REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MILIMANI LAW COURTS

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. E 135 OF 2023

BETWEEN

REPUBLIC……..…….APPLICANT

AND

THE PRINCIPAL SECRETARY, THE NATIONAL TREASURY & ECONOMIC PLANNING……..…….1ST RESPONDENT
THE NATIONAL TREASURY &

ECONOMIC PLANNING……...2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL……3RD RESPONDENT

BETWEEN

M/S GAPS TECH SOLUTIONS LIMITED…….....INTERESTED PARTY

AND

M/S CORPRISK AFRICA LIMITED…….….EX- PARTE APPLICANT

RULING NO. 2 ON REFERENCE DATED 30TH DECEMBER, 2025

1. This is the second reference that this Court is determining. The first reference dated 25th October, 2024, arising from taxation of the same party and party bill of costs dated 16th May 2024 was determined vide a ruling dated 30th April 2025. This Court in the aforesaid ruling set aside the taxation ruling of the taxing master and directed that the same taxing master retaxes the bill of costs afresh, applying the guidelines provided in the aforesaid ruling.

2. Parties then filed submissions before the taxing master and in her ruling dated 17th December, 2025, she retaxed the party and party bill of costs at Kshs 337,729, taxing off 32,138,267.70.
3. The main issue arising and giving rise to the second reference dated 30th December, 2025 challenging the re-taxation is over the instruction's fees and the court attendances on the interested parties' party and party bill of costs dated 16th May, 2024. The interested party prays that the ruling rendered on 17th December, 2025 be set aside and that the same be taxed based on the rules of taxation. It also prays for costs of the reference.
4. The grounds upon which the reference is predicated are that on instructions fees, the taxing master misdirected herself by failing to appreciate that the orders sought under judicial review had the effect of depriving the interested party legally won tender; that she failed to appreciate that the prayers sought under judicial review process had the effect of rendering the whole procurement process null and void to the detriment of the tax payers and the interested parties' interests; that the taxing master failed to appreciate that the process required going back to the bulky parent documents as filed by the exparte applicant to assist the parties and the honourable court appreciate and rule out irregularity in the tendering process; that the taxing master failed to appreciate the magnitude of the tender in question, the volume of documentation involved in the judicial review process and the effect of the prayers sought on the interested parties future dealing; that the taxing master

failed to appreciate that the judicia review Division Hon Justice Chigiti had a very long cause list during the period to the extent that mentions and directions took the form of hearings thus stretching more than the normal one hour.

5. In the supporting affidavit sworn by Gilbert Odadi the interested party's director, the applicant reiterates the grounds in support of the reference, adding that the taxing master failed to appreciate that the exparte applicant wanted the tender award quashed so that it could be awarded the same; that the taxing master failed to appreciate the importance of the subject matter to the a nation and the interested party yet it is a major consideration in the course of taxation and informs the eventual award.
6. Further, that the costs awarded were not reflective of the importance, time, effect and damage suffered by the interested party in the process of these proceedings involving bulky evidence by the exparte applicant that was looked into by the interested party as tabled by the exparte applicant.
7. That the interested party went through bulky volumes of paper work to arrive at a reasonable response to the exparte applicant's application; that the taxing master failed to appreciate the time bound timelines for determining the matter and arrived a wrong conclusion that the matter was determined in a summary manner.
8. That she failed to appreciate the over one-hour appearance before E. Mwita J in Pet E493 of 2023 which petition was withdrawn and the JR herein filed.

That she failed to appreciate that even though the judgment was not ready on 20th March 2024, the interested party waited on call for more than one hour due to the long cause list by Chigiti.

9. The reference followed a notice of objection dated 29th December, 2025

10. Parties' counsel argued the reference orally on 23/02/2026. Ms Owino for the applicant submitted, adopting the grounds and supporting affidavit maintaining that at page 4 of the Ruling, the Taxing Officer downplays the weight of the matter in question and justifies failure to go into the heavy documentation, importance of the matter and the effort by the advocate to ensure the award is not made. She submitted that the tender document was a specialized document and that they had to analyse to establish what the tender document provided, including issues of national security.

11. Further, that they had to delve into the details of the Private Security Regulations Act, yet the taxing officer failed to appreciate the voluminous documents, the novelty and skill of counsel. She submitted that the exchequer would have lost so much and that should have been taken into account. She prayed that the Bill be taxed afresh taking into account the principles laid out in the ruling in respect of the first reference.

12. Opposing the reference, Mr. Mututri counsel for the exparte applicant submitted that the subject matter of Judicial Review application involved setting aside an award of the tender. He relied on **R. vs Registrar of Companies exparte David John Nderitu & Another and the Board of**

Directors, Muruatetu Farmers & 20 Others [2020] eKLR where the learned Judge held that in Judicial Review applications, which are not merely money suits, they seek declarations and other orders hence the proper schedule is schedule 6 Part A paragraph j(ii) of the Advocates Remuneration Order.

13. Counsel for the exparte applicant further relied on **Kenya Motor Sports Federation Ltd vs McKean & Another [2023] KEHC 2023729 KLR wherein Chigiti J** is said to have guided on which schedule is applicable in Judicial Review matters.

14. He submitted that this was a very simple matter as stated by this court at paragraph 34 of the Ruling on the first Reference. He argued that there was no abuse of discretion by the Taxing Master. He relied on **Republic vs Minister for Agriculture & 2 Others exparte Muchiri Njuguna & 6 Others and urged that the taxing master's enhancement of instructions fees by** 2 ½ times was appropriate and it ought to be upheld by this Court.

15. In a rejoinder, Ms Owino submitted maintaining that this Court gave guidelines arising from Judicial precedents but the Taxing Master did not take into account the guidelines. That the Ruling on taxation does not speak of experience and independent opinion. She argued that taxation is not a mathematical exercise but guidelines have been set out. That the folios were equivalent to a registry. That the nature and importance of the issue in question should be considered, attendance, time spent in court, waiting to be

squeezed into the full schedule to save the tender. She urged this court to accord the interested party reasonable costs.

Analysis and determination.

16. I have considered the reference and the opposition thereto. The main issue for determination is whether the reference is merited and if so, what orders should this court make.

17. As earlier stated, this is the second reference on the interested party's party and party costs and as earlier observed in the earlier reference, the circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known as was stated in the **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**. 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 or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the 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;

(3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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.

18. As stated by the Supreme Court **in Kenya Airports Authority v Otieno Ragot & Co. Advocates, Pet. No. E011 of 2023**, the Advocates Remuneration Order:

" …relates to the remuneration of advocates. As evinced by rule 2 ***thereof, it relates to assessment of costs incurred in a contentious matter which can be reimbursed to a successful party/litigant by the other party. More specifically, it prescribes and regulates the remuneration of advocates in respect of professional business undertaken, and the recompense of costs/expenses incurred by a successful party in a suit. The overall objective is to prevent exploitation of parties to a suit/transaction with regard to remuneration of advocates and compensation of costs or expenses incurred by a successful party as well as maintain the standards of the legal profession. Differently put, it is to ensure that fees/costs paid to an advocate and a successful party are reasonable."***

19. In **Kenya Revenue Authority v Universal Corporation Ltd [2024] KECA 1103 (KLR)**, M'Inoti, JA while citing the above **Kenya Airports Authority v Otieno Ragot & Co. Advocates** case, opined that ***the purpose of taxation of costs is to ensure fair and reasonable recompense, not to***

enrich a litigant or its advocate, or to penalise the losing party and that what constitutes reasonable recompense is determined on a case-by case-basis.

20. In **Republic v Ministry of Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna & 6 Others [2006] eKLR**, Ojwang' J (as he then was) stated that:

"…the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious."

21. Ojwang' J, the now retired Supreme Court Judge in the above case restated the circumstances under which the taxing officer's exercise of discretion will be interfered with and stated 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, 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…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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors..”

22. Odunga JA in **Makove (Commissioner of Insurance) v Kenya Reinsurance Corporation Ltd, Statutory Manager United Insurance Company Limited & 10 others (Civil Appeal (Application) 279 of 2009) [2026] KECA 364 (KLR) (27 February 2026) (Ruling)**, quite recently had this to say concerning challenges to taxation:

“Mere allegation that the amount taxed was excessive would not justify interference with the Deputy Registrar’s exercise of discretion. In fact, rule 112(3) bars any reference based only on quantum. However, the taxed costs might be so manifestly excessive as to amount to an error of principle, a position restated by the Supreme Court of Uganda (Mulenga, JSC) in Bank of Uganda vs. Banco Arabe Espaniol, Civil Application No. 29 of 2019 where it held that:

“…[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge.

Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount…Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

23. In **Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92,** the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement 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 matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.

24. Therefore, as stated in my first ruling on the earlier reference, it is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with

the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle.

25. In the earlier ruling, I did set aside the taxation that had been done on instructions fees and the court attendances and I gave reasons for such setting aside. None of the parties challenged that decision. They both returned to the drawing board and had the bill retaxed on those objected to items.

26. ***The question is whether the taxing master applied herself to the guidance given by this court and the settled principles, for taxation of the impugned items in the bill of costs. These items are the advocates instructions fees and the court attendance items, which items the interested party insists should be enhanced.***

27. In taxing the instructions fees, the Taxing master relied on Schedule 6A (1) (j) of the Advocates Remuneration Order and reproduced it, correctly so and guided by the decisions in **Republic v Nyeri County Government exparte Central Kenya coffee Mill Limited [2017]** where the court set aside the taxing master's award for instruction fees (Kshs. 45,000) and substituted it with Kshs. 150,000, citing trends in judicial review matters and the defended nature of the case. The court applied costs principles under the Advocates (Remuneration) Order, emphasizing that judicial review matters should be taxed based on their opposed nature and complexity. It referenced established trends in similar cases to adjust instruction fees and getting-up

fees, distinguishing between lower and higher scales depending on whether the matter required active opposition or trial preparation. The decision also clarified that written submissions qualify as 'going into battle' for getting-up fees, while court attendance fees depend on specific evidence.

28. In her impugned ruling, the taxing master noted that the issue of value of the subject matter was raised by the interested party in justifying the costs sought. She however noted that the suit was an application for prerogative orders whose limit is set, while the exparte applicant submitted that the costs sought were exorbitant as the matter was judicial review not raising any novel issue hence the statutory minimum under Schedule 6A (1) (j) should apply. She observed that the suit was determined within 4 months of filing into court and no doubt, the statutory period for hearing and determining public procurement disputes is 45 days from date of filing as stipulated in section 175 of the Public Procurement and Asset Disposal Act, and the fact that she had followed the guidelines given by this court in the arlier ruling on a reference. She revised the instructions fees, increasing it from the minimum of Kshs 100,000 to **Kshs 250,000** as being reasonable instructions fees, taxing off **Kshs 24,015,100.**

29. On court attendances, I observe that the taxing master specified what transpired on each of the dates attended and the purpose for which the matter came up and awarded khs 2,300 for court attendances on 20th January 2024, taxing off kshs 4800 noting that on 30th January 2024 there was no such

attendance from the court records. On 20th March 2024 when judgment was found not to be ready, she awarded kshs 1100 for 30 minutes or less and on 5th April 2024 when judgment was delivered, she awarded 5,000.

30. The interested party maintains that the matter was complex. I had occasion to read the pleadings and decision of the learned judge. I already concluded in my earlier ruling that the matter was not complex. It was a simple matter which could have been disposed of by way of a preliminary objection being raised and there is no doubt about that. In **Republic v University of Nairobi & another Ex parte Nasibwa Wakenya Moses [2018] eKLR** where the Judge cited the case of **Republic v Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (supra),** the following guideline among others, was provided by Ojwang J. (as he then was)

> ***"It is trite that where complexity of proceedings is a relevant factor, the specific elements have to be demonstrated and judged on the basis of the express or implied recognition and mode of treatment by the trial judge".***

31. I reiterate that no complexity of the matter was demonstrated to warrant the amount sought by the interested party as instructions fees and or to call for more than what the taxing officer arrived at. The trial Judge never recognized the matter to have been complex. Neither do I find it complex, having considered the same. I do not find any particular circumstances raised

showing that the taxing master was wrong in her assessment of instruction fees or that she flouted any of the principles for taxation in judicial review proceedings in her assessment of instruction fees and the court attendance fees.

32. I find no credible reason given in the Reference for disturbing the Taxation Ruling. I find the Reference lacking in merit and I proceed to dismiss it and uphold the ruling on taxation dated 17th December, 2025 by the taxing master, Hon. Emmie Chelule.

33. I however order that each party bear their own costs of this protracted matter.

34. I so order.

Dated, Signed and Delivered virtually at Nairobi this 15th Day of April, 2026

R.E. ABURILI

JUDGE