Non- Governmental Organizations Coordination Board v EG & 5 others (Petition (Application) 16 of 2019) [2023] KESC 102 (KLR) (Civ) (8 December 2023) (Ruling)

Neutral citation: [2023] KESC 102 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL

PETITION (APPLICATION) 16 OF 2019

W OUKO, SCJ

DECEMBER 8, 2023

BETWEEN

NON- GOVERNMENTAL ORGANIZATIONS COORDINATION BOARD ..... APPLICANT

AND

EG ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

DK ..... 3RD RESPONDENT

AMI ..... 4TH RESPONDENT

KENYA CHRISTIAN PROFESSIONALS FORUM ..... 5TH RESPONDENT

KATIBA INSTITUTE ..... 6TH RESPONDENT

(Being a Reference seeking to set aside and/or review the decision of Hon B Kasavuli, Deputy Registrar of the Supreme Court, delivered on 9th June 2023)

Principles to be considered in an application for setting aside a certificate of taxation

The application sought the review and setting aside of a certificate of taxation. The court highlighted the principles to be considered in an application for setting aside a certificate of taxation. The court held that it could only issue an order upon being appropriately moved and that the applicant ought to have filed a formal application to strike out the pleadings as opposed to seeking to do so through submissions. The court further held that a consent by parties became an order of the court only when it had been formally adopted by the court. The court finally held that the function of a single judge of the court seized of a reference was to review the taxing officer's certificate of taxation to ascertain whether the taxing officer had, among other things, erred in principle. It was and could not be in the nature of a new hearing.

Reported by Kakai Toili

Civil Practice and Procedure *– certificate of taxation – setting aside of a certificate of taxation - principles to be considered in an application for setting aside a certificate of taxation - what was the role of a single judge of the Supreme Court seized of a reference to review a taxing officer's certificate of taxation - Supreme Court Rules, 2020, rules 6(2), 59, 60 and Third Schedule.*

Civil Practice and Procedure *– pleadings – striking out of pleadings - whether an application to strike out pleadings could be made through submissions – Supreme Court Rules, 2020 Part V.*

Civil Practice and Procedure *– orders – orders by consent - when did a consent by parties become an order of the court.*

Civil Practice and Procedure *– orders – decrees - what was the nature of a decree.*

Brief facts

The application sought for among other orders; that the court set aside and/or review downwards the decision made by the Registrar of the court as related to item 1 on instructions taxed at Kshs 5,000,000. The applicant contended that; the Deputy Registrar delivered a decision taxing the 1st respondent's bill of costs at Kshs 5,018,104 of which, Kshs 5,000,000 was awarded as instruction fees; and that by doing so, the Deputy Registrar erred in failing to give consideration to the fact that the bill of costs and decree were lodged and drawn contrary to rule 29 as well as paragraph 2(2) of the Third Schedule to the Supreme Court Rules, 2020 because the decree was neither drawn and certified following the applicable procedure nor was it lodged after making the order for costs. The applicant further submitted that it had never received any draft decree for approval or rejection from the 1st respondent.

Issues

i. What were the principles to be considered in an application for setting aside a certificate of taxation?
ii. Whether an application to strike out pleadings could be made through submissions.
iii. When did a consent by parties became an order of the court?
iv. What was the nature of a decree?
v. What was the role of a single judge of the Supreme Court seized of a reference to review a taxing officer's certificate of taxation?

Held

1. The power to strike out pleadings was a draconian measure that ought to be employed sparingly and only as a last resort and even then, only in the clearest of cases. The objection had been raised by the applicant in its further affidavit and supplementary submissions, without an opportunity to the 1st respondent to reply, and considering that under Part V of the Supreme Court Rules, the court could only issue an order upon being appropriately moved, the applicant ought to have filed a formal application to strike out the pleadings as opposed to seeking to do so through submissions. For that reason, the court declined to venture into the merits as to whether the 1st respondent's replying affidavit was properly on record.
2. Adoption of a consent by a court was a process, in the course of which a court discharged the duty of evaluating the clarity of the consent placed before it by parties and giving directions on the manner of adoption. That circumvented the risk of an unlawful order and validated the mode of adoption and compliance. Thus, a consent by parties became an order of the court only when it had been formally adopted by the court. The consent had not been formally adopted by the court as an order and therefore served no useful purpose in the proceedings. It could not *per se* have settled the issue of costs between the parties.

3. A draft decree was not submitted to the applicant for approval or rejection in terms of rule 29 of the Supreme Court Rules. Rule 29(4) set out in some detail the steps to be followed when a decree had been drawn;
    1. the parties must themselves, first be satisfied that the decree reflected the decision;
    2. the process of exchanging a draft decree may be initiated by either party; and
    3. it was only when the parties failed to agree that the court stepped in to settle the terms of a decree.
4. Strictly speaking, a decree, being a formal expression of a court's conclusive determination of the rights of the parties in a suit, was a product of a judgment and therefore belonged to the court. That was why it was of no consequence until it was duly sealed by the Registrar, who, under section 10 of the Supreme Court Act was responsible for certifying that any order, direction or decision was an order, direction or decision of the court, or of the Chief Justice or other judge, as the case may be.
5. The main consideration in approving or rejecting a decree was that a decree must always mirror the judgment. The applicant did not claim that the decree was at variance with the judgment of the court, which in so far as costs were concerned merely stated that the 1st respondent shall have the costs.
6. While parties must strictly follow the steps enumerated in rule 29 of the Supreme Court Rules in the circumstances of the instant case, the setting aside of the execution process was not the answer and would serve no purpose. The relief of setting "aside and/or review downwards" would have been efficacious only if it was demonstrated that the decree was at variance with the judgment. Although the 1st respondent offended rule 29, that offence could not attract the kind of sanction sought.
7. A certificate of taxation would be set aside, and a single judge could only interfere with the taxing officer's decision on taxation if:
    1. There was an error of principle committed by the taxing officer.
    2. The fee awarded was shown to be manifestly excessive or was so high as to confine access to the court to the wealthy; (and conversely, if the award was so manifestly deficient as to amount to an injustice to one party).
    3. The court was satisfied that the successful litigant was entitled to fair reimbursement for the costs he had incurred, (and the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party).
    4. The award proposed was so far as practicable, consistent with previous awards in similar cases.
    5. There was no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances.
    6. Although the taxing officer exercised unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically.
    7. The single judge would normally not interfere with the decision of the taxing officer merely because the judge believed he would have awarded a different figure had he been in the taxing officer's shoes.
8. In the court, costs payable by a party could be awarded at three levels: assessed by the court itself when making its decision; or taxed by the Registrar; or reached by consent of the parties (rule 59 of the Supreme Court Rules, 2020). Where the Registrar was called upon to tax a bill of costs rule 60 of the Supreme Court Rules, 2020 directed that such costs shall be taxed in line with the scale outlined in the Third Schedule to the Supreme Court Rules, 2020. Balancing all those factors the taxing officer proceeded, in exercise of his discretion, to reduce the 1st respondent's proposed award of Kshs 20,000,000 to Kshs 5,000,000. The taxing officer could not be said to have committed an error of principle. The function of a single judge seized of a reference was to review the taxing officer's certificate of taxation to ascertain whether the taxing officer had, among other things, erred in principle. It was and could not be in the nature of a new hearing.

9. Unless the taxing officer improperly exercised his discretion or applied the wrong principles or the quantum awarded was obviously wrong, the single judge ought not to interfere with the decision of the taxing officer on the mere question of quantum, or merely because the single judge would have awarded a different figure had he been the taxing officer.
10. Rule 6(2) of the Supreme Court Rules only permitted any party aggrieved by a decision of the Registrar to apply for a review to a single judge, whose decision was final. Because taxation was not a mathematical exercise but rather a discretionary process, the single judge could not purport to engage in such an exercise, which involved perusing the record in order to ascertain all work necessary and properly done in connection with the appeal, including attendances, correspondence, perusals, and consulting authorities. In the circumstances, no material had been placed before the court to interfere with the taxing officer's discretion.

Reference dismissed.

Orders

Each party to bear their own costs.

Citations

Cases

1. Awiti & another v Independent Electoral and Boundaries Commission & 2 others (Petition 17 of 2018; [2019] eKLR) — Explained
2. Bellevue Development Company Ltd v Gikonyo & 3 others (Petition 42 of 2018; [2020] KESC 43 (KLR)) — Explained
3. Geoffrey M Asanyo & 3 others v Attorney-General (Petition 7 of 2019; [2020] KESC 62 (KLR)) — Explained
4. Kaloki, Philip Kyalo Kituti v Independent Electoral and Boundaries Commission & 2 others (Election Petition 1 of 2017; [2018] KEHC 8503 (KLR)) — Explained
5. Konchellah v Ole Sunkuli & 2 others (Civil Application 26 of 2018; [2018] eKLR) — Explained
6. Obado v Oyugi & 2 others (Petition 4 of 2014; [2014] eKLR) — Explained
7. Outa v Odoto & 3 others (Petition 6 of 2014; [2023] KESC 75 (KLR)) — Explained
8. Outa v Odoto & 3 others (Petition 6 of 2014; [2023] KESC 75 (KLR)) — Explained
9. Salat, Nicholas Kiptoo Arap Korir v Independent Electoral And Boundaries Commission & 6 others (Civil Appeal 228 of 2013; [2013] KECA 113 (KLR)) — Explained
10. Waity, Sammy Ndungu v Independent Electoral and Boundaries Commission & 3 others (Election Petition 2 of 2017; [2018] KEHC 8826 (KLR)) — Explained

Statutes

1. Oaths And Statutory Declarations Act (cap 15) — section 5 — Interpreted
2. Supreme Court Act, 2011 (Act No 7 of 2011) — section 3(d)(e), 3A, 10, 11, 23(2)(e) — Interpreted
3. Supreme Court Rules, 2020 (Act No 7 of 2011 sub leg) — rule 15(2), 29(4), 62; Schedule 3; part v — Interpreted

Advocates

Mr. Charles Kanjama, SC for Applicant
Ms. Ligunya for 1st Respondent

RULING

Representation:

Mr. Charles Kanjama, SC for the applicant

(Muma & Kanjama Advocates)

Ms. Ligunya for the 1st respondent

(Ligunya Sande & Associates Advocates)

Non- appearance by the 2nd, 3rd, 4th, 5th and 6th respondents

1. Upon considering the notice of motion by the applicant dated September 28, 2023 brought under sections 3(d)(e), 3A, 11 and 23(2)(e) of the *Supreme Court Act, 2011* as well as rules 15(2), 29(4) and 62 of the *Supreme Court Rules, 2020*, seeking:

> "i) That this honourable court be pleased to set aside and/or review downwards the decision made by the registrar of this court dated June 9, 2023 as relates to item 1 on instructions taxed at Kshs 5,000,000; and
>
> ii) Costs of this application be provided for"; and

2. Upon reading the applicant's affidavit sworn on June 24, 2023 by Lindon Otieno, the legal affairs manager of the applicant, in support of the motion, wherein he deposes that the Deputy Registrar delivered a decision taxing the 1st respondent's Bill of Costs dated March 28, 2023 at Kshs 5,018,104 of which, Kshs 5,000,000 was awarded as instruction fees; that by doing so, the Deputy Registrar erred in failing to give consideration to the fact that the Bill of Costs and Decree were lodged and drawn contrary to rule 29 as well as paragraph 2(2) of the third schedule to the *Supreme Court Rules, 2020* because the Decree was neither drawn and certified following the laid procedure nor was it lodged after making the order for costs; that the Deputy Registrar erred in principle by arriving at an erroneous decision on the taxation by failing to give consideration to the fact that the instant appeal was a public interest matter and that the applicant is a statutory body funded by public coffers, thereby awarding costs so manifestly excessive, punitive and so high as to confine access to the court to the wealthy; that the taxed bill is so high as to be regarded as punishment of the applicant as opposed to fair reimbursement for costs incurred by the 1st respondent; that the taxed award is not consistent with previous awards in similar public interest cases; and that the unfair decision of the taxing officer and the taxation amounted to a miscarriage of justice as the taxing officer did not exercise his discretion judicially; and

3. Upon considering the applicant's submissions dated September 29, 2023 to the effect; that the applicant has never received any draft decree for approval or rejection from the 1st respondent contrary to rule 29 of the *Supreme Court Rules*; that paragraph 9 of the third schedule to the *Supreme Court Rules, 2020* as read with the scale of costs under the said third schedule, provides that the fee to be awarded for instructions to act for a respondent under item 2(a) in any petition, reference or application is Kshs 1,500; that in Outa v Odoyo & 3 others, SC Petition No 6 of 2014; [2023] KESC 75 (KLR), a similar public interest matter relating to an election petition, the court analyzed a number of cases where costs were capped at no more than Kshs 2.5 million or 3 million and in such cases, costs were to be shared among three or more respondents. In light of these cases, an award of Kshs 5 million to be paid by a statutory body funded by public coffers in the instant case is a new record high. The applicant also cites the cases of *Sammy Ndungu Waity v Independent Electoral and Boundaries Commission & 3 others*, [2018] eKLR where costs of a gubernatorial election were capped at Kshs 1.5 million and *Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission & 2 others*, [2018] eKLR, a parliamentary election where costs were capped at Kshs 500,000 to urge that its application be allowed; and

4. Upon considering the 1st respondent's replying affidavit sworn on October 4, 2023 by EG opposing the application and urging that it be dismissed for the reasons; that the court dismissed the appeal with costs to the 1st respondent; subsequently, the applicant did not file for a review of the judgment, therefore the issue of costs remains settled; that rule 29(4) of the third schedule of the *Supreme Court Rules, 2020* is not couched in mandatory terms and does not bar one from lodging a bill of costs for taxation before the Registrar, but merely provides that a party is at liberty to forward a draft order to the other party for its approval for purposes of extracting a decree; that the Deputy Registrar in his taxation ruling, substantively pronounced himself on the issue of whether the bill of costs was properly before him; that the amount awarded is not excessively high or punitive and the same is commensurate with the works done in the ten years that the case has been litigated in court; that the applicant is a profit making organization as it charges for incorporation and registration of both national and international organizations and is therefore not funded by public coffers as alleged; that a consent dated June 29, 2023 was executed by both parties; and that this court be pleased to confirm the taxed costs and adopt and uphold the consent by the parties; and

5. Further,in its submissions dated October 5, 2023, the respondent posits that the discretion of the taxing master was exercised judiciously as he considered the complexity of the matter and the time spent; that the decision was fair, reasonable and consistent with other decisions of this court in *Zacharia Okoth Obado v Edward Akongo Oyugi & 2 others*, SC Petition No 4 of 2014; [2014] eKLR, *Bellevue Development Company Ltd v Francis Gikonyo & 3 others*, SC Petition No 42 of 2018; [2020] eKLR and *Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others*, SC Petition No 17 of 2018; [2019] eKLR; that the fee of Kshs 5 million can be justified by; the time spent in litigation being ten years; the complexity and novelty of the matter that necessitated *the constitution* of a bench of three judges in the High Court, and a five-judge bench in the Court of Appeal; and the extensive research which included comparative analysis of jurisprudence from different jurisdictions; and

6. Taking into account,the applicant's further affidavit and supplementary submissions dated October 18, 2023, in response to the 1st respondent's replying affidavit, in which the applicant submits that the 1st respondent's replying affidavit has no legal value and effect; that it contravenes section 5 of the *Oaths and Statutory Declarations Act* for the reason that the Commissioner for Oaths did not indicate the place where the said document was attested; consequently, the replying affidavit is fatally defective and the applicant urges the court to find that there is no replying affidavit on record; that the replying affidavit, being a principal document, in absence of this foundational pleading, it follows that the submissions filed by the 1st respondent are also of no effect. For this proposition, the applicant relies on the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others*, SC Application No 26 of 2018; [2018] eKLR where this court held that an affidavit must clearly state the place and date where it was made, and it must be made before a Magistrate or a Commissioner for Oaths; and

7. Moreover,regarding the impugned consent, the applicant gave the following background of the circumstances culminating in the consent: that on June 24, 2023, it filed an application for stay of execution of the hon Deputy Registrar's ruling on taxation and an order of injunction against the attachment and sale of the applicant's property; that despite that application being certified as urgent by the court on June 27, 2023, on the morning of June 29, 2023, Zasha Auctioneers in the company of more than 50 men, proceeded to the applicant's office premises and sought to attach and subsequently sell the applicant's properties including the applicant's tools necessary for the performance of its statutory obligation; that in light of the impending attachment, on the same day the applicant filed a certificate of urgency seeking reconsideration and issuance of the stay order against the 1st respondent's execution; that noting the imminent threat of execution and subsequent defeat of the substance of the

instant application, counsel for the applicant and 1st respondent resolved to enter into negotiations on behalf of the parties which would have eventually resulted into a consent being filed by the parties. However, counsel for the parties failed to agree; that instead, the 1st respondent's advocate used her influence of having auctioneers at the applicant's premises to unduly coerce the applicant's Executive Director into entering a consent with it; that upon the applicant being served with the impugned consent and a letter purporting to have the consent being adopted as an order of the court, the applicant protested to the service of the documents through its counsel to the Registrar of the court by a letter dated July 3, 2023 and affidavit of protest sworn by Mutuma Nkanata on July 4, 2023 since the impugned consent was allegedly obtained under duress, coercion and undue influence; that the impugned consent is therefore null and void for being procured without the authority or consent of the applicant's board as well as without authority of the applicant's counsel; that the impugned consent does not settle the matter; and that there was no consensus ad idem for the parties to be said to have entered into a consent; and in view of the foregoing rival arguments, I, now therefore opine as follows:

8. Before considering the merits of the reference, there are two preliminary issues to be disposed of. The first one is whether the 1st respondent's replying affidavit is competent. According to the applicant, the replying affidavit is fatally defective for the reason that it lacks in the jurat or attestation part, the place where the oath or affidavit was made or taken contrary to section 5 of the *Oaths and Statutory Declarations Act*.

9. Alive to the fact that the power to strike out pleadings is a draconian measure that ought to be employed sparingly and only as a last resort and even then, only in the clearest of cases, as has been explained in a long line of previous decisions, including *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others*, Civil Appeal (Application) No 228 of 2013; [2013] eKLR.

10. It is noted that this objection has been raised by the applicant in its further affidavit and supplementary Submissions, without an opportunity to the 1st respondent to reply, and considering that under part v of the *Supreme Court Rules*, the court can only issue an order upon being appropriately moved, the applicant ought to have filed a formal application to strike out these pleadings as opposed to seeking to do so through submissions. For this reason, I decline to venture into the merit of whether the 1st respondent's Replying Affidavit is properly on record.

11. Secondly, there have been arguments by both parties as to the effect of a consent dated June 29, 2023. In that consent, it is purported that the applicant acknowledged its indebtedness to the 1st respondent and undertook to settle the taxed bill of costs together with the auctioneer's charges. This court, in *Geoffrey M Asanyo & 3 others v Attorney-General*, SC Petition No 7 of 2019; [2020] eKLR held as follows regarding a consent:

> "[40] Adoption of a consent by a court is a process, in the course of which a court discharges the duty of evaluating the clarity of the consent placed before it by parties and giving directions on the manner of adoption. This circumvents the risk of an unlawful order and validates the mode of adoption and compliance. Thus, a consent by parties becomes an order of the court only once it has been formally adopted by the court..."

12. Noting that both the Executive Director of the applicant and counsel for the 1st respondent executed the consent dated June 29, 2023; that subsequently, the applicant's counsel contested the manner in which it was entered insisting that the applicant's Executive Director was coerced into signing it and that the applicant's board did not sanction it. But of significance is the fact that the consent has not been formally adopted by the court as an order and therefore serves no useful purpose in these proceedings. It could not per se have settled the issue of costs between the parties.

13. Evaluating the arguments in this reference, the first matter to consider is whether the bill of costs and decree were lodged and drawn contrary to rule 29 and paragraph 2(2) of the third schedule to the *Supreme Court Rules 2020*. The argument is that the 1st respondent failed to submit the decree to the applicant for approval or rejection as required by rule 29.

14. Rule 29(4) provides as follows:

> "(4) Any party may, within fourteen days from the date of judgment or ruling, prepare a draft order and submit for the approval of the other party who shall, within seven days of receiving the draft order-
>
> a. approve it, with or without any changes; or
>
> b. reject it.
>
> 5. Where the parties approve the draft, it shall be submitted to the Registrar who shall if satisfied that it is properly drawn, certify the order accordingly.
>
> 6. Where parties do not agree on the content of the order, any judge who sat at the hearing shall settle the terms of the order." [my emphasis].

15. Accordingly, the taxing officer in determining this question stated the following:

> "(7) ..... but having read rule 29(4), it is my view that the same is optional so that it will be erroneous to hold that the filing of a party and party bill of costs must be preceded by an approved decree or order. It is equally clear from the framing of rules 59, 60 and the third schedule to the *Supreme Court Rules, 2020* that in the exercise of his/her discretion in assessment of costs, the Registrar is not required to first ensure compliance with rule 29 of the *Supreme Court Rules 2020*.
>
> (8) Lastly, I have read the submissions by the appellant on this aspect of the case and noted that it does not challenge the order for costs as contained in the Judgment of February 24, 2023.
>
> The appellant's contention on this issue falls on the wayside."

16. It is common factor that a draft decree was not submitted to the applicant for approval or rejection in terms of rule 29 aforesaid. What then is the effect of that failure? The applicant has prayed that for this omission, the court be pleased "to set aside and/or review downwards" the impugned decision as it relates to item 1 on instructions taxed at Kshs 5,000,000.

17. It must be stressed that is not for nothing that rule 29(4) of the *Supreme Court Rules*, reproduced above, sets out in some detail the steps to be followed when a decree has been drawn: that the parties must themselves, first be satisfied that the decree reflects the decision; that the process of exchanging a draft decree may be initiated by either party; and that it is only when the parties fail to agree that the court steps in to settle the terms of a decree.

18. But strictly speaking, a decree, being a formal expression of a court's conclusive determination of the rights of the parties in a suit, is a product of a judgment and therefore belongs to the court. That is why

it is of no consequence until it is duly sealed by the registrar, who, under section 10 of the *Supreme Court Act* is responsible for—

> " 10(1) (d)...certifying that any order, direction or decision is an order, direction or decision of the court, or of the chief justice or other judge, as the case may be."

19. The main consideration in approving or rejecting a decree is that a decree must always mirror the judgment. In the instant case, the applicant does not claim that the decree is at variance with the judgment of the court, which in so far as costs are concerned merely stated that: "the 1st respondent shall have the costs".

20. While it must be emphasized that parties must strictly follow the steps enumerated in rule 29, in the circumstances of this case, it is my considered view that the setting aside of the execution process, as sought here is not the answer and will serve no purpose. The relief of setting "aside and/or review downwards" would have been efficacious only if it was demonstrated that the decree was at variance with the judgment.

21. In the end, on this question, I come to the conclusion that, although the 1st respondent offended rule 29 of the *Supreme Court Rules*, that offence cannot attract the kind of sanction sought in this prayer.

22. The gravamen of the applicant's reference is the taxed award of Kshs 5,000,000 for instruction fees. This court recently in Outa v Odoyo & 3 others, SC Petition No 6 of 2014; [2023] KESC 75 (KLR) highlighted the following principles to be considered in an application for setting aside a certificate of taxation:

> " (11) A certificate of taxation will be set aside, and a single Judge can only interfere with the taxing officer's decision on taxation if;
>
> a. there is an error of principle committed by the taxing officer;
>
> b. the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy;(and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).
>
> c. the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and
>
> d. the award proposed is so far as practicable, consistent with previous awards in similar cases.
>
> To these general principles, I may add that;
>
> i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,
>
> ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that

discretion must be exercised judicially, not whimsically,

iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes."

23. Bearing these principles in mind, I reiterate that the only point of contention is item No 1 which was on instruction fees. The 1st respondent had sought the item be taxed at kshs 20,000,000 while the applicant insisted that Kshs 1,500 was reasonable. Resolving this question, the taxing officer expressed himself as follows:

> "(16) ... I hold and find that this was an exceptional case where novel constitutional issues were raised. I am mindful in this case, counsel's industry in the success of the case must be compensated reasonably. There is indeed evidence of extensive research as submitted by counsel for the 1st respondent. The nature of the case and its importance in the field of enforcement of human rights for the minority cannot be underestimated. The Kshs 1,500/= proposed by the appellant is so little that it cannot attract young lawyers to the legal profession.
>
> (17) I am now satisfied that after a consideration of the factors a taxing officer ought to bear in mind in awarding instruction fees, I hereby in the exercise of my discretion award Kshs 5,000,000 as instruction fees."

24. In arriving at the award, the taxing officer took into consideration, the novelty of the matter and its contribution to the growth of jurisprudence; the nature of the case and its importance in the field of enforcement of human rights for the minority involving the LGBTIQ community; and the industry of counsel through extensive research conducted while being cautious not to enrich the victor unjustly. He therefore found the amount of Kshs 20,000,000 proposed by the 1st respondent to be excessive and 1,500 grossly and manifestly deficient.

25. In this court costs payable by a party can be awarded at three levels: assessed by the court itself when making its decision; or taxed by the registrar; or reached by consent of the parties. See rule 59 of the *Supreme Court Rules, 2020*. Where the registrar is called upon to tax a bill of costs rule 60 directs that such costs shall be taxed in line with the scale outlined in the third schedule to the *Supreme Court Rules 2020*.

26. Specific to instructions, paragraph 9 of the third schedule makes 3 important provisions, that:

i. Instruction fees "shall be such sum as the taxing officer shall consider reasonable but shall not be less than one thousand shillings".

ii. Secondly, the fees for instructions "shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties".

iii. Finally, that sum allowed under the second consideration "shall include all works necessary and properly done in connection with the appeal and not otherwise chargeable, including attendances, correspondence, perusals, and consulting authorities".

27. Balancing all these factors the taxing officer proceeded, in exercise of his discretion, to reduce the 1st respondent's proposed award of Kshs 20,000,000 to Kshs 5,000,000. I do not think the taxing officer

can be said to have committed an error of principle or can it be said that the fee awarded is manifestly excessive as to warrant my interference? The function of a single judge seized of a reference is to review the taxing officer's certificate of taxation to ascertain whether the taxing officer has, among other things, erred in principle. It is and cannot be in the nature of a new hearing.

28. Unless the taxing officer improperly exercises his discretion or applies the wrong principles or the quantum awarded is obviously wrong, the single Judge ought not to interfere with the decision of the taxing officer on the mere question of quantum, or merely because the single judge would have awarded a different figure had he been the taxing officer.

29. Rule 6 (2) of the rules of the court only permits any party aggrieved by a decision of the registrar to apply for a review to a single judge, whose decision is final. Because taxation is not a mathematical exercise but rather a discretionary process, the single Judge cannot purport to engage in such an exercise, which involves perusing the record in order to ascertain all work necessary and properly done in connection with the appeal, including attendances, correspondence, perusals, and consulting authorities.

30. In the circumstances, I find that no material has been placed before me to interfere with the taxing officer's discretion. The authorities cited by the applicant to persuade me that the award was excessive relate to election petitions whose timeline are only six months in the courts below, while parties and counsel in thisappeal have been in court for over ten years, traversing the entire superior courts. Perhaps it is this single factor that informed the court's decision to award costs to the 1st respondent even when the two superior courts below did not make any orders as to costs. No doubt, the complexity and novelty of the case similarly informed the decision to constitute larger benches in the courts below (High Court, three judges and five in the Court of Appeal), while in this court there was a split decision, 3:2.

31. Consequently, and for all the reasons explained, this reference fails and is dismissed with an order that each party shall bear their own costs.

32. Accordingly, I order that:

    i. The reference dated September 28, 2023 be and is hereby dismissed; and

    ii. Parties shall bear their own costs as costs are awarded at the discretion of the court.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER 2023.

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA