

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 149 OF 2011**  
**CONSOLIDATED WITH PETITION NO. 207 OF 2011**  
**PARTY AND PARTY BILL OF COST**

(Dated 30<sup>th</sup> April 2020 consolidated and taxed together with Party  
and Party Bill of costs dated 20<sup>th</sup> July 2020)

**MARTIN WANDERI**  
**JOEL RUTTO SUTER**  
**MARK KAMAU**  
**MICHEAL OUTA**  
**SAMUEL MUKABI**  
**MAUREEN AKINYI**  
**JOHN MWENDA**  
**FRED WEKESA**  
**DAVID OWINO**  
**MERCY WANGALIA**  
**DENIS OSEWE**  
**BRIAN MABATUK & OTHERS.....**  
**APPLICANTS**

**VERSUS**

**KENYA ENGINEERS REGISTRATION  
BOARD.....RESPONDENTS**

**ARISING FROM  
REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
PETITION NO 149 OF 2011**

**JESSE WAWERU WAHOME  
GEOFFREY NANGILLAH MAKANGA  
MAURICE OTIENO OLOO.....  
PETITIONERS**

(All suing for and on behalf of themselves and on behalf of the  
following persons)

**ALFRED KIPKOECH KIBET  
RICHARD GITURO GICHAGA  
PATRICK KARANJA MBUGUA  
MUSTAFA ALI AHMED  
JOSEPHINE WANJIKU MBUGU  
ALBERT KIPKORIR CHIMJOR  
ABRAHAM KIPKORIR LAGAT  
ROBERT K. CHERUIYOT  
GILBERT KIMUTAI RONO  
BERNARD OCHIENG OSUNGU  
SAMUEL WEKESA WEKULO  
PATRICK GICHOHI WAITHANJI**

**RAYMOND OTIENO OREDA**  
**JAMES MBUGUA MBURU**  
**PHILIP KIOKO NZIOKI**  
**DICKSON GICONI KIVINDU**  
**ALEXANDER MUTHAMI MULEKYA**  
**JOHN RONOH KIBET**  
**JANET ABISI SIMION**  
**ROBERT MAINA KARIUKI**  
**FREDRICK KAYASI MURIUKI**  
**FLORENCE WAMBUI MUNGAI**  
**HENRY NDEGWA NJUGUNA**  
**FRANCIS WAINAINA NJOROGE**  
**MICHAEL STANLEY LADO**  
**PETER ODHIAMBOUKO**  
**MARK EKERU ACHILLA**  
**ANDREW WANJOHI KAGENYA**  
**JAMES GATHURU KIHU**  
**TIMOTHY MWENDA BAARIU**  
**JUMA NATHANIEL**  
**BERNARD OCHIENG MBEDA**  
**SIMON MBUGUA**  
**CHOKERA JOSHUA MURIITHI**  
**EDWIN KIPROTICH NG'ETICH**  
**OSCAR ROBERT MATANO**  
**PATRICK MATHENGE GITHINJI**

**NGIGI NJOROGE DUNCAN  
WARUI MICHAEL MWANGI  
LICHORO CHARLES MUTURIA**

**AND**

**KENYA ENGINEERS REGISTRATION BOARD.....1<sup>ST</sup>  
RESPONDENT**

**EGERTON UNIVERSITY.....2<sup>ND</sup>  
RESPONDENT**

**MINISTRY OF HIGHER EDUCATION SCIENCE AND  
TECHNOLOGY.....3<sup>RD</sup>  
RESPONDENT**

**COMMISSION FOR HIGHER EDUCATION.....4<sup>TH</sup>  
RESPONDENT**

**CONSOLIDATED WITH PETITION NO. 207 OF 2011**

**BETWEEN**

**MARTIN WANDERI.....1<sup>ST</sup>  
PETITIONER**

**SUTTER JOEL.....2<sup>ND</sup>  
PETITIONER**

**MARK KAMAU .....3<sup>RD</sup>  
PETITIONER**

**MICHAEL OUTA.....4<sup>TH</sup>  
PETITIONER**

**SAMUEL MUKABI.....5<sup>TH</sup>  
PETITIONER**

**MAUREEN AKINYI.....6<sup>TH</sup>  
PETITIONER**

**JOHN MWENDA.....7<sup>TH</sup>**  
**PETITIONER**

**FRED WEKESA.....8<sup>TH</sup>**  
**PETITIONER**

**DAVID OWINO.....9<sup>TH</sup>**  
**PETITIONER**

**MERCY WANG'ALIA.....10<sup>TH</sup>**  
**PETITIONER**

**DENIS OSEWE.....11<sup>TH</sup>**  
**PETITIONER**

**BRIAN MABAKUK.....12<sup>TH</sup>**  
**PETITIONER**

**AND**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND  
TECHNOLOGY.....1<sup>ST</sup>**  
**RESPONDENT**

**MOI UNIVERSITY.....2<sup>ND</sup>**  
**RESPONDENT**

**THE ENGINEERS REGISTRATION**

**BOARD OF KENYA.....3<sup>RD</sup>**  
**RESPONDENT**

**THE PERMANENT SECRETARY MINISTRY OF HIGHER  
EDUCTAION SCIENCE AND  
TECHNOLOGY.....4<sup>TH</sup> RESPONDENT**

**THE COMMISSION FOR HIGHER EDUCATION.....5<sup>TH</sup>**  
**RESPONDENT**

(Being a Reference from Ruling on Taxation of Party and  
Party Bill of Costs by the Hon. Njeri Thuku dated 23<sup>rd</sup> March  
2021)

## **RULING**

### *Background*

1. Two petitions were filed in this court by students of Egerton University and Masinde Muliro University of Science and Technology being petition Nos. 149 of 2011 and 207 of 2011 respectively. The two petitions were subsequently consolidated because they were grounded on similar facts and raised similar issues of law and heard together.
2. On 15<sup>th</sup> October 2012, this court (Majanja, J) delivered a judgment in favour of the petitioners. Aggrieved the Engineers Boards of Kenya appealed against that decision vide Civil Appeal No. 240 of 2013. In a judgment delivered on 12<sup>th</sup> June 2015, the Court of

Appeal allowed the appeal and set aside this Court's judgment.

3. The petitioners lodged appeals to the Supreme Court, being Petition of Appeal Nos. 19 of 2015 and 4 of 2016 which were also consolidated. In a judgment delivered on 17<sup>th</sup> July 2018, the Supreme Court allowed the consolidated appeals, set aside the judgment of the Court of Appeal, affirming the judgment of this Court.
4. Two party and party bills of costs dated 30<sup>th</sup> April 2020 and 20<sup>th</sup> July 2020 were then filed for taxation through the firms of Katwa & Kemboy Advocates and Murimi Murango & Associates Advocates. They sought instruction fee of Kshs. 30,000,000 and Kshs. 8,000,000 and a cumulative sum of Kshs. 34,722,670.88 and Kshs. 13,735,443, respectively.

5. The party and party bills of costs were taxed and on 23<sup>rd</sup> March 2021, the taxing officer (Hon. Njeri Thuku) allowed the two bills of costs at Kshs. 582, 530 and Kshs. 782, 247, respectively. She awarded Instruction fee of Kshs. 300,000 and getting up fee of Kshs. 100,000 in each. The petitioners were aggrieved and filed this reference dated 29<sup>th</sup> April 2021.

#### *The Reference*

6. The reference brought under rule 11(1), (2) and (4) of the Advocates (Remuneration) Order, seeks to set aside the taxing officer's decision dated 23<sup>rd</sup> March 2021; an order that the Bill of costs dated 30<sup>th</sup> April 2020 be taxed and allowed at Kshs. 34,722, 670.88 and the party and party bill of costs dated 20<sup>th</sup> July 2020 be taxed at 13, 735, 443 or at such amounts as the court may deem fair and reasonable. In the

alternative, the bills of costs be referred to the taxing officer for fresh taxation with specific consideration on instruction fee, getting up fee, drawings, attendances and perusals.

7. The reference is based on the grounds that the taxing officer undervalued work, effort and enterprise put into the cases; taxed off the requested amount at less than 1% for especially instruction and getting up fees without assigning reasoning; failed to consider taxation done at the Supreme Court where the bill of costs was taxed at Kshs. 5,075,190 with instructions taxed at Kshs. 4,500,000. The taxing officer had failed to consider the orders made in the petitioners' favour, including damages compensation of over Kshs. 40,000,000 made.

8. The petitioners asserted that the taxing officer erred in failing to make reasoned analysis of what informed the amount allowed; favoring the respondents proposed tax offs and awarding petitioners minimal instructions, getting up fees and attendance fees by treating the petitions as public law claims brought for the public.
9. The petitioners blamed the taxing officer for misdirecting herself on the principles applicable and wrongly exercised discretion. According to the petitioners, the taxing officer erred in taxing off the bill of costs dated 30<sup>th</sup> April 2020 at Kshs. 582, 530 instead of Kshs. 34, 722, 670 and the bill of costs dated 20<sup>th</sup> July 2020 at Kshs. 782, 247 instead of Kshs. 13, 735,443.

### *Response*

10. The respondents opposed the reference through replying affidavit sworn by Eng. Margaret Ogai. The respondents asserted through Eng. Ogai that the costs awarded were reasonable and the taxing officer exercised her discretion properly. The respondents contended that the orders sought if granted would be outrageous, unfair and unjust.

*Petitioners' submissions*

11. The petitioners argued that the taxing officer allowed instruction and getting up fee that were manifestly law to amount to an unreasonable award. According to the petitioners, the complexity, scope and importance of the matter warranted much higher instruction and getting up fees than what was allowed. The petitioners maintained that the taxing officer

failed to give a detailed reasons on how she arrived at the amount allowed which favoured the respondents. The taxing officer erred in treating their case as a public law cause brought in the public interest.

12. It is the petitioners' case that the taxing officer failed to recognize that the High Court, Court of Appeal and the Supreme Court arrived at different decisions on the matter and that the Supreme Court awarded Kshs. 4,500,000 as instruction fees in a related matter.

13. The petitioners maintained that the taxing officer erred in principle and provisions under the Advocates (Remuneration) Order, 2006, failed to apply the principle of reasonableness in assessing costs and in the exercise of discretion resulting in inadequate compensation for work done.

14. The petitioners relied on the decision in *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR for the proposition that a taxing officer whenever exercising discretion must do so judiciously, but this was not the case in the circumstances of this case. The petitioners further cited the decision in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] KECA 325 (KLR) for the contention that had the taxing officer considered relevant factors in that authority, she would not have awarded Kshs. 300,000 on instruction fee.

15. The petitioners argued that their case was not a simple one. Reduction of their earning would have subjected them to mental, emotional and psychological distress. The responsibility entrusted upon their counsel to successfully prosecute the petitions was

enormous. Counsel had to peruse numerous documents in detail so as to identify the grounds upon which the petition was to be premised and their counsel had to abandon other engagements to attend to the case.

16. The petitioners went on to argue that the petitions required thorough preparation and extensive legal research on relevant statutory provisions and legal precedents to support the arguments made in court, which was time consuming. Further, the respondents submitted numerous legal authorities, all of which had to be carefully reviewed by counsel. The award of Kshs. 300,000 as instructions fees was therefore unreasonably low.

17. The petitioners argued that instruction fees of Kshs. 20,000,000 and Kshs. 8,000,000 were commensurate to the extensive work involved and urged the court to assess the appropriate fees due to them. They relied on among others, the decisions in *Eastland Hotel Limited v Wafula Simiyu & Co. Advocates* [2014] eKLR; *Moronge & Company Advocates v Kenya Airports Authority* [2014] eKLR on when a court can interfere with a taxing officer's decision.

18. The petitioners again relied on the decision in *Joreth Ltd v Kigano & Associates* [2002] 1 E.A 92 and *Peter Muthoka & another v Ochieng & 3 others* (supra) that the taxing officer ought to have been guided by the numerous deeds of assignment on record that

ascertained the value of the subject matter at Kshs. 30,000,000 and Kshs. 8,000,000, respectively.

19. The petitioners maintained that the amount the taxing officer allowed was manifestly low as to justify interference by this court and that it is in the interest of justice that the reference be allowed. The petitioners relied on the decision in *Green Hills Investments Ltd v China National Complete Plant Export Corporation* (Complaint) T/A Covec [2004] KEHC 2607 (KLR). They argued that awarding Kshs. 582, 530 and Kshs. 782, 247 denies them their rightful compensation.

20. The petitioners further relied on the decisions in *Rose Wangui Mambo & 2 others v Limuru Country Club & 15 others*; *Federation of Women Lawyers (Fida) &*

*another (Interested parties) [2020] eKLR and Republic v Minister of Agriculture & 2 others Ex-parte Samuel Muchiri W Njuguna & 6 others [2006] eKLR for the position that they factored in the complexity and urgency of the matter and the taxing officer does not have to allow the minimum fee prescribed in the Advocates Renumeration Order.*

21. They urged that the Bills of costs dated 30<sup>th</sup> April 2020 and 20<sup>th</sup> July 2020 be allowed as drawn.

#### *Respondents' submissions*

22. The respondents submitted that the reference is fatally defective because it was filed out of time without leave of court. The allegation that the delay was caused by Covid 19 has no basis because court proceedings and filing of documents were being done

online. They relied on Rule 11 of the Advocates Remuneration Order and the decision in *Ahmed Nassir v National Bank of Kenya Ltd* [2006] EA.

23. The respondents maintained that the taxing officer's decision was correct and was made in accordance with Schedule 6 (1) (j) (ii) of the Advocates Remuneration Order, 2006. They relied on the decisions in *Kipkorir, Titoo & Kiara Advocates v Deposit Projection Fund Board* (supra); *First American Bank of Kenya v Shah and 2 Others* [2002] KEHC 1277 (KLR); *Mwakio, Kirwa & Company Advocates v County Public Service Board Bome & another* [2022] eKLR and *Republic v Ministry of Agriculture & 20 others Exparte Muchiri W. Njuguna* (supra).

24. The respondents argued that the bills of costs dated 30<sup>th</sup> April 2020 and 20<sup>th</sup> July 2020 were fairly and reasonably taxed in compliance with the law. They relied on the decisions in *Joreth Ltd v Kigano & Associates* (supra); *Kenyariri Associates Advocates v Salama Beach Hotel Limited & 2 others* [2015] eKLR that instruction fee of Kshs. 300,000 was reasonable and adequate.

25. Regarding getting up fee, the respondents referred to paragraph 2 of Schedule 6 of the Advocates Remuneration Order, 2006 to argue that the amount awarded was in tandem with the provisions of Schedule 6 (1) (j) (ii) of the Advocates Remuneration Order and should not be disturbed. They maintained that the taxing officer was guided by paragraph 7(d) of

Schedule 6 of the Advocates (Remuneration) Order in awarding court attendance fees.

26. On disbursements, the respondents submitted that the petitioners did not produce evidence in form of receipts or vouchers as required by the Advocates Remuneration Order, hence the claims were disallowed. They urged the court to dismiss the reference

### *Determination*

23. I have considered the reference and the responses thereto. The reference has challenged the decision of the taxing officer made on 23<sup>rd</sup> March 2021 on the petitioners' party and party bills of costs. The taxing officer allowed the two bills of costs at Kshs. 582, 530 and Kshs. 782, 247, respectively, awarded instruction

fee of Kshs. 300,000 and getting up fee of Kshs. 100,000.

24. The petitioners have challenged the amount allowed as instruction fee, getting up fee, costs on drawings, attendances and perusals. They have sought to set aside the taxing officer's decision; an order that the party and party bills of costs dated 30<sup>th</sup> April 2020 and 20<sup>th</sup> July 2020 be taxed and allowed at Kshs. 34,722, 670.88 and 13, 735, 443 respectively, or at such amount as the court may deem fair and reasonable. In the alternative, they urge that the bills of costs be referred to the taxing officer for fresh taxation with special attention on instruction fee, getting up fee, drawings, attendances and perusals.

25. The petitioners have argued that the taxing officer erred in principle and wrongly applied her discretion

when taxing the bill of costs dated 30<sup>th</sup> April 2020 and allowed them at Kshs. 582, 530 instead of Kshs. 34, 722, 670 and the bill of costs dated 20<sup>th</sup> July 2020 at Kshs. 782, 247 instead of Kshs. 13, 735,443. They have blamed the taxing officer for failing to consider the fact that at the Supreme Court, the bill of costs was taxed at Kshs. 5,075,190 with instructions fee allowed at Kshs. 4,500,000.

26. The respondents have supported the decision of the taxing officer, arguing that she did not err in principle and the amount allowed was reasonable compensation.

27. The principle underlying award of costs was well stated in *Manindra Chandra Nandi v Aswini Kumar Acharaya* ILR (1921) 48 Cal. 427, as follows:

*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).

28. In most litigations, parties often engage advocates to represent them and, as a result, they incur costs towards the advocate's professional fees and other incidentals. The successful party is entitled to fair and adequate compensation in the costs incurred in prosecuting or defending the suit. This is done through taxation of party and party bill of costs. Advocates Remuneration Orders fix the level of the amount to be allowed as party and party costs which is to be determined based on certain parameters such as the value of the subject matter of the dispute or other factors and considerations.

29. In that respect, instruction fee is the amount a party pays or is deemed to have paid to the advocate

which is to be reimbursed by the losing party through 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. Costs are not intended to punish the losing party.

30. Taxation of a 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 taxing 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).

31. In *Rogan-Kemper v Lord Grosvenor* (No.3) [1977]

KLR 303; [1977] eKLR, Law JA, stated:

*[A] judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless, in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate.*

32. Law JA went on to adopt what Buckley L J had to say on the subject in *In the Estate of Ogilvie, Ogilvie v Massey* [1910] P 243, 245, that:

*In questions of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the Court will not interfere unless the taxing master is shown to have gone wholly wrong.*

(See also *Bank of Uganda v Banco Arabe Espaniol*, (Civil Application No. 29 of 2019).

33. In *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, the same position was reiterated thus:

*[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.*

The above principles of law apply when the court is called upon to interfere with the decision officer.

*Instruction fee*

34. In this reference, the first grievance is on instruction fee. The petitioners have criticized the taxing officer over the amount allowed as instruction fee. The two bills of costs were filed by two different law firms. One bill of costs was filed by Katwa & Kemboy Advocates and sought instruction fee of Kshs. 30,000,000. The other bill of costs was filed by Murimi Murango & Associates Advocates and sought instruction fee of Kshs. 8,000,00. The taxing officer considered the bills of costs together since the issues raised in the consolidated petitions were similar and so were the arguments in the bills of costs. Applying Schedule 6 Paragraph 1 (j) of the Advocates

Remuneration (Amendment) Order, 2006, the Taxing Officer allowed instruction fee of Kshs. 300,000 in respect of both bills of costs. In doing so, the Taxing officer observed that the sum of Kshs, 30,000,000 and 8,000,000 sought in the respective bills of costs as instruction fee were not in line with Schedule 6 Paragraph 1 (j) of the Advocates Remuneration (Amendment) Order, 2006. This is the amount the petitioners have criticized as manifestly low.

35. The consolidated petitions were filed in 2011 and therefore the applicable Order was the Advocates Remuneration (Amendment) Order, 2006. Schedule 6 paragraph 1 (j) of that Order is on Prerogative orders. It provides that to present or oppose an application for a Prerogative order the amount allowable is such sum as may be reasonable but not less than Kshs. 28,000.

36. I have considered the impugned decision by the taxing officer. The decision being in respect to party and party bill of costs, it was governed by Schedule 6 Paragraph 1 (j) of the Advocates Remuneration (Amendment) Order, 2006 which provides for minimum instruction fee of Kshs. 28,000, leaving the maximum amount at the discretion of the taxing officer.

37. After making reference to relevant binding decisions, the Taxing Officer exercising her discretion and proceeded to allow instruction fee of Kshs. 300,000, which the petitioners have criticized and argued that she applied a wrong principle and discretion. On the other hand, the respondents supported the decision, contending that the amount allowed was in consonance with Schedule 6 Paragraph

1 (j) of the Advocates Remuneration (Amendment) Order, 2006.

38. The decision in *Joreth Ltd v Kigano & Associates Advocates* [2002] KECA 153 (KLR) laid down the principles the taxing officer should use in determining instruction fee, namely: the value of the subject matter 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.

39. 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.

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

41. In both *Joreth v Kigano & Associates* (supra) and *Peter Muthoka v Ochieng & 3 others* (supra), the taxing officer resorts to use of discretion where the value of the subject matter of the suit, 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.

42. In this reference, although the petitioners argued that the taxing officer fell into error by allowing instruction fee of Kshs. 300,000, they did not point out the precise error of principle the taxing officer committed.

43. The law allows the taxing officer to exercise some level of 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 in the *Joreth Case*.

44. As already adverted 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 which is reimbursed by the losing party. The amount should be reasonable and not a punishment to the losing party.

45. In her decision, the taxing officer appreciated that the applicable remuneration order allowed a minimum of Kshs. 28,000. The Taxing Officer allowed instruction fee of Kshs. 3,00,000, pointing out that the amount of Kshs, 30,000,000 and 8,000,000 claimed as instruction fee were way above what the applicable Advocates Remuneration Order allowed.

46. The taxing officer had before her pleading filed in this court in form of constitutional petitions. The petitioners did not argue that the value of the subject matter was discernible from those pleadings or the judgment to take the issue of instruction fee outside

Schedule 6 Paragraph 1 (j) of the Advocates Remuneration (Amendment) Order, 2006. The petitioners did not also show that the matter did not fall under the public law realm and therefore that subject to Schedule 6 Paragraph 1 (j) of the Advocates Remuneration (Amendment) Order, 2006 did not apply.

47. The petitioners also argued that the Taxing officer was in error in allowing instruction fee of Kshs 300,000 because instruction fee allowed at the Supreme Court were higher. The short answer to this argument is that the Supreme Court is different from this court and uses a different method if not Remuneration Order and, therefore, the amount allowed as instruction fee does not have to be the same as that assessed by the taxing officer of this court.

48. For my part, I am not persuaded that the amount allowed as instruction fee was so manifestly low to amount to wrong exercise of discretion calling for interference by this court. As Law JA observed, “*a judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless, in the judge’s view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate.*” (*Rogan-Kemper v Lord Grosvenor (No.3)* (supra).

49. Similarly, when it comes to questions of quantum, the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed. The Court should not interfere unless the taxing master is shown to have gone wholly wrong. (*See In the Estate of Ogilvie, Ogilvie v Massey*) (supra).

50. In the circumstances of this reference, the petitioners were unable to show that the taxing officer erred to an extent that would call on this court to interfere with exercise of that discretion given that the taxing officer increased instruction fee from the minimum of Kshs. 28,000 to Kshs. 300,000 an increase of more than 1,000%. I find no fault on the part of the Taxing Officer with regard to the amount allowed as instruction fee.

*Getting up fee*

51. The petitioners again took issue with item 2, getting up fee. The petitioners argues that the Taxing Officer's error on instruction fee affected the amount allowed as getting up fee. Getting up fee is one-third of the instruction fee allowed. The taxing officer having allowed instruction fee of Kshs. 300,000, getting up

fee being one third of instruction fee was allowed at Kshs. 100,000.

52. Having found that the taxing officer did not err with regard to instruction fee, the challenge on getting up fee is not well founded. I therefore find no fault on the part of the taxing officer with respect to getting up fee.

*Drawings, Attendances and Perusals*

53. The petitioners again took issue with costs allowed on drawings, attendances and perusals, urging this court to allow them as drawn in the bills of costs. Costs on drawings, attendances and perusals are matters of fact and costs are allowed depending on the services rendered in that regard.

54. I have perused the Taxing Officer's decision on these items. The Taxing Officer observed at paragraph 14 of her decision:

*The contentious issues are the court attendances which I have taxed as provided for in the Advocates Remuneration Order, 2006...I have allowed the disbursements in both Bills but disallowed VAT in both Bills.*

The Taxing Officer explained why she had disallowed the claim for VAT.

55. A further perusal of the decision shows that the items that were disallowed were so disallowed for lack of proof. This fact is clear when one looks at paragraph 21 with regard to the bill of costs dated 30<sup>th</sup> April 2020 and paragraph 23 with regard to the bill of costs dated 20<sup>th</sup> July 2020. The petitioners did not show that the

taxing officer was wrong and that there were supporting documents that were ignored.

### *Conclusion*

56. Having considered the reference, the responses, arguments made on behalf of the parties and perusing the decision of the Taxing Officer, the conclusion I come to, is that the taxing officer did not err in the amount allowed on instruction fee and getting up fee. There was also no evidence that the taxing officer erred with regard to items on drawings, attendances and perusals.

57. Consequently, and for the above reasons, the reference has no merit. It is declined and dismissed.

Each party will, however, bear their 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**

**L N MUGAMBI  
JUDGE**