

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E061 OF 2023

TV AFRICA-KENYA HOLDING LTD.....
APPLICANT

-VERSUS-

COMMUNICATIONS AUTHORITY OF KENYA..... RESPONDENT

RULING

1. For determination is the chamber summons dated **01/07/2025** filed by **TV Africa-Kenya Ltd** (*hereafter the Applicant*) as against **Communications Authority of Kenya** (*hereafter the Respondent*) brought pursuant to **Paragraph 11 (2)** of the **Advocates Remuneration Order (ARO)** seeking orders: -
 - a) *Spent.*
 - b) *Spent*
 - c) *Spent*
 - d) *That the Honourable Court be pleased to review, vary and or set aside the ruling and order of the taxing master delivered on 24/06/2025 in respect of the Respondent's Party and Party Bill of Costs dated 03/05/2024 and that the bill of costs be taxed on merit.*
 - e) *That in the alternative the Honourable Court be pleased to refer the matter back for re-taxation by a different Taxing Master of the Bill of Costs and with proper directions thereof*
2. The motion is premised on grounds found at the supporting affidavit sworn by Ken Ngaruiya on even date, who cites being

the Chief Executive Officer of the Applicant thus competent and duly authorized to depose.

3. The gist of the deposition is that the sum of Kshs. 1,049,930/- awarded as costs for defending a notice of motion application and prosecution of a preliminary objection is excessive, unjust and unfair and lacks any statutory or legal justification to support such an award. That the Taxing Officer erred in her ruling when she failed to provide any justification for departing from **Schedule 6A Part (c)(viii)** of the **ARO** thus erred when she awarded Kshs. 1,000,000/- as instruction fess in respect of a motion and a Preliminary Objection.
4. He goes on to depose that the Taxing Officer erred in holding that the motion and preliminary objection disposed of the suit whereas the same was voluntarily withdrawn. That the Taxing Officer having presumed that the suit was heard and determined to conclusion misapplied the applicable principles of taxation in taxing the bill as awarded. He states that whereas the proceedings were not certified as complex, the Taxing Officer had no justification for awarding such exorbitant instruction fees. That the Taxing Officer further failed to consider the other challenges in the bill of costs, to wit, in the interest of justice, the instant reference ought to be allowed as prayed.
5. **The Respondent opposes the application** by way of a replying affidavit deposed by **Samwel Rambo dated 31/07/2025**, who cites being a Deputy Director litigation services with the Respondent duly authorized and competent to depose the affidavit. The kernel of his response is that in taxing the Respondent's bill of costs, the Taxing Officer exercised her

discretion and was well guided by **Schedule 6A Part (c)(viii)** of the **ARO** therefore this Court ought not to upset the award merely because it could have awarded a higher or lower amount. In conclusion he states that the Applicant has not laid out any sufficient basis on which this Court should interfere with the Taxing Officer's award, to wit, the instant reference ought to be dismissed with costs to the Respondent.

6. In rejoinder by way of a supplementary affidavit dated 02/08/2025 Ken Ngaruiya iterates that the Taxing Officer erroneously proceeded to tax the Respondent's bill of costs on the presumption that the suit was heard and determined before this Court, yet the same was withdrawn, and at the Communication and Multimedia Tribunal, and thereafter compromised before the said Tribunal.
7. Directions were taken on disposal of the chamber summons by way of written submissions, only the Applicant complied. That said, the Court has considered the rival affidavit material and postulates that the issues for determination concern:
 - a) *Whether the Applicant's reference is merited?*
 - b) *Who ought to bear the costs of the application?*
8. Before addressing the above coined issues, I believe it prudent to set out a brief history of the matter, as equally set out in the rival affidavit material by the parties hereto in order to contextualize the nature of the dispute presently for consideration.
9. As rightly noted by the respective parties, the instant proceedings before this Court were commenced by the Applicant when it filed the instant suit alongside motion dated

30/03/2023 under urgency seeking inter alia injunctive reliefs as against the Respondent. The motion was opposed by way of a preliminary objection filed by the Respondent dated 24/04/2023 essentially challenging this Court's jurisdiction to entertain the proceedings on the premise of the Doctrine of Exhaustion.

10. Vide a ruling rendered on 21/12/2023, Ongeri, J. upheld the Respondent's preliminary objection, to wit, she proceeded to strike out the Applicant's motion dated 30/03/2023 with costs, for being premature. She further directed that the Applicant equally bears the costs of the preliminary objection dated 24/04/2023.

11. It is on the backdrop of the latter ruling that the Applicant proceeded to file a Notice of Withdrawal of Suit and upon the same coming up for direction before this Court, Ongeri, J. issued a brief ruling dated 25/04/2024, ordering as follows-;

"1. Upon perusing the notice of withdrawal dated 18/4/2014, the suit be and is hereby marked as withdrawn.

2. The Plaintiff to pay costs of the preliminary objection and the application dated 30/3/2023.

3. The costs of the suit to abide by the outcome of the tribunal since the matter is still alive.

4. The file is marked as close."

12. On the backdrop of the latter ruling, the Respondent filed a Party and Party bill of costs dated 03/05/2024, which was eventually taxed in the sum Kshs. 2,053,169/- on 18/11/2024 by Hon. Wambo. Aggrieved with taxed costs, the Applicant lodged a chamber summons reference seeking inter alia to review, vary and or set aside the latter ruling and have the bill

taxed on merit or in the alternative have the bill re-taxed by a different taxing officer.

- 13.** By way of a ruling delivered on 29/04/2025, Mutuku, J. found merit to the Applicant's reference and allowed the same as prayed where after she ordered that the Respondent's bill of costs dated 03/05/2024 be taxed afresh on merit before a different taxing officer. I find it useful at this juncture to quote in part facets of the above ruling for the benefit of the Court and parties herein-;

“Further, on 25th. April 2024, Justice Ongeru considered the Applicant's Notice of Withdrawal of the suit and delivered a brief ruling allowing the Applicant to withdraw the suit and reiterated that the Applicant was to pay the Respondent the costs of the Preliminary Objection and the Notice of Motion dated 30th March 2023. The Judge stated that the costs of the suit to abide by the outcome of the Tribunal since the matter was still active.

The above facts clearly show that the Party and Party Bill of Costs was in respect of the Preliminary Objection and the Notice of Motion and not the main suit. The record is clear that the Court did not award costs for the main suit and therefore taxed Bill of Costs cannot have been in respect of the main suit

This court is not privy to the status of the matter before the Tribunal. Be that as it may, there is no doubt that the taxed bill of costs was not for the main suit but the Preliminary Objection and the Notice of Motion as pronounced by the Court (Hon. Lady Justice Ongeru, J).

Guided by the principle that this court should not interfere with the decision of the taxing officer unless there is an error of principle, and having considered the issues raised in this application, it is my considered view that the taxed bill is excessive for basing the taxation on the value of the subject matter of the main suit instead of basing it on the Notice of Motion Application and the Preliminary Objection I find the Chamber Summons dated 29th November 2024 merited and hereby allow it by granting prayers 4 and 5. The Ruling of the Taxing Officer delivered on 18th November 2024 in respect of the Respondent's Party and Party Bill of Costs, including consequential orders, is hereby set aside. The said Bill of Costs shall be taxed afresh on merit before a different taxing officer at the Civil Division of the High Court at Milimani Law Courts, Nairobi."

- 14.** As a consequence of the latter ruling, the Respondent bill of costs dated 03/05/2024 was taxed afresh before Hon. Kurumbu, who vide a ruling delivered on 24/06/2025, taxed the Respondent's bill of costs at Kshs. 1,049,930/-, thus prompting the instant second chamber summons reference that is presently for consideration before this Court. With the above history in reserve, this Court will proceed to address itself as hereunder concerning the earlier issue(s) coined for determination.

Whether the Applicant's reference is merited?

- 15.** On the question at fore, this Court has time without number drawn guidance from the dicta in **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd [1972] EA 162, Spry**, V-P. stated at p.164 that:

“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.”

16. See also **Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others [2006] eKLR.**

17. The Court of Appeal in the above case proceeded to lay down some principles to undergird the exercise of discretion by taxing officers in the assessment of costs, as follows:-

“a) that costs be not allowed to rise to such a level as to limit access to the courts to the wealthy only;

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) that so far as practicable there should be consistency in the awards made.”

18. See also **Rodgers Mwema Nzioka v The Attorney General & 9 Others (2007) eKLR and Rogan Kamper v Grosvenor (1978).**

19. 11. Similarly, Ringera, J (as he then was) in **First American Bank of Kenya v. Shah & Others [2002] 1 E.A. 64 at p.69,** stated; -

“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.... Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. 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 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. 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. If the Court considers that the decision of the taxing officer discloses 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.”

- 20.** Keeping in mind the above principles, by the Applicant’s affidavit material and submissions before this Court, in support of the reference, its complaint is localized on Item 1, 3, 10, 12, 13, 15, 16, 19, 20, 22, 23, 25, 26,27, 28, 29, 30, 31, 37, 38, 40, 42, 44, 46 & 47 in the Respondent’s bill of costs. It is the Applicant’s contestation that the Taxing Officer erroneously and excessively awarded Kshs. 1,000,000/- as Instruction Fees meanwhile failed to re-tax the other items challenged in the reference given the

ruling by **Mutuku, J.** delivered on 29/04/2025 directing that the bill of costs be taxed a fresh. At this juncture I find it useful to set out in brief the relevant facets of **Hon. Kurumbu's** impugned taxation ruling-:

“A reading of the judge’s ruling delivered on 29th April 2025 especially paragraph 29 shows that the court found that “the taxed bill is excessive for basing the taxation on the value of the subject matter of the main suit instead of basing it on the Notice of Motion Application and the Preliminary Objection.” My understanding is that the only item affected is No.1 on instruction fees. If that were not the case, the judge would have had no difficulty specifying the items challenged and rendering herself on which other item the taxing officer erred and the reasons.

Item 1– Instructions fees- The amount claimed is Kshs 3,331,489.74/=.

I am guided by the decision in the case of Peter Muthoka and Another v Ochieng and 3 Others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR.....

In the case of Joreth Limited versus Kigano and associates (2002) E.A 92 the court set out various factors that are to be considered when determining instructions fees.....

In the ARO Schedule 6A (1) after the part for other matters, there is provision numbered (c) for matters arising during proceedings. Under that part (c) (viii) it reads “to present or oppose any other application not otherwise provided for— where the application is opposed, such sum as may be reasonable but not less than Kshs 5000/=

..... There is no doubt that (c) deals with matters arising during proceedings. This may be understood to

apply generally to all interlocutory applications since in the proceeding part, there is no specific provision for those kind of applications under parts 6A (1) (a) to (j).

The defendant argued that the value of the subject matter stated in the application is the correct basis of assessing instruction fees. I find that there is no basis of this argument that the value is ascertainable from the application. I say so because whether it is stated in the plaint or in the application, that remains the value of the subject matter. In any case, the costs of the suit will be assessed after the outcome of the tribunal.

Proceeding as suggested by the Defendant will be in breach of the judge's finding in the reference. In this matter, the taxing master will consider the nature and importance of the cause or matter, the amount involved, the interest of the parties the general conduct of the proceedings. The other factors considered are the time taken in determining the matter and the intended and factual effect of the Notice of Motion and the P O, which is that they ultimately led to closure of the matter because once the Defendant succeeded in the two, the plaintiff withdrew the suit at the High Court.

..... It is therefore the view of the taxing Officer herein that the costs herein are limited to the application and the Preliminary Objection. The costs of the suit will be assessed as guided above after the outcome of the tribunal.

In view of the above the instruction fees are assessed at Kshs 1,000,000/=. Kshs 2,331,489.74/= is taxed off.

As mentioned above, the other items of the Taxing Officers ruling delivered on 18th November 2024 are not affected. Therefore:

.....

Amount awarded for items 2-50 (not subject to retaxation) Kshs 49,930/= The bill is taxed as follows Instruction fees -Item 1 Kshs 1,000,000/= Add amount earlier assessed for items 2-50 Kshs 49,930/= Amount payable Kshs 1,049,930/=.

- 21.** As a priori, the Court does concur with Applicant's submissions that the learned Taxing Officer erred when she limited her taxation of the Respondent's bill of costs to Instruction Fees alone whereas **Mutuku, J.** orders were unequivocal to the effect that the Respondent's bill of cost be taxed afresh. While the Learned Judge, saliently in her ruling addressed the questions concerning Instruction Fees, her final determination was to the effect that the entirety of **Hon. Wambo's** ruling, of which included taxation on Items 2-50 in respect of the Respondent's bill of cost dated 03/05/2024, was set aside, and ought to have been taxed afresh. To the forestated end, **Hon Kurumbu's** ruling ought to be faulted.
- 22.** That said, the Court equally garners that the award on Instruction Fees has been contentious, since **Hon. Wambo's** ruling, nevertheless it necessitates reminder that the Court of Appeal in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR**, emphasized that a judge ought not interfere with the exercise of discretion by the Taxing Officer unless the latter, erred in principle in assessing the

costs. On the issue of instruction fees, the same has since been settled since **Joreth Limited v Kigano and Associates [2002] 1 E.A 92**, to wit, I need not restate the dicta emanating therefrom and or re-invent the wheel on the issue.

23. Here, while taking due cognizance of the wisdom in **Joreth Limited** (supra), costs in respect of the matter were limited to two (2) issue(s) on the premise of **Ongeri, J's.**, brief ruling rendered on 25/04/2024. Specific to the latter, was costs on the Applicant's motion dated 30/03/2023 and costs in respect of the Respondent's preliminary objection dated 24/04/2023.

24. To the foregoing end, the applicable provision of the **Advocates Remuneration Order** in respect of the disputed issues was **Schedule 6 Part A**, as rightly observed by the Taxing Officer in her impugned ruling. That said as to Instruction Fees, in respect of the Applicant's motion, presented as Item 1 in the Respondent's bill of costs, the same is duly provided for under Paragraph **(c)(viii)** of the **ARO** which states that-;

to present or oppose any other application not otherwise provided for—

where the application is unopposed 3,000

where the application is opposed, such sum as may be reasonable but not less than 5,000

25. Vide the impugned ruling that is the subject of the present taxation proceedings, in awarding Kshs. 1,000,000/- in respect of the said Item 1, the Taxing Officer applied herself to the facts, she ought to consider the nature and importance of the cause or matter, the amount involved, the interest of the parties the general conduct of the proceedings, time taken in determining

the matter and the intended and factual effect of the notice of motion and the preliminary objection, which ultimately led to closure of the matter because the Respondent succeeded in the two, where after the Applicant withdrew the suit at the High Court.

26. While calling to aid the decisions in **Kenya Airports Authority v Otieno Ragot and Company Advocates [2024] KESC 44 (KLR)**, **Danson Mutuku Muema vs. Julius Muthoka Muema & Others Machakos High Court Civil Appeal No. 6 of 1991** which was cited in **Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others (supra)**, **Mwakio, Kirwa & Company Advocates v County Public Service Board Bome & Joshua Terer [2022] KEELRC 834 (KLR)** and **Mugweru t/a Mugweru Co Advocate v Kianjoya Enterprises Limited [2023] KEELC 20637 (KLR)** counsel for the Applicant argued that the award of Kshs. 1,000,000/- was erroneous and excessive whereas, the learned Judge having not certified the Applicant's motion as complex, the ARO provides that the instruction fees in respect of the latter range between Kshs. 5,000/- to a maximum of Kshs. 100,000/-. Counsel urged the Court to award Kshs. 5,000/- as being sufficient instruction fees on the matter.

27. Considering the totality of the above, the Court is inclined to agree with Applicant submissions concerning the Taxing Officer's award. As rightly argued, by dint of Paragraph (c)(vii) & (viii) of the ARO, where there is no certification of complexity in respect of presentation or opposition of cases or application, the minimum awardable amount is Kshs. 5,000/-. Here, the Respondent was pressed to oppose a routine application seeking

injunctive reliefs, with the principle concerned therein being well settled since **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. Further, the Taxing Officer erred with respect to pegging her award under Item 1 to the subject matter of the suit, yet Ongeri, J's., orders in her brief ruling rendered of 25/04/2024, were unequivocally.

- 28.** Therefore, applying my mind to the above facts, the persuasive decisions cited by the Applicant and the dicta in **Premchand Raichand Ltd** (supra), I hereby set aside the award by the Taxing Officer of Kshs. 1,000,000/- and substitute it with an award of **Kshs. 20,000/- for Item 1.**
- 29.** With respect to Items 3, 10, 12, 13, 15, 16, 19, 20, 22, 23, 25, 26,27, 28, 29, 30, 31, 37, 38, 40, 42, 44, 46 & 47, as assailed by the Applicant, notably from the impugned ruling by **Hon. Kurumbu**, she sustained the awards as taxed by **Hon. Wambo**, despite **Mutuku,J.s'** ruling that the entirety of the Respondent's bill be taxed afresh.
- 30.** That said, having taken the liberty of pursuing **Hon. Wambo's** ruling dated 18/11/2024, in respect of Items 2-50 of the Respondent's bill of costs, I am not convinced by the Applicant's contestations and or challenge that the awards were so erroneous as to warrant interference by this Court.
- 31.** The Items were accordingly taxed to scale save for Items 22 and Item 47. On the former this Court concurs with the Applicant that the Respondent's submissions were made up of 12 pages. Drawing as provided for in **Schedule 6 Part A Paragraph 4** provides that..... *pleadings not otherwise provided for - (i) four folios or less 1,100 (ii) in excess of four folios; additional per folio*

after the first four folios 150. The award by Hon. Wambo of Kshs. 3,800/- is disturbed and substituted with an award of **Kshs. 2,300/-**.

32. As concerns Item 47, **Schedule 6 Part A Paragraph 7(a)** provides that on any necessary application to or formal attendance on the registrar or deputy registrar Kshs 1,000/-. Here, the award by Hon. Wambo in his ruling, in the sum of Kshs. 2,300/- is substituted with an award of **Kshs. 1,000/-**.

33. In the end, the Respondent's bill of cost dated 03/05/2024 is consequently taxed in the following terms-;

Item 1 is taxed at Kshs. 20,000/-

Item 22 is taxed at Kshs. 2,300/-

Items 47 is taxed at Kshs. 1,000/-

Items 2 - 50 save for Items 22 & 47 above, are sustained as taxed by Hon. Wambo, in his ruling dated 18/10/2024.

34. Therefore, the Respondent's bill of costs dated 03/05/2024 is taxed in the sum of Kshs. 67,130/- whereas Kshs. 3,317,039.74/- is taxed off.

On costs, applying my discretion, the Court directs that each party bears its own costs of the reference.

Orders Accordingly.

Delivered Dated and Signed at Nairobi this 19th day of February, 2026.

JANET MULWA.

JUDGE

ORIGINAL