Republic v President of the Law Society of Kenya & another; Match Electricals Limited (Ex parte Applicant) (Judicial Review Application E120 of 2022) [2025] KEHC 11891 (KLR) (Judicial Review) (8 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11891 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E120 OF 2022

RE ABURILI, J

AUGUST 8, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE PRESIDENT OF THE LAW SOCIETY OF KENYA ..... 1ST RESPONDENT

LIBYAN ARAB AFRICAN INVESTMENTS COMPANY KENYA LIMITED AHMED MOHAMED AMEAR, MOHAR MAAWAL SHTWEI, ALL TRADING AS LEDGER PLAZA HOTEL NAIROBI FORMERLY LAICO REGENCY HOTEL NAIROBI KENYA ..... 2ND RESPONDENT

AND

MATCH ELECTRICALS LIMITED ..... EX PARTE APPLICANT

RULING

1. The 2nd respondent is before this court vide a chamber summons application dated 20th March 2025. The application is brought under Rule 11(2) of the Advocates (Remuneration) Order. It seeks for a review and/setting aside of the assessment of the Taxing Officer on item 1 with respect to their bill of costs dated 24th December,2024.

2. The application also seeks for the item to be taxed afresh and in the alternative the bill of costs is remitted to be taxed afresh by a Taxing Officer other that Hon. E.C. Chelule.

3. The application is supported by the affidavit of Jamal Ahmed sworn on 20th March,2025.

4. The 2nd respondents' case is that in her ruling of 6th March,2025 the Taxing Officer taxed the bill of costs at Kshs.265,070.00 taxing off the sum of Kshs.600,000. It is urged that in doing so, she failed to consider the relevant factors when increasing instruction fees, as outlined in the case of Joreth Limited vs. Kigano & Associates [2002] eKLR which amount involved in the dispute totalled to USD 801,133.00.

5. The 2nd respondents also argue that the taxing master failed to consider that the application sought an order of mandamus, the research and volume of documents perused and prepared by the parties, the principle that the remuneration of an advocate must be such as to attract worthy recruits to the profession and the decision cited by the 2nd respondent on costs in its submissions.

6. In response, the ex parte applicant filed a replying affidavit sworn by Christopher Maina Theuri on 26th March,2025.

7. According to the ex parte applicant, the taxing officer properly applied the proper scale for such a matter which is governed by schedule 6(j)(ii) of the Advocates Remuneration Order. The ex parte applicant's case is that the matter was not complex at all nor was it novel and that there was no difficulty in opposing the application whatsoever.

8. The 2nd respondents' application which according to the applicant was brought under Order 53 rule 3(1) of the Civil Procedure Rules and section 8 and 9 of the *Law Reform Act* and sought for an order or mandamus to issue to compel the 1st respondent to appoint an arbitrator to hear and determine the dispute between the ex parte applicant and the 2nd respondents arising from a contract for the facelift of LAICO Regency Hotel Kenya dated 12th December, 2012.

9. It is argued that the 2nd respondent filed grounds of opposition dated 8th December,2023 and a replying affidavit dated 30th October,2023. Further, that parties were directed to file their written submissions by the court on 11th December, 2023, when the matter came up for hearing and a ruling was subsequently delivered on 20th June,2024 via email.

10. The exparte applicant maintains that the application was straightforward in nature and did not require much input to warrant granting such excessive amount as sought by the 2nd respondent herein. It is argued that it is trite that costs are intended to be reasonable and not to unjustly enrich a litigant.

11. Further, that the sum of Kshs.265,070/= assessed by the Taxing Officer was fair and reasonable and the same should be upheld since the 2nd respondent has not demonstrated any justifiable reason as to why this honourable court ought to interfere with the Taxing Officer's decision.

12. The application was canvassed by way of written submissions.

13. The 2nd respondent filed written submissions dated 22nd April, 2025, and supplementary submissions dated 27th May,2025.

14. In their submissions, the 2nd respondent asserts that the test to be applied when determining a reference was set by Ringera J (as he then was) in First American Bank of Kenya Limited vs. Gulab P. Shah & 2 others [2002] eKLR where the court is said to have held that a court can only interfere with a taxing officer's decision on taxation if the decision was based on an error of principle.

15. According to the 2nd respondent, the Taxing Officer made an error of principle when she failed to consider the nature and importance of the matter, the time and research expended in the matter including the 2nd respondent's affidavit which was 204 pages long, the 11 grounds set out in opposition

to the application, each referring to court decisions and books in support of the grounds raised. The submissions were said to be 13 pages long while the authorities were 87 pages in total.

16. Further submission was that the 2nd respondent's advocates had to peruse the ex parte applicant's documents filed before advising the 2nd respondent on the best way forward. The taxing master is also faulted for failing to take into account the extensive research conducted by the 2nd respondent's advocates in identifying the authorities to oppose the judicial review application, the time, care and labour taken to prepare the affidavit, grounds of opposition and digest of authorities.

17. The 2nd respondent relies on the case of Premchand Raichand Limited & Another vs. Quarry Services of East Africa Limited & others [1972] EA 162 where the court is said to have held that a successful party ought to be fairly reimbursed and the remuneration must be such as to attract worthy recruits to the legal profession.

18. Further reliance is placed on the cases of High Court Mis. Application No. 372 of 2007; East African Cables Limited vs Kenya Power and Lighting Co. Limited where the court is said to have awarded Kshs.750,000.00 as instruction fees where the proceedings did not go beyond the leave stage allowed; High Court Misc Application Civil Suit No. 1534 of 2005; Kenya Shell Limited vs Commissions of Lands where the court is said to have taxed and allowed Kshs.500,000.00 as instruction fees and High Court Judicial Review Application No. 6 of 2018 Consolidated with Judicial Review Application No. 7 and 18 of 2018; Republic vs Public Procurement Administrative Review Board & 2 others where the court is said to have allowed the instructions fees to be taxed at Kshs.5,000,000.00. It is the 2nd respondent's case that all the above cases are more than 7 years old.

19. The ex parte applicant in its submissions dated 5th May,2025, relies on the case of Joreth Limited vs. Kigano & Associates [2000] eKLR where the court is said to have laid out the principles that guide taxing officers in exercising their discretion.

20. It also relies on the case of Ramesh Naran Patel vs. Attorney General & Another [2012] eKLR where the court is said to have observed that costs were intended to be reasonable and not to unjustly enrich a litigant. The case of Lucy Waithera & 2 Others vs. Edwin Njagi T/A E.K. Njagi & Company Advocates [2017] eKLR is also relied on where the court is said to have held that the taxing master's discretion must be exercised judiciously and the same must be done in accordance with the Advocates Remuneration Order where discretion is given for variation. Also, that justification must be given for such variations.

Analysis and Determination

21. I have considered the chamber summons and the opposition thereto as argued by both parties' counsel and the issue for determination is whether the court should interfere with the discretion of the taxing master.

22. The principles for setting aside the decisions of a Taxing Master were well established by the Court of Appeal in the case of Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board [2005] eKLR that:

> " On 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."

23. 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."

24. Further guidance is found in the case of Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92 where 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.

25. Therefore, it is generally not within a Judge's mandate to re-tax a bill of costs. If the Judge determines that the taxing officer made an error in principle, the proper course is to remit the bill to the same or a different taxing officer with suitable guidance on how it should be taxed. A Judge should only intervene in the taxing officer's assessment of costs if there has been a misdirection on a point of principle.

26. When taxing a bill of costs, the Taxing Officer is performing duties specific to that role. The Taxing Master serves as an officer of the Superior Court, designated to assess and determine bills of costs.

27. As a matter of principle, instruction fees are a distinct and fixed item, charged only once and are not influenced by the stage at which the suit stands. Specifically, regarding the taxing of instruction fees and more so in judicial review proceedings, the following guidelines were provided by Ojwang J. (as he then was), in Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) eKLR:

> " 1. . the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
>
> 2. the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;
>
> 3. the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
>
> 4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
>
> 5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
>
> 6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
>
> 7. where responsibility borne by advocates is taken into account, its nature is to be specified;
>
> 8. where novelty is taken into account, its nature is to be clarified;
>
> 9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form."

28. The above guidelines were also applied by Odunga J. (as he then was) in Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd, [2014] eKLR, where the learned Judge in addition held that the Taxing Officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

29. In Kamunyori & Company Advocates vs. Development Bank of Kenya Limited (2015) Civil Appeal 206 of 2006 the court held inter alia, that: "where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred."

30. The primary complaint raised by the 2nd respondent in the reference is that the instruction fees awarded by the Taxing Master was manifestly low and failed to reflect the value of the subject matter, complexity and novelty of the matter and the time and effort put in by counsel.

31. The Supreme Court in the case of Fredrick Otieno Outo vs. Jared Otieno Odoto & 3 others Petition No. 6 of 2014 observed thus:

> "

"[10] The principles of setting aside the decision of a Taxing Officer are now old hat, going by the numerous decisions of the superior courts below. As early as 1972 these principles were propounded by Spry VP, in the leading case of Premchand Raichand Limited & Another v. Quarry Services of East Africa Limited and Another; [1972] EA 162, which has been approved in a long line of subsequent rulings, for example, First American Bank of Kenya v. Shah and Others; (2002) EA 64 and Joreth Ltd v. Kigano and Associates (2002); 1 EA 92, to name but two.

(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."

32. The proper exercise of discretion by the Taxing Officers was restated in the case of Kamunyori & Company Advocates v Development Bank of Kenya Limited [2015] Civil Appeal 206 of 2006, where it was held that:

"...Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside."

33. In making a determination on how much instruction fees was to be awarded, the Taxing Master observed that the applicable law was schedule 6 (j) of the Advocates Remuneration Order 2014 and that as the taxing officer, she had the discretion to increase the figure provided that the discretion was exercised judiciously and was also subject to the principle of reasonableness.

34. She further observed that in exercising her discretion, she was guided by the case of Premchand Raichand Ltd & Another vs. Quarry Services EA LTD & Others [1972] EA PG 162 and Republic vs. Minister For Agriculture & 2 Others Ex parte Samuel Muchiri W' Njuguna & 6 Others [2006] eKLR where it was held that the Taxing Officer must clearly justify any complexities warranting the exercise of discretion in assessing costs. This includes specifying any novelty, extensive effort, time consumption, or document analysis involved, unless such work is already covered under another cost item.

35. She also relied on the case of Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92 where the court according to her set out various factors that the court ought to consider in determining the instruction fees and these include importance of the matter, general conduct of the case, time taken for its dispatch and the impact of the case on the parties.

36. She further stated that in her considered view the prayers sought were of a prerogative nature which fall under schedule 6(j) (ii) of the Advocates Remuneration Order 2014. She also stated that the court has a discretion to enhance instructions fees considering the complexity of the matter, responsibility by counsel, time spent, reason done and skill deployed by counsel. The Taxing Master went ahead to state that the court must ensure that the advocates instructions fees is to seek and has more and no less than reasonable compensation for professional work done.

37. While relying on Article 48 of *the Constitution* the Taxing Master observed that the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment.

38. She went ahead to observe that this matter commenced on the 28th July,2022, and Judgement was entered on the 20th June, 2024 and as such, the amount of work undertaken by counsel during that period was acknowledged.

39. Upon carefully considering the factual and legal issues with a view to gauge complexity of issues, importance of the matter and further my perusal of the pleadings, noting the volume thereof and in exercise of her discretion it was her opinion that the amount in the party and party Bill of costs was excessive.

40. The Taxing Master observed that it was important that advocates should be well motivated but that it was also in the public interest that costs be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

41. The Taxing Master further stated that the basic fee applicable as governed by Schedule 6(j) (ii) of the Advocates Remuneration Order, 2014 was Kshs.100,000/= and as such she found that Kshs. 200,000/= was reasonable instruction fees taking into account the time taken in the matter, the interests of the parties, the importance of the matter, the volume of the pleadings, scope of the work done and the nature of the dispute. She went ahead to tax off Kshs.600,000/= from the said Item 1.

42. In this court's humble opinion, the Taxing Master in reaching the decision that she did, was well within her mandate and the confines of the law. She took into account all the factors to be considered in the taxation of bills of costs especially item 1 on instructions fees and this court finds no error of principle on her part, capable of being corrected. The Interested Parties' claim for Kshs. 800,000/= as instruction fees, in view of the analysis above was, not only unsubstantiated but also grossly exaggerated.

43. Besides, the reference filed before this court does not see how the claimed amount correlates with any known or measurable valuation of the subject matter in judicial review litigation. As was held in Republic v Commissioner of Domestic Taxes Ex Parte Ukwala Supermarket Ltd & 2 Others [2018] eKLR, while the subject matter's value may be considered, it is not the sole determinant of instruction fees particularly in public law litigation where monetary claims are not the central issue.

44. The application for an order of mandamus to compel the 1st respondent to appoint an arbitrator to hear and determine a dispute between the ex parte applicant and the 2nd respondents herein arising from a contract cannot be a complex or novel case whose value of the subject matter as stated is USD 801,133.00 which the ex parte applicant stated was the amount involved in the dispute. This was not a civil suit where the amount of USD 801,133.00 was being sought to be recovered.

45. To determine instructions fees on the basis of that amount, in these public law litigations would drive away justice seekers yet all that the applicant was seeking was an order of mandamus compelling the 1st respondent to appoint an arbitrator to hear and determine a dispute between it and the 2nd respondent herein.

46. The 2nd respondent has referred to High Court Miscellaneous Application No. 372 of 2007; East African Cables Limited vs Kenya Power and Lighting Co. Limited, a matter which, according to the court, revolved around the public tendering process. In that case, the applicant sought leave to apply for an order of certiorari to quash the decision of the then Public Procurement Complaints, Review and Appeals Board, a declaration, an order of prohibition and an order of mandamus.

47. It is evident that although the matter involved an application for leave, it concerned a more technical subject matter compared to the instant case, where the sole issue was whether or not an order of mandamus ought to have been issued to compel the 1st Respondent to appoint an arbitrator. Notably, despite the complexity of the matter and the substantial amount involved being Kshs. 576,233,160/= the court taxed off Kshs. 757,000/= from the 2nd respondent's bill of costs and awarded the sum of Kshs. 822,598/=.

48. The 2nd respondent has also relied on High Court Miscellaneous Application Civil Suit No. 1534 of 2005; Kenya Shell Limited vs Commissioner of Lands, where the court is said to have awarded the sum of Kshs. 500,000/=. However, the ruling does not provide any reasons as to why the taxing officer opted to award that amount and as such, this Court cannot be expected to rely on a decision that furnishes no rationale for the sums awarded.

49. Regarding High Court Judicial Review Application No. 6 of 2018, consolidated with Judicial Review Application Nos. 7 and 18 of 2018; Republic vs Public Procurement Administrative Review Board & 2 Others, referred to by the 2nd respondent, this Court notes that the matter was not an ordinary judicial review application but one involving public procurement that was of great importance to the public. In that case, the court identified six issues for determination, unlike in the instant case where the court identified only two issues namely, whether an order of mandamus was available and whether it would be of any value to the applicant. It is also important to note that the court in the above matter was dealing with three consolidated suits, even though one was later withdrawn and was therefore not addressing a single suit as is in the present case.

50. In light of all the above, I find and hold that the reference lacks merit. I decline to set aside the taxation ruling dated 24th December,2024.

51. I order that each party bear their own costs of this reference.

52. I so order.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF AUGUST 2025

R.E ABURILI

JUDGE