



**Otonglo & 4 others v Nairobi County Government; Kuoni & 4 others (Interested Parties)
(Environment & Land Petition 41 of 2017) [2024] KEELC 324 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 41 OF 2017**

**J OMANGE, J
JANUARY 25, 2024**

BETWEEN

**SAMUEL NYONA OTONGLO 1ST PETITIONER
GEORGE ORR 2ND PETITIONER
JOSEPH MBAI 3RD PETITIONER
MOHAMOUD ALI MOHAMED 4TH PETITIONER
SARAH ORR 5TH PETITIONER**

AND

NAIROBI COUNTY GOVERNMENT RESPONDENT

AND

**WALTER KUONI INTERESTED PARTY
ELENA KUONI INTERESTED PARTY
GEORGE ROBINSON ORR INTERESTED PARTY
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY
(NEMA) INTERESTED PARTY
NATIONAL CONSTRUCTION AUTHORITY INTERESTED PARTY**

RULING

1. The Petition dated 11th September, 2017 sought various reliefs which include;
 - i. A declaration that there has been a violation of the Constitutional Rights and Fundamental Freedoms of the Petitioners.



- ii. An order that the multi-dwelling building in a single dwelling housing zone violates physical planning laws and that the Respondent herein is to forthwith demolish all the illegal structures including but not limited to the guard house/gate house on their neighbour's (L.R no 9104/224) boundary wall and swimming pool with no effluent treatment plant to treat the backwash before it is discharged into the septic tank or otherwise.
 - iii. An order of mandamus compelling the 1st and 2nd interested parties to demolish all structures (including but not limited to the gate/guard house on their neighbour's wall (LR 9104/224) for intentional violation of NCC building codes and bylaws and failure to conduct an EIA for constructing a multi-dwelling in a single-family dwelling zone (Gigiri zone 13).
 - iv. An order of mandamus compelling the 1st, 2nd and 4th interested parties to conduct an empirical environment impact assessment on any intended construction by the 1st and 2nd interested parties in light of the plans impact on the neighbours of Daisy Drive and the Karura forest area in general.
 - v. An injunction restraining the 1st and 2nd interested parties from continuing the illegal construction works (including but not limited to the gate/guard house on their neighbour's (LR NO 9104/224) boundary wall on their property pending resolution of this petition.
 - vi. Damages for the harm caused to the petitioners.
 - vii. The costs of this application be provided for.
2. The Petition was dismissed with costs to the Respondent and 1st, 2nd, 3rd, 4th 5th interested parties favour on the 28th May 2021. Subsequently, the 1st and 2nd interested parties filed their party and party bill of costs dated 27th October 2020. Vide a ruling dated 2nd July 2021 the Honourable Deputy Registrar taxed the bill at Ksh.475,856/=.
 3. The Petitioners filed a reference to the bill vide the chamber summons application dated 7th March 2023 which is before this Court for determination. It seeks a review /setting aside of the bill dated 27th October 2020.
 4. The application is premised on grounds on its face and on the Petitioner's supporting affidavit sworn by Dr John Khaminwa on the 7th March 2023. He avers that the petitioners are aggrieved by the ruling of the Taxing Officer dated 2nd July 2021 as the taxing officer; error in law by applying the provisions of schedule 6(1)(b) on instruction fees instead of schedule 6(1)(j) of the 2014 *Advocates' Remuneration Order*; did not independently determine the value of the subject matter from the pleadings, independent judicial assessment and annexures thereto; and instead only relied on the property value as submitted by the Petitioners; the disbursements were uncorroborated by receipts or proof of disbursement; erred on the allocation for clerical attendance at the Registry on routine matters for the Counsel for the 1st and 2nd Interested Parties.
 5. The application is opposed by the 1st and 2nd interested parties vide replying affidavit sworn by Saadia Karimbux Effendy dated 24th April 2023. She deponed that contrary to the petitioner's averments; the taxing master applied the right provisions that is schedule 6(1)(j) of the 2014 *Advocates' Remuneration Order*. She Further deponed that on the issue of disbursements, the taxing master considered all the evidence and submissions.
 6. Regarding the issue of service and clerical attendance at registry it was her contention that the applicable remuneration order is the *advocates remuneration (amendment) order* of 2014 and not the



- 2009 schedule as submitted by the petitioners hence the scale being relied upon by petitioners was incorrect.
7. On the 25th April 2023 the Court directed that application be canvassed by way of written submissions. The Petitioners written submissions are dated 8th May 2023. In summary, the Petitioner while heavily relying on the right to access justice at an affordable cost takes issue with the Taxing Masters decision on the instruction fees, item 1, item 94, disbursements, and item 7,47 and 67 in respect of which the Petitioner argues a cost of Ksh 1000 would be adequate. On item 6,46 and 66, the Petitioner argues that an amount of Ksh 500 is excessive as the correct figure should be Ksh 210.
 8. The Petitioners submitted that this being a matter which was brought by elderly citizens for conservatory and declaratory orders, the award should have been Ksh.100,000 as was held in *First American Bank of Kenya vs Shab and Others* (2002)1EA 64 .The petitioners further cited the case of *Mumias Sugar company Limited vs Tom Ojienda & Associates* (2019) in support of the argument that counsels must submit proof of disbursements which the Petitioners insist were missing.
 9. The Petitioners stress that the matter being a constitutional petition the taxing master was under an obligation to weigh between access to justice and financial costs and that the limitations in the *Advocates Remuneration Order* were put in place to promote access to justice for all as guaranteed by articles 49 and 50 of *the constitution*. The Petitioners argue that the bill of costs was too exorbitant and could deny the petitioners access to justice. To buttress this point, the Petitioners cite the case of *Rose Wangui Mambo and 2 Others v Limuru Country Club & 15 others ;Federation of Women Lawyers(Fida) and another (interested parties)* [2020]
 10. The 1st and 2nd interested parties' written submissions are dated 21st June 2023. They reiterate the contents of their replying affidavit and state that the instruction fees was awarded based on the value of the subject matter that is Ksh 65 Million, and schedule 6-part A(1)(j) of the *ARO* 2014 and as such the decision should not be interfered with as the figure was correctly taxed. They placed reliance on the case of *Del monte Limited Vs Kenya National Chamber of commerce and Industry (KNCCI) Muranga chapter* 92021) eKLR. It was their submission that based on the above case law the decision of a taxing master can only be interfered with where it is so high or relatively low to amount to an injustice to one party or the other.
 11. It is also the 1st and 2nd interested parties' submission that they had an identifiable stake in the matter as any decision the court made was to directly affect them hence it is their contention that they are entitled to costs as awarded in the Judgment although the suit was not defended by the Respondents. Counsel submitted on the complexity of the matter which warranted the instruction fees as awarded by the learned taxing master.
 12. From the pleadings and the submissions by both parties the following issues emerge for determination;Which Remuneration Order is applicable?Did the Taxing Master apply the correct section in determining the instruction fees payable?Did the taxing master apply the correct principles in assessing the instruction fees?Did the Taxing Master correctly tax the items that were objected to?
 13. On the question of the applicable remuneration order, the Petition was filed in the year 2017 hence the applicable order is the *Advocates Remuneration Order* 2014 which came into effect on 11th April, 2014. The Taxing Officer thus applied the correct Remuneration Order.
 14. Regarding the applicable schedule, this was a Constitutional Petition. It is argued by the Petitioner that given that the Respondent did not oppose the Petition it should be treated as undefended. On the other hand, the interested parties argue that they had an identifiable stake hence the Petition was defended. As a party who had an identifiable stake I find that the defence that was mounted by the



interested parties cannot be wished away. Indeed, as parties who had an interest in the matter there is no doubt they put up a spirited defence to the petition which can then only be deemed to have been defended. I find that the taxing master correctly found as was indicated in her Ruling that the relevant applicable section of Advocates Remuneration Order is Schedule 6 (1) (j). The said Paragraph (j) states:

1. Subject as hereinafter provided, the fees for instructions shall be as follows-....

Instruction fees (j)

Constitutional petitions and prerogative orders

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing officer in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

- (i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
- (ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000

- 15. A reading of the above provision clearly shows that the Remuneration Order specifically provides the minimum instruction fees for constitutional petitions and applications for prerogative orders. In light of that express provision, as per the highlighted section of the ruling above the taxing master did rely on the right provision that is Paragraph 1(j)(ii) of Schedule 6 as the matter before her was a defended constitutional petition and Ksh. 100,000 is the provided minimum instruction fees. The instruction fees can however be increased based on the factors specified therein.
- 16. While identifying the above section the Taxing Officer early in the Ruling correctly sums “ the taxing officer is enjoined to consider the nature and importance of the application, the complexity of the matter, the difficulty or novelty of the question raised, the amount or value of the subject matter and the time expended by the advocate” .
- 17. Later in the Ruling in her ruling the Taxing master stated, “...I have considered the 1st and 2nd interested party’s bill of costs, the submissions filed and the authorities availed by the petitioner and the 1st interested parties in support of their submissions.....Schedule 6 of the ARO provides an instruction fee of not less than Ksh 100, 000 to apply for or oppose an application for prerogative orders. In accessing instruction fees, the taxing officer is enjoined to consider the nature and importance of the application, complexity of the matter, the difficulty or novelty of the question raised , the amount or the value of the subject matter and time spent by the advocate,.....The proceedings in the court related to environmental protection. I have also considered the care and labour employed by counsels in the prosecution of the petition. I am persuaded that an instruction fee of Ksh 400,000/= is fair and reasonable.
- 18. The question that this court must determine is whether in enhancing the instruction fees the Taxing Master exercised her discretion judiciously. Courts will not generally interfere with the exercise of discretion of a Taxing Officer. In Republic v Ministry of Agriculture & 2 others Ex parte Muchiri Wnjuguna & 6 Others [2006] eKLR; the Court stated, “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 interference 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 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.”

19. The only way to demonstrate that discretion has been exercised judiciously is by giving plausible reasons for reaching a decision. It is not enough to outline the principles guiding the exercise of discretion. It must be demonstrated in the decision that those principles were indeed applied. In *Republic v Minister for Agriculture & 2 others Ex-Parte Samuel Muchiri W’njuguna & 6 others* [2006] eKLR it was held that:

“Item 1 (advocate’s instruction fees) in the bill of costs is one of the very few which were not based on consent. The figure of Kshs.20,000,000/= which is now contested was the taxing officer’s own decision. It is necessary to ascertain how she arrived at that figure; for although the judicial review applicants’ firm position is that it was an exercise of lawful discretion which, therefore, this Court should uphold, the correct perception of a discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria...It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived.”

20. The taxing master in her ruling stated that she had considered the principles care and labour employed by counsels in prosecution of the petition and left it at that. There are no details of the specific elements that prompted the increase of fees by four times from the minimum of Ksh 100,000 to Ksh 400,000. The ruling also fails to indicate how the specific elements led to the enhancement of the instruction fees. There is no highlight of special services undertaken.
21. I restate the words of Ojwang, J as he then was in the case of *Republic v Minister for Agriculture & 2 others Ex-Parte Samuel Muchiri W’njuguna & 6 others* [2006] eKLR wherein the Honourable Judge stated “The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must 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.”
22. Counsel for the petitioner took issue with disbursements and service fee I The items that were singled out are item 7, 47 and 67 on service and item 6, 46 and 66 on attendances which the petitioners alleged were higher than the figure provided in the 2009 *Remuneration Order*. In light of my finding above that the applicable remuneration order is that of 2014, the amounts awarded on these items are in order.
23. Counsel for the petitioner strongly argued that the taxing master ought to have taken into consideration the fact that this was a Constitutional Petition seeking to enforce Article 22 and 258 of *the Constitution*. A similar view was held by the Constitutional Court of South Africa in the case of *Harriellall versus University of Kwa Zulu Natal* (2018) (1) SA 269 (CC) at para 28 in which



Jafta J held ‘in Biowatch this court laid down a general rule relating to costs in Constitutional matters. That Rule applies in every Constitutional matter involving organs of state. The Rule seeks to shield unsuccessful litigants from the obligation of paying costs to the state. The underlying principle is to prevent the chilling effect that adverse costs might have on litigants seeking to assert constitutional rights. I am persuaded that given the important role of litigation that is brought to court to safeguard the bill of rights, it is essential that faced with a bill of costs filed in a Constitutional Petition the Taxing Master while considering whether to enhance the fees should consider the nature of public interest that was canvassed in the matter.

24. In the final result I find that the taxing master erred in principle in failing to specify and establish the factors and sufficient reasons that informed the increase in the instruction fees. I find that the principles elaborately laid out by His Lordship Ojwang J as he then was in the *Republic v Minister for Agriculture & 2 others Ex-Parte Samuel Muchiri W’njuguna & 6 others* [2006] eKLR apply mutatis mutandis to this case. The court therefore issues the following orders;
- a. The decision of the taxing master to allow Kshs 400000 in respect of the Instruction fees is hereby set aside.
 - b. The bill of costs dated 27th October, 2020 is hereby remitted for fresh taxation on item 1 by a fresh taxation master who is to be guided by the following principles.
 - c. On the nature of the Petition whether it was safeguarding public or private interests.
 - d. On the importance of the Petition, the specific aspects of the petition that underscore its importance.
 - e. where complexity of proceedings is a relevant factor, the specific elements of the same are to be identified and stated; the issues addressed and the express or implied recognition of the complexity by the trial Judge.
 - f. where responsibility borne by advocates is taken into account, its nature is to be specified.
 - g. where novelty is taken into account, the new areas of law addressed by the Judge.
 - h. where account is taken of time spent, the research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.
 - i. Where value of subject matter is considered the value must be drawn from pleadings or proceedings.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF JANUARY 2024.

JUDY OMANGE

JUDGE

In the presence of

Ms Valentine Khaminwa for Petitioner

Ms Kemboi for Ms Effeny for 1st and 2nd Interested Parties

Steve - Court Assistant

