REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC J.R. NO. 41 OF 2019

REFERENCE APPLICATION

IN THE MATTER OF THE ADVOCATE'S(REMUNERATION) (AMENDMENT) ORDER, 2014

AND

IN THE MATTER OF TAXATION OF PARTY-TO-PARTY COSTS

BETWEEN

ERDERMANN PROPERTY LIMITED::::::::::::::::::::::::::::APPLICANT

VERSUS

LONDON DISTILLERS (K) LIMITED::::::::::::::::::::::::RESPONDENT

Arising From

MACHAKOS ELC JUDICIAL REVIEW CASE NO. 41 OF 2019

REPUBLIC::APPLICANT

VERSUS

NATIONAL ENVIRONMENT TRIBUNAL::::::::::::::::::::RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY::::::::::::::::::::1ST INTERESTED PARTY

LONDON DISTILLERS (K) LIMITED::2ND INTERESTED PARTY

DIRECTOR OF CRIMINAL INVESTIGATIONS::::::::::::::::::::::::::::::::::::3RD INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS::::::::::::::::::::::::::::::::::::::4TH INTERESTED PARTY

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THE HON ATTORNEY GENERAL::::::::::::::::5TH INTERESTED PARTY

AND

ERDERMANN PROPERTY LIMITED::::::::::::::::::::::::::::::EX-PARTE APPLICANT/RESPONDENT

RULING

The application is dated 10th December 2024 and is brought under Section 1A, 1B, 3A & 63 (c) of the Civil Procedure Act, Cap 21 Laws of Kenya, Section 51 of the Advocates Act, Order 22 Rule 22 of the Civil Procedure Rules, 2010, Rule 11(2) of the Advocates (Remuneration) Order, 2014 seeking the following orders;

1. THAT the Honourable Court be pleased to certify this application as urgent and an early inter-partes date be given.
2. THAT pending the inter-partes hearing and determination of this Application, this Honourable Court be pleased to grant an order of the stay the execution of the ruling of the Honourable M.A. Otindo dated 26th November, 2024 and all actions consequent thereto.
3. THAT the Honourable Court be pleased to vacate and set aside in its entirety the Ruling and reasoning of the learned Taxing Officer, Honourable M.A. Otindo dated 26th November, 2024 taxing the Respondent's Bill of Costs dated 31st August, 2023 at KSHS. 29,187,390/=.

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4. THAT the Honourable Court be pleased to re-assess the quantum of instruction fees in the Party to Party's Bill of Costs.
5. THAT in the alternative to prayer (4) above, the Honourable Court be pleased to remit the Bill of costs dated 31st August, 2023 for re-assessment of the quantum of total instruction and getting up fees chargeable before a different Taxing Master with appropriate directions thereof.
6. THAT the costs of this Application be borne by the Respondent.

It is based on the grounds that vide a ruling dated 26th of November, 2024, the learned Taxing Master taxed the Respondent's Bill of Costs dated 31st August, 2023 at a manifestly excessive sum of KShs. 29,187,390/= as being constituted of inter alia, instruction fees of KSh 29,000,000/= and an assessment on other items of the bill of costs. That on the 9th of December, 2024, and being aggrieved and dissatisfied with the learned Taxing Officer's ruling, the Applicant lodged an objection to the taxation and requested for the reasons for the taxation of item 1, being instruction fees, of the ruling vide the objection to the taxation of even date. This was duly served upon the Respondent's counsel. That further to the above, the Taxing Officer acted contrary to well settled principles of taxation and also misdirected herself on the principles of law applicable. That the learned Taxing Officer misdirected herself and arrived at a decision that was not only erroneous and unreasonable in the

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circumstances but legally untenable by awarding the Respondent fees which are grossly disproportionate, unreasonable, exaggerated, excessive and gratuitous without any basis in law or fact. This was a manifest error of principle. That the learned Taxing Officer exercised her discretion on the grounds that are both unclear, unreasonable and legally untenable, in awarding the instruction fee as KSHs. 29,000,000/= disregarding the fundamental principle in law that in constitutional and judicial review matters, the instruction fee is not pegged on the value of the subject matter. That the learned Taxing Master misdirected herself and arrived at a decision that was not only erroneous and unreasonable by, whilst acknowledging that the value of the subject matter was not ascertainable, proceeded to factor the monumental losses pleaded by the Applicant in demonstrating the prejudice occasioned on account of the impugned orders of the National Environment Tribunal, as a critical and key point of reference in her taxation of the bill and the consequent assessment of the instruction fees. That the learned Taxing Officer's finding of complexity of issues in the fairly routine application seeking to set aside the leave so granted by this Court to pursue the judicial review orders was an error of principle when none had been, with specificity, pleaded by the Respondent in its bill of costs. The learned Taxing Master misdirected herself by finding that the financial loss report availed by the Applicant formed the crux of the judicial review

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proceedings, disregarding the uncontroverted averments that the judicial review motion urged a solitary issue for consideration by the Court, being whether the Respondent (NET) could apply a suspended law to the proceedings then pending before the National Environment Tribunal in NET 21 of 2019. That the learned Taxing Master misapprehended and grossly misdirected herself by failing to find that the Applicant was not in fact seeking compensation against the pleaded losses nor did the financial loss reports comprise the substratum of the dispute to warrant her reliance in assessing the instruction and getting up fees.

That the learned Taxing Officer erred in principles of taxation by imputing the particulars of industry allegedly expended by the Respondent's counsel in finding that the failure of the other parties to participate in the judicial review proceedings expanded the Respondent's counsel's scope of work in defending the judicial review proceedings. These particulars were never pleaded by the Respondent. That whilst the learned Taxing Officer misapprehended and grossly misdirected herself by taking irrelevant factors into consideration, to wit, the financial losses pleaded by the Applicant in demonstrating the prejudice of the prevalence of the orders of the NET and completely disregarded the uncontroverted fact that the judicial review proceedings were never heard and the leave so granted by this Court was withdrawn barely a month after the institution of these proceedings. That the learned Taxing

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Officer misapprehended and grossly misdirected herself on the principles of law enunciated in the authorities cited by the Applicant as she willfully and arbitrarily failed to consider the submissions filed by the Applicant which would have revealed that taxation of public law proceedings are to be considered entirely free of any private business arrangements, a binding decision by the High Court in Republic v Commissioner of Domestic Taxes Ex Parte Ukwala Supermarket Limited & 2 Others (2018) eKLR the learned Taxing Officer was bound to apply, but did not, in arriving at the manifestly erroneous decision. That further to the above, the learned Taxing officer erred in principle by arriving at an erroneous decision on the taxation by reason of her consideration of the financial loss report as a critical factor in her taxation of the bill, and failed to give due and/or proper consideration to the substratum of the judicial review proceedings which had only posed a solitary issue for consideration by the Court, namely, the Respondent's (NET) arbitrary application of a suspended provision (section 129 (4) of the Environment Management and Coordination Act, 1999, whose application had been stayed by the High Court, Lady Justice Okwany in High Court Constitutional Petition No. 251 of 2017, Okiya Omtata & anor v National Assembly of Kenya and others. That in all the circumstances of this matter the said decision of the learned Taxing Officer is premised on the wrong principles of law and/or is without basis in law, unreasonable and unjust.

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That no prejudice will be occasioned to the Respondent if the orders sought herein are granted. That to the contrary, if the orders sought by the Applicant are not granted, the Applicant is at the risk of suffering irreparable and incompensable substantial loss as the Respondent will at any time instruct auctioneers to commence proclamation and attachment of its properties in execution of a manifestly excessive, unjust, arbitrary and oppressive award of instruction fees in the sum of KShs. 29,000,000/=. That as at the date of the filing of this reference, no reasons have been furnished by the learned Taxing Master pursuant to the notice of objection dated 9th December, 2024, particularly requesting the Taxing Master's rationale for awarding the arbitrary sum of KShs. 29,000,000/= as instruction fees.

This court has considered the application and the submissions therein. The procedure for the challenge of a Taxing Master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:

> *"(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.*
>
> *(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen*

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days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."

Be that as it may, the principles of varying or setting aside a Taxing Master's decision are set out in the cases of First American Bank of Kenya vs Shah and Others (2002) EA 64 and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92, that the Taxing Master's judicial discretion can only be interfered with when it is established that the there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law. In First American Bank of Kenya vs Shah and Others (2002) E.A.L.R 64 the court held that;

"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".

These principles reiterate the position of the Court of Appeal in Joreth Ltd vs Kigano & Associates (2002) eKLR, where the said Court held that a Taxing

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Master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial

discretion and that such judicial discretion can only be interfered with when it is

established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the Taxing Master is excessive to amount to an error in principle.

The Applicant in the instant application contends that being dissatisfied with the Taxing Officer's decision have filed this application. That the award of Instruction fees at over 644 times the basic instruction fees allowable for unopposed applications under Schedule 6 (1) (j) (i) of the Advocates Remuneration Order, 2014 to the Respondent was arbitrary, capricious, excessive, unreasonable, unjustified and gratuitously and violated the principle that taxation of instruction fees should avoid any prospect of unjust enrichment for any particular party or parties. That as a result of the foregoing, the learned Taxing Master erred in principle and in law in assessing the Respondent's Bill of Costs arriving at a wrong assessment of instruction fees, and consequently an erroneous assessment of the quantum of the total instruction fees.

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It is now settled that the Court will not interfere with the decision of a Taxing Officer except in cases where the Applicant demonstrates that there was an error in principle or the quantum is manifestly excessive or too low that it amounts to an injustice.

In the case of Thomas James Artur v Nyeri Electricity Undertaking [1969] EA 64 at page 69 that;

> *"Where there has been an error in principle, the court will therefore interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will interfere only in exceptional circumstances."*

The Court of Appeal in the case of Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR stated that:

> *"On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs."*

The Applicants are challenging the award of Kshs. 29,000,000 charged under as instruction fees under item No. 1 in the Bill of Costs and argue that the award is excessive and unreasonable. However, the Respondents opposed this and submit

that the costs awarded are not excessive. The Respondents submit that the value of the subject matter is a material factor for consideration for the purposes in arriving at the figure pleaded by the 2nd Interested Party. That reliance was made on the stipulation under Schedule 6(1)(b) of the Advocates Renumeration Order where computation is provided in circumstances where the loss complained of and which comprised of the subject matter had been computed by the ex parte Applicant itself at Kshs. 2,400,000,000/=.

In Republic vs Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna (2006) eKLR Ojwang, J (as he then was) expressed himself as follows:

> *"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*

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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 case 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…A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved…Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for…The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must

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be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be

set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs…"

…The principles guiding the review of taxation in this court were settled in President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another:

"a. Costs are awarded to a successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.

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b. A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.

c. The taxing master must strike this equitable balance correctly in the light of all the circumstances of the case.

d. An overall balance between the interests of the parties should be maintained.

e. The taxing master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.

f. And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate the ruling."

The Applicant stated that the instruction fees of KShs. 29,000,000/- was excessive and a capricious exercise of judicial discretion bestowed upon the learned Taxing Officer. That further to the above, the learned Taxing officer erred in principle by arriving at an erroneous decision on the taxation for reason of her finding that the

routine application to set aside the leave granted by this Court, for which costs were awarded and the subject of the Respondent's bill, was litigation that traversed outside the parties in these proceedings. Again, a manifest error of principle and her application of the law.

The Taxing Master in her ruling dated 29th May 2023 provided that the taxation of the matter would be based on Remuneration (Amendment) order of 2014. Under Item one the Taxing Master based her calculations on schedule 6 (j) part A of party and party bill of costs. The Taxing Master contended that the matter although a judicial review application was complex and the ex parte Applicant could have occasioned immense losses of upto 2 billion shillings. She noted that there were other related matters which expanded the scope of work. That the files were voluminous documentation that required extensive research. I disagree with the analysis and find that this was a judicial review application and costs incurred should be analysed as such. From the court record it is clear that no substantive motion was dealt with. I find an era in principle and in the circumstances the fees awarded are excessively high. Bearing in mind that this suit was stayed pending the hearing of a similar suit and the judgement adopted thereafter, I find that there is an error by the Taxing Master in the assessment. Consequently, I find that the application is merited and make the following orders;

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1. That the Ruling of the Taxing Officer delivered on 26th November 2024 in the be set aside/vacated.
2. That the bill of costs remitted back to be taxed by a different Taxing Master.
3. There will be no order as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF APRIL 2026.

N.A. MATHEKA

JUDGE

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