues that it was within the taxing officer's discretion to increase or reduce the amount of instruction fee. Any errors committed by the taxing officer as may be found, did not materially affect the costs allowed. This court is not therefore obliged to interfere with the taxing officer's decision merely because in its opinion, the amount awarded was high or low.

22. The 1<sup>st</sup> respondent submits that the nature of the pleadings and the prayers sought were not in public interest. If granted, they would have benefited the petitioner and prejudiced the respondents'

operations. The matter, did not therefore fall within the description of public interest litigation. The 1<sup>st</sup> respondent relies on the decisions in *Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani & 4 others* [2014] eKLR and *Okoiti & 2 others v Attorney General & 14 others* [2023] KESC 31(KLR).

23. The 1<sup>st</sup> respondent maintains that the taxing officer did not commit any error of principle when awarding instruction fee given the public importance of the subject matter in a constitutional petition. According to the 1<sup>st</sup> respondent, under Schedule 6 1 paragraph (j) of the Remuneration Order, 2014, the taxing officer is to consider the public importance and effect of the matter.

24. The 1<sup>st</sup> respondent urges the court to find that the amount allowed in items 1 and 2 was not excessive considering that the taxing officer adhered to the principles of law. The 1<sup>st</sup> respondent relies on the decisions in *Okiya Omtatah Okoiti v Attorney General & 3 others* [2014] eKLR and *Danson Mungatana v NSSF Board of Trustees & 3 others* [2018] eKLR for the position that there is no basis for interfering with the taxing officer's discretion.

25. The 1<sup>st</sup> respondent urges the court to also consider the decisions in *First American Bank of Kenya v Shah v Gulab P. Shah & 2 Others* [2002] eKLR and *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Others* [1972] E.A 162.

26. On re-taxation, the petitioner argues that this court cannot retax the Bill of costs. The matter can only be remitted to the taxing officer for fresh taxation. The 1<sup>st</sup> respondent urges the court to dismiss the reference with costs.

### *Determination*

27. I have considered the reference and the response thereto. The petitioner has challenged the decision of the taxing officer made on 24<sup>th</sup> September 2024 where the taxing officer allowed the party and party bill of costs at an all-inclusive amount of Kshs. 4, 181, 535. Item 1- instruction fee, was allowed at Kshs. 3,000,000 and item 2 at Kshs. 1,000,000, being one-third of the instruction fee allowed.

28. The petitioner being aggrieved with the taxing officer's decision on those two items, has now filed this reference to challenge the costs allowed in respect of those items. According to the petitioner, the taxing officer applied a wrong principle in assessing instruction fee and therefore fell into error. In the bill of costs, the 1<sup>st</sup> respondent had sought instruction fee of Kshs. 12,500,000, arguing that the matter was complex and deserving instruction fee of that amount. However, the taxing officer allowed instruction fee at Kshs. 3,000,000.

29. The petitioner argues that in allowing the instruction fee, the taxing officer took into account the nature of the pleadings contending that the matter was complex, an argument the petitioner maintains was incorrect and therefore amounted to applying a wrong principle.

30. The 1<sup>st</sup> respondent has maintained that the reference is misconceived and that the petitioner did not comply with the law in so far as it did not file a notice of objection to the taxation and seek reasons from the taxing officer.

31. To this argument, the petitioner argues that the reference was brought without unreasonable delay and in compliance with Paragraph 11(1) of the Remuneration Order. The taxing officer's decision was delivered on 24<sup>th</sup> September 2024, a notice of objection to taxation lodged on 4<sup>th</sup> October 2024 and the reference was filed on 7<sup>th</sup> October 2024.

32. The 1<sup>st</sup> respondent has not denied that a notice objecting to taxation was filed on time or that the reference itself was filed on time. Regarding reasons from the taxing officer, it is clear from the taxing

officer's decision that the decision contains reasons. This is clear from the heading of the ruling which reads "*RULING & REASONS FOR TAXATION*" In that case, it would be unnecessary to again write to the taxing officer seeking reasons that are already contained in the decision itself. Such a cause would in my respectful view, be a waste of judicial time for the taxing officer again to pen down reasons which are already contained in the decision. I find no merit in the 1<sup>st</sup> respondent's argument in this respect.

33. On the main issue, the principle underlying award of costs was well explained in *Manindra Chandra Nandi v Aswini Kumar Acharaya*\_ILR (1921) 48 Cal. 427, thus;

*We must remember that whatever the origin of costs might be, they are now awarded, not as a punishment of the defeated party but as a*

*recompense to the successful party for the expenses to which he had been subjected to, or as Lord Coke puts it, for whatever appears to the court to be the legal expenses incurred by the party in prosecuting the suit or his defence...The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him and to the defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently, the party to blame pays costs to the party without fault.*

(See also *Vinod Seth v Devinder Bajaj & another* - C. A. No. 481 of 2010).

34. As parties engage in court, they often instruct advocates to represent them and, therefore, incur costs towards the advocate's professional fees and other incidentals. The successful party is entitled to fair and adequate recompense in the costs incurred to prosecute or defend the suit. This is done through taxation of party and party bill of costs. Advocates Remuneration Orders fix the level of amount of party and party costs to be determined based on parameters such as the subject matter of the dispute or other factors and considerations.

35. Instruction fee is the amount a party pays to the advocate which is to be reimbursed through the taxation of the party and party bill of costs. It is for this reason, that the principle that costs recompense and indemnify a party for what "*appears to the court*

*to be the legal expenses incurred by the party in prosecuting the suit or his defence”* applies so that the successful party is fairly and adequately reimbursed.

36. Taxation of bill of costs is an exercise of discretion by the taxing officer. In this regard, the law is settled that this court will not interfere with the officer’s discretion unless the taxing officer has erred in principle. (*Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another* [1972] EA 162); *Rogan-Kemper v Lord Grosvenor* (No.3) [1977] KLR 303; [1977] eKLR: *Bank of Uganda v Banco Arabe Espaniol*, (Civil Application No. 29 of 2019).

37. In *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, it was observed:

*[T]he court will not interfere with the exercise of the taxing master's discretion unless it appears that such discretion has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue.*

*Instruction fee*

38. I have perused the impugned decision by the taxing officer dated 24<sup>th</sup> September 2024. The decision was in respect to party and party bill of

costs in which the 1<sup>st</sup> respondent sought instruction fee of Kshs. 12, 500,000. The taxing officer however, allowed instruction fee of Kshs. 300,000. In doing so, the taxing officer stated, where relevant:

*Schedule 6 1 (j) provides a minimum of Kshs. 100,000/= to present or oppose Constitutional Petition or Prerogative orders where the matter is opposed. The taxing master has discretion to increase or reduce the amount depending on Complexity  
Novel legal issues raised  
Importance of matter to parties  
Time taken to prepare /do research and dispense off the matter among others....*

39. The taxing officer made reference to relevant decisions on the issue and then stated:

*The issues raised to me were not complex to warrant an award of Kshs. 12,500,000/= under this head. The issues that this court will consider are the documents filed in court and the time spent dealing with the matter was not like that of an ordinary petition.*

*The matter was of great importance as it involved cancellation of a sugar manufacturing company which will have a ripple effect on the public and hence the matter touched on public interest.*

*Having considered these factors, the item is hereby taxed at Kshs. 3,000,000 under this head. Kshs. 9,500,000 is hereby taxed off from this item.*

40. The taxing officer stated, as a fact, that the issues raised in the petition were not complex to warrant

awarding instruction fee of Kshs. 12,500,000 that had been sought. in the circumstances and according to the taxing officer, the issues that she was to consider were the documents filed in court and the time spent in dealing with the matter which made the petition “...not like that of an ordinary petition.”

41. The taxing office took the view, that the matter was of great importance as it involved cancellation of a sugar manufacturing company which would have a ripple effect on the public and therefore the matter touched on public interest. In other words, the basis for allowing instruction fee of Kshs. 3,000,000 was because the matter was not only of great public interest but also the documents filed, which the petitioner has criticised as a wrong

principle in the circumstances of this case since this was an ordinary constitutional petition where Schedule VI (1) Paragraph (j) of the Remuneration Order 2014 provides for a minimum of Kshs. 100,000 for presenting or opposing a constitutional petition or prerogative orders.

42. The decision in *Joreth Ltd v Kigano & Associates Advocates* [2002] KECA 153 (KLR) laid down the principle that the taxing officer should determine the value of the subject matter of a suit for the purposes of taxation of a bill of costs from the pleadings, judgment or settlement where possible and if it is not so ascertainable, the taxing officer is entitled to use discretion to assess such instruction fee as he/she considers just.

43. In doing so, the taxing officer should take into account factors such as “*the nature and 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.*”

44. In *Peter Muthoka & another v Ochieng & 3 others*, [2019] KECA 597 (KLR), the Court of Appeal stated that it is only where the value of the subject is neither discernible nor determinable from the pleadings, judgment or the settlement as the case may be, that the taxing officer is permitted to use his/her discretion to assess instruction fee.

45. In both *Joreth v Kigano & Associates* (supra) and *Peter Muthoka v Ochieng & 3 others* (supra), the position laid down is that the taxing officer resorts to

use of discretion only where the value of the subject matter of a suit which is the basis of taxation of the bill of costs is not discernible from the pleadings, judgment or settlement. The taxing officer has then to assess instruction fee by considering, 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.

46. In this reference, the petitioner has argued that the taxing officer fell into error when she stated that the matter was of great public interest as the basis for arriving at the amount allowed on instruction fee. The 1<sup>st</sup> respondent on its part maintains that the taxing officer was right and did not commit any error of principle.

47. I have considered the arguments by both sides on this issue. The law allows the taxing officer to exercise discretion in determining instruction fee where the value of the subject matter cannot be ascertained from either the pleadings, judgment or settlement by applying the parameters the Court of Appeal identified. these include *“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.”*

48. As already alluded to, instruction fee is the amount the successful party paid or was deemed to have paid as remuneration to his/her advocate for professional services rendered and which the losing party is to reimburse.

49. In her decision, the taxing officer found that the issues raised in the petition were not complex and, therefore, she had to consider the documents filed in court and the time spent in dealing with the matter which was not like that of an ordinary petition. Further, that the matter was of great importance because it involved cancellation of a sugar manufacturing company (sic) which would have a ripple effect on the public making the matter one touching public interest.

50. Although the taxing officer did not state in her decision, which documents were filed, or the time spent in dealing with the matter that made it different from ordinary constitutional petitions, she acknowledged that the matter was of great importance because it involved cancellation of a

sugar manufacturing company which would have a ripple effect on the public.

51. I have perused the petition and the reliefs that were sought. The petition challenged actions by the respondents and more so, the 4<sup>th</sup> respondent, that the petitioner felt were in violation of the Constitution and the law. The petitioner also felt the actions were discriminatory in issuing the sugar milling licence to the 4<sup>th</sup> respondent terming it unlawful exercise of power. Upon hearing the petition, the court found no merit and dismissed it with costs, setting the stage for taxation of the party and party bill of costs leading to this reference.

52. Given the facts in the petition and this reference, the decisions on taxation and the matters considered by the taxing officer, as well as the fact

that the Remuneration Order 2014 grants the taxing officer discretion to increase the amount of instruction fee from the minimum of Kshs. 100, 000 a discretion the taxing officer dully exercised, I see no reason to interfere with that discretion.

53. In short, and for avoidance of doubt, I am unable to find fault in the taxing officer's decision with regard to instruction fee which, in my view, was well within the taxing officer's discretion. The petitioner has not shown that the instruction fee allowed was manifestly excessive or that the taxing officer applied a wrong principle, to call on this court to interfere with that discretion.

54. It is worth emphasising that this court will only interfere where it is demonstrated that the taxing officer was clearly wrong in arriving at the amount

allowed on instruction fee which has not been shown to have been the case here.

*Getting up fee*

55. The petitioner's other grievance was on item 2, getting up fee. The petitioner argues that the taxing officer's error on instruction fee affected the amount allowed with regard to getting up fee. Getting up fee is one-third of the instruction fee allowed. The taxing officer having allowed instruction fee of Kshs. 3,000,000, getting up fee being one third of instruction fee was allowed at Kshs. 1000,000.

56. Having found that the taxing officer did not err on the instruction fee allowed, the challenge on getting up fee becomes moot, in the circumstances. I therefore find no fault on the part of the taxing officer with respect to getting up fee.

57. Consequently, having considered the reference, the response and arguments made on behalf of the parties, the conclusion I come to, is that the reference has no merit. It is declined and dismissed. Each party will bear own costs of the Reference.

**Dated and signed at Nairobi this 4<sup>th</sup> Day of February 2026**

**E C MWITA  
JUDGE**

**Delivered and countersigned this 5<sup>th</sup> Day of February 2026**

**LN MUGAMBI  
JUDGE**