Republic v Public Procurement Administrative Review Board; Energy Regulatory Commission & another (Interested Parties) (Application 496 of 2017) [2024] KEHC 7730 (KLR) (Judicial Review) (29 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7730 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 496 OF 2017

J NGAAH, J

JUNE 29, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

ENERGY REGULATORY COMMISSION ..... INTERESTED PARTY

INTERTEK TESTING SERVICES LIMITED ..... INTERESTED PARTY

RULING

1. There are three applications on record two of which have been filed by the ex parte applicant. The applicant's first application is a chamber summons dated 27 June 2023 expressed to be brought under Paragraphs *11*(1), *11*(2) and *12* Advocates Remuneration Order, 2014 and Section 3A and 63(e) of the *Civil Procedure Act*, cap. 21. In this application the applicant seeks the following orders:

> " 1. This Honourable Court be pleased to allow this reference against the ruling on taxation of the taxing officer, Honourable E. C. Chelule (DR) delivered on the 15th June 2023;
>
> 2. This Honorable Court be pleased to set aside and/or review the taxing master's decision on the Party & Party Bill of Costs dated 29th October 2019 delivered on 15 June, 2023; and

3. The costs of this reference be provided for."

2. This particular application is supported by an affidavit sworn on 27 June 2023 by Mr. Kenneth Wilson, the applicant's learned counsel.

According to Mr. Wilson, the 1st interested party filed its Party and Party bill of costs dated 29 October 2019. It was disposed of by way of written submissions and on 15 June 2023, the taxing officer rendered her ruling according to which the bill was taxed at Kshs. 4,668,608.00. He has faulted the taxation on the ground that the taxing officer erred in law and principle in inordinately enhancing the instruction fees in item 1 of the Bill of Costs. According to the scale the minimum fee chargeable is Kshs.100,000.00. The taxation is also impugned because the taxing officer allowed getting up fees in item 2 yet getting up fees is not allowable in judicial review proceedings.

3. The taxing officer is also said to have erred in law and principle in taxing items 11, 12, 13, 14, 17 and 19 on the higher scale instead of the lower scale despite there being no order that costs be taxed on the higher scale and for taxing Items 12 and 13 separately despite the two being a duplication for court attendance on the same date which was 23 August, 2017. On the same ground of erring in principle and law, the taxing officer is faulted in taxing value added tax..

4. The applicant's second application is dated 5 July 2023. It is expressed to be brought under the same provisions of the law as the ones under which the first application was filed. It seeks the following orders:

"1. This Honourable Court be pleased to enlarge the time within which the Applicant is to file the reference challenging the Ruling delivered by the Taxing Master Honourable E. C. Chelule (DR) on 15th June 2023.

2. The reference filed herein be deemed to have been properly filed within time.

3. This Honourable Court be pleased to vary and/or set aside the ruling delivered by the Taxi ng Officer on 15th June 2023.

4. The costs of this application and the reference be provided for".

5. This particular application is supported by the affidavit of Mr. Newton Odundo who is also the learned counsel for the applicant. According to Mr. Odundo, the taxing officer's ruling on the 1st interested party's bill of costs was e-mailed to the parties on 15 June 2023. However, the copy that was sent to the parties was incomplete in the sense that it had some pages missing. The applicant's advocates had to request for a complete ruling.

6. Mr Odundo has sworn that "while the said ruling was being considered and the application outlining the grounds of objection being drafted, Wednesday 28th June, 2023, was declared a public holiday to mark Eid-Ul-Adha vide the Kenya Gazette Notice No. 8456." The learned counsel for the applicant was unable to file these pleadings on 29 June 2023 "due to technological failure". Nonetheless, being dissatisfied with the taxing officer's ruling, the applicant is said to have promptly filed the application dated 27 June 2023 "setting out the grounds of objection against the said decision as provided by Rule (sic) 11(2) of Advocates Remuneration Order on 30th June, 2023."

According to the applicant, the respondent will not be prejudiced in any way if this application is allowed.

7. The final application is by the 1st interested party. It is dated 15 December 2023 and it is by way of a motion expressed to be brought under "Rule" 11 (2) of the Advocates (Remuneration) Order, Order

51 rule 1 of the Civil Procedure Rules; and, section 1A, l B, 3 and 3A of the *Civil Procedure Act*. In it the applicant prays for orders:

> " 1. THAT the prayer for enlargement of time in the Chamber Summons dated 5th July 2023 be dismissed.
>
> 2. THAT the application for reference dated 5th July 2023 be struck out with costs.
>
> 3. THAT the costs of this application be awarded to the Applicant".

8. The application is supported by the affidavit of Mr. Bosire Nyamori who is the learned counsel for the 1st interested party. According to Mr. Nyamori, "section" 11(2) of the Advocates Remuneration Order provides that a party objecting to taxation of a Bill of Costs, has fourteen days from the date when the reasons for taxation are given to file a reference against the taxation. Having filed the application on 5 July 2023 when the ruling was delivered on 15 June 2023, the ex parte applicant is said to have been six days late yet no satisfactory reason has been proffered for the delay.

9. In any event, the taxing officer is said to have exercised her discretion judiciously and with reasonableness and that, the Respondent has not demonstrated any abuse of discretion. The 1st interested party has defended the taxing officer's ruling as comprehensive and supported by case law. If the orders sought are granted, it is urged, the 1st interested party would be prejudiced as they would amount to frustrating a successful litigant from being fairly compensated.

10. Besides the application to strike out the ex parte applicant's application dated 5 July 2023, the 1st interested party also filed grounds of objection against the application. According to these grounds, the application is fatally defective; it is incompetent and an abuse of the court process. It is said to offend paragraph 11(2) of the Advocates Remuneration Order.

11. The ex parte applicant's application dated 5 July 2023 is almost on all fours with its application dated 27 June 2023. The only difference is that in the application dated 5 July 2023, the applicant seeks for enlargement of time and that the reference dated 27 June 2023 be deemed as duly filed. So, at the very outset, prayer 3 in the application dated 5 July 2023 is declined to the extent that it is one of the prayers sought in the applicant's previous application of 27 June 2023. The only aspect of the application dated 5 July 2023 which should concern this Honourable Court is the prayer for enlargement of time.

12. Paragraph 11 of the Advocates Remuneration Order, 2014 prescribes how and when the decision of the taxing officer on taxation may be challenged. It reads as follows:

> 11. Objection to decision on taxation and appeal to Court of Appeal
>
> (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he 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 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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) far the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

13. It is apparent from the learned taxing officer's ruling that the reasons for taxation of the disputed items, amongst other items, were contained in the ruling. As a matter of fact, the ruling was captioned "ruling and reasons for taxation on the party and party bill of costs dated 29th October 2019".

14. I agree with the applicant that the purpose for which the notice to object was required under paragraph *11*(1) had been served by the ruling. Considering that the reasons for the taxation of the disputed items had been given, the notice objecting to the taxation and asking for the reasons for taxation was rendered superfluous. All that was required of the ex parte applicant was for it to file a reference against the taxation within the time prescribed in paragraph 11(2) of the Advocates Remuneration Order.

15. The reference was indeed filed on 30 June 2023. If the ruling was delivered on 15 June 2023, the last day by which the reference ought to have been filed was, of course, the fourteenth day after the delivery of the ruling. According to section 57 of the *Interpretation and General Provisions Act*, cap. 2, which prescribes how time should be computed, in such circumstances, the countdown to the deadline started on 16 June 2023. This section reads as follows:

57. Computation of time.
In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

16. Section 57(a) is of particular relevance as to when the clock started ticking. Fourteen days from 16 June 2023 would lapse on 29 June 2023. Accordingly, 29 June 2023 was the last date by which the reference ought to have been filed. That being the case, the ex parte applicant was a day late when it filed its

reference on 30 June 2023. The question, therefore, is whether there is sufficient material upon which this Honourable Court may exercise its discretion and enlarge time.

17. One of the reasons the applicant has given for the delay was that 28 June 2023 was a public holiday and, therefore, as far as I understand its case, the reference could not be filed on this particular date. This to me is a lame excuse because, as noted, 29 June 2023 was still available for the applicant to file its application. As a matter of fact, Mr. Odundo has sworn that the applicant attempted to file the application on this particular date. In his own words, Mr. Odundo has sworn that:

> " The Ex-Parte applicant's advocates unsuccessfully attempted to file the said application on 29th June, 2023 in the afternoon through the online judiciary case tracking system due to technological failure".

18. If there was any "technological failure" as suggested by Mr. Odundo, it must have been on the applicant's advocates' part and not the court. I say so because there is no proof of any system failure on the part of the judiciary and, in the absence of such proof, I am entitled to proceed on the presumption that the court tracking system was up and running at the material time.

19. But I note that the delay in filing was of one day only, if not some hours. It is a delay that one would not regard inordinate. In these circumstances I would give the applicant the benefit of doubt and enlarge the time within which he ought to have filed the reference by one day. Accordingly, the application dated 5 July 2023 is allowed to the extent that the reference filed on 30 June 2023 is hereby admitted and deemed as duly filed. In the same breath, the 1st interested party's application dated 15 December 2023 is dismissed. Costs will abide the outcome of the applicant's reference.

20. At the beginning of this ruling, I laid out the applicant's case. There does not appear to have been a response on the part of the 1st interested party against the applicant's reference. As noted, the 1st respondent's motion dated 15 December 2023 sought to strike out the applicant's application dated 5 July 2023. The grounds of objection of even date also targeted the same application. Nonetheless, in the affidavit filed in support of the motion to strike the ex parte applicant's application, Mr. Nyamori, the learned counsel for the 1st interested party, swore that:

> " 8. THAT furthermore, Taxing Master exercised their discretion judiciously and with reasonableness in line with established principles and practice. The Respondent has not demonstrated any abuse of discretion therefore obviating the necessity to vacate the Tax Master's decision.
>
> 9. THAT the Taxing Master delivered a comprehensive ruling supported by relevant case law outlining the reasons for the decision. The Respondents have not demonstrated any sound basis for review of the Taxing Master's decision."

21. Thus, although the affidavit was in support of the application to strike out the ex parte applicant's application of 5 July 2023, the 1st respondent's counsel addressed, albeit in passing, the merits of the ex parte applicant's reference. I will, therefore, not proceed as if the reference is not opposed.

22. In the submissions filed on behalf of the applicant, it has been acknowledged that the Court will only interfere with the discretion of the taxing officer if there is an error of principle and, in this submission, the applicant has relied on Republic -vs Ministry of Agriculture & 20 Others ex- parte Muchiri Wa Njuguna (2006) eklr and, as to what amounts to an error of principle, the learned counsel cited the case of *Kamunyori & Company Advocates vs. Development Bank of Kenya Limited (2015) Civil Appeal 206*

of 2006 where 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."

23. Based on these decisions, it has been urged that there was no basis for the taxing officer to have enhanced instruction fees from Kshs. 100,000/= to Kshs. 3,000,000/=. Such an increment, it has been urged, is in itself an error of principle.

24. As far as getting up fees is concerned, it has been urged it is not given in judicial review application because there is no preparation of witnesses for trial or, generally, preparation for trial as if it is an ordinary suit. The case of Ramesh Naran Patel versus Attorney General & Another (2012) Eklr was cited in support of this argument. The court in that case is said to have cited with approval the case of Republic Vs. National Environmental Tribunal ex Parte Silverste N. Enterprises Limited (2010) Eklr where it was held that in a judicial review application getting up fees could not be allowed because evidence was contained in affidavits only and "that the item in the Advocates Remuneration Order - on getting up fees contemplates involvement by counsel in the preparation of witnesses, witness statements and determination of the matter by viva voce evidence".

25. On the 1st interested party's part, it was submitted that the applicant has not demonstrated how the taxing master erred in principle in the taxation of instruction fees. Like in the applicant's case, it was submitted on behalf of the 1st interested party 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. To this end the learned counsel for the 1st interested party relied on Nyangito & Co. Advocates v Doinvo Lessos Creameries Ltd [2014] eKLR. For the same argument, the case of First American Bank of Kenya Ltd v Gulab P. Shahd & 2 Others (2002) eKLR was cited. The 1st respondent has defended taxing officer's decision because the taxing master gave her reasons for the taxation and, having done so, the court cannot interfere with her exercise of discretion.

26. The applicant's bone of contention with the taxing master's bill are mainly the items on instruction fees and getting up fees. They are also aggrieved by the taxation of other items in the 1st interested party's bill of costs, more particularly items 11, 12, 13, 14, 17 and 19 but the major ones are the instruction fees and getting up fees.

27. According to the impugned ruling, the 1st interested party asked for Kshs. 33,848, 316.60 as party and party costs in its bill of costs dated 29 October 2019. The subject matter of the suit, the basis upon which this amount was arrived at is said to have been a contract whose value was stated to be Kshs. 1,442,973,762. To be precise, this is how the item was couched:

> " To taking instructions to defend the Commission in the judicial review proceedings and prosecuting to have the claim against the 1st interested party dismissed; the subject matter being a contract whose value is approximately Kshs. 1,442,973,762."

28. The learned taxing master proceeded on this understanding that the value of the subject matter of the suit was as stated by the 1st interested party in its bill of costs. This is evidenced in the second paragraph of her ruling where she noted as follows:

> " Instructions herein arose from defending the commission in the judicial review proceedings until the claim against the 1st interested party was dismissed. The subject matter was a contract of Kshs. 1,442,973,762/-."

29. The suit having been filed in the year 2017, the taxing officer applied the Advocates Remuneration (Amendment) Order, 2014 as the standard upon which she assessed the costs. In particular, she made reference to Schedule VI(1)(j) of the Remuneration order and held that the taxing officer has the discretion of increasing the minimum instruction fees depending on, among other factors, the amount or value of the subject matter.

30. The learned taxing officer then cited the court decisions in Premchand Raichand Ltd & Another versus Quarry Services of EA Ltd & Others (1972) EA 162 and Republic versus Minister for Agriculture & 2 Others ex parte: Samuel Muchiri W'Njuguna & 6 Others (2006)eKLR on the need to state with precision any complex element involved in the suit out of which the bill of costs arises; the novelty involved in the proceedings; the industry employed and such other aspects as the details of the any initiative by counsel and the volume of documentation. Other decisions cited by the taxing officer are Joreth Limited versus Kigano & Another (2002) E.A.92 on the factors to be considered in assessment of costs and Republic versus Nyeri County Government; ex parte; Central Kenya Coffee Mill Limited (2017) eKLR on the same issue. The taxing officer then held as follows:

> " The suit was filed on the 11th of August 2017 and judgment entered within one month on the 22nd of September 2017. Having perused the file and looked at the volume of documents therein I am not convinced that the applicant has demonstrated sufficient reasons as to convince me to increase the instruction fees from the minimum of Kshs. 100,000/- as provided under the ARO to the amount sought. I do note however the great interest of the parties in the suit noting the value of the subject matter, the entities involved the volume of documents which is large, as well as the work employed by counsel."

Taking all these factors into account, the learned taxing officer increased the fees to Kshs. 3,000,000/=.

31. In Republic versus Minister for Agriculture & 2 Others; ex parte Samuel Muchiri W'Njuguna & 6 Others (supra) which the taxing officer cited, the court held inter alia that:

> " The complex element in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. 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 detail of such a situation must be set out in a clear manner. If large volumes of documentation had, to be clarified, 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".

32. It may as well be that the instruction fees the 1st interested party was entitled to was Kshs. 3,000,000/=; however, contrary to what was held in Muchiri W'Njuguna case, the taxing master never demonstrated what "great interest" in the matter involved. If the status of the "entities involved" was factor in aasement of the fees, it was never shown how such status would influence the fees payable. Again, the volume of documents was simply described as "large" without any disclosures of how "large" the documents were.

33. Ordinarily volume of the documentation would be described in folios or paginated; and it would have helped for the learned taxing officer to state in more certain terms the volume of the documents in terms of these folios which, by the way, is the term employed by the Remuneration Order. Again, it is noted in the cited case that "if the conduct of the proceedings necessitated the deployment of a considerable

amount of industry, and was inordinately time consuming, the detail of such a situation must be set out in a clear manner". Accordingly, it is not enough for the taxing officer to arrive at any particular figure on the basis of "the work employed by counsel" without giving the details of the extent of the work or counsel's involvement.

As much as the learned taxing officer cited the decision in Muchiri W'Njuguna case, it appears that she did not follow it through and apply it to the letter.

34. More crucially, the value of the subject matter ought not to have influenced the decision of the taxing officer in assessment of costs. As far as I can gather from the pleadings, the suit was all about a decision that had been made by the Public Procurement Administrative Review Board with respect to procurement proceedings that were underway at the Energy Regulatory Commission. This is apparent from the prayers in the motion that formed the suit against the Commission and the Public Procurement Administrative Review Board. Besides the prayer for costs, the rest of the prayers were captured as follows:

> " 1). An order of certiorari to remove into the High Court and quash the decision of and ruling delivered by the Public Procurement Administrative Review Board on 1st August, 2017 in Application No. 64 of 2017, SGS Kenya Limited -vs- Energy Regulatory Commission.
>
> 2) An order of prohibition to remove into the High Court and quash the decision of the Energy Regulatory Commission to proceed with the tender process in Tender Number ERC/PROC/4/3/17-18/016 for the Provision of Marking and Monitoring of Petroleum Products.
>
> 3) An order of prohibition directed to the Energy Regulatory Commission prohibiting it, directly and/or through its servants and/or agents from entering into and/or signing any contract with any third party concerning Tender Number ERC/PROC/4/3/17-18/016 for the Provision of Marking and Monitoring of Petroleum Products.
>
> 4). An order of mandamus directing the Energy Regulatory Commission to proceed with the tender process in Tender Number ERC/PROC/4/3/17-18/016 for the Provision of Marking and Monitoring of Petroleum Products including award of the contract to SGS Kenya Limited."

35. Nowhere in these prayers is it mentioned that that there exists a contract whose approximate value is Kshs. 1,442,973,762/- as suggested by the interested party in its bill of costs or as held by the learned taxing officer in her ruling of 15 June 2023.

36. As a matter of fact, going by the Public Procurement Administrative Review Board's impugned decision, the procurement process had been terminated midstream and the procuring entity was given the green light to rep-advertise the tender. There could not have been a contract in such circumstances and to hold that one not only existed but also that there was a value put on it was, to say the least, a misdirection on the facts on the part of the taxing officer.

37. In Joreth Limited versus Kigano & Another (supra), a decision which, as noted, was also cited by the taxing officer, the Court of Appeal held that where the value of the subject matter has to be taken into account, that value must be apparent from the pleadings. The court held as follows:

> "We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment 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 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."

38. It follows that in assessing the instruction fees as she did; taking into account a non-existent contract or value of the subject matter, the taxing officer's exercise discretion was tainted. In short, she made an error of principle and arrived at the wrong decision and, for this reason, her assessment cannot stand.

39. As far as getting up fees is concerned, it would, in ordinary circumstances, be pegged upon instruction fees. It is provided for under paragraph (2) of Schedule VI of the Advocates Remuneration Order. This paragraph reads as follows:

Fees for getting up or preparing for trial

In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that —

i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;

(iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

40. Inevitably, since the instruction fees was taxed at Kshs. 3,000,000/=, the taxing officer assessed getting up fees at Kshs. 1,000,000/= which is a third of the instruction fees. Having found that the instruction fees was improperly assessed, the instruction fees would also not stand to the extent that its assessment is pegged on instruction fees that was arrived at in error of principle.

41. But there is another question on whether, everything else being equal, this fee would be payable in judicial review applications. Counsel for the applicant urged that it would not because in judicial review proceedings, evidence is based on affidavit evidence only and the hearing of a judicial review application does not involve preparation of witnesses.

42. It has, however, been held in SHAMSHUDIN KHOSLA as Chairman, ABDUL GAFUR PASTA as Honorary Secretary & MOHAMED BAYUSUF as Treasurer [on their own behalf and on behalf of] THE MEMBERS OF KENYA TRANSPORT ASSOCIATION v KENYA REVENUE

AUTHORITY [2011] eKLR that the fees is payable in judicial review proceedings. Ojwang, J. (as he then was) held in this case that:

> " From the foregoing authority, I would draw the inference that "getting-up" fees, in ordinary litigation, partially overlaps with instruction fees. Whereas instruction fees represent the formal commitment of the Advocate to a new client who thereafter gives sufficient instructions, in a process of hearing-and-receiving by the Advocate, getting-up fees relate to the first step (and possibly, later, equally-significant steps) which the Advocate takes, in preparing the pleadings and other vital process-documents, for lodgment and service."

43. The case from which the learned judge made the inference was Haider bin Mohamed el Mandry & 4 Others v. Khadija Binti Ali Bin Salem alias Bimkubwa (1956) 23EACA 313, where the Court of Appeal for East Africa held at p.316 (Briggs, J.A., in relation to instruction fees and getting-up fees as follows:

> " In the main bill only one item is excessive, namely the fee from instructions to defend. Shillings 9,000/= was claimed and only Shs. 1000/= was taxed off. I consider the sum of Shs. 9,000/= allowed so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles. This is merely a 'getting-up' fee. Even attendances to take witnesses' statements are separately charged...[The] figure of Shs. 9,000/= would be appropriate only to a long and heavy case.....I think [the taxing officer] must have failed entirely to consider relevant factors, such as the small sum involved, the comparatively short time occupied in hearing, the very modest amount of research required to examine the issue of law...."

44. I would follow the learned judge's decision and hold that the getting up fees is payable in judicial review proceedings. In this regard I am also persuaded by the reasoning of Prof. Ngugi, J. (as he then was) in Republic vs. Egerton University; ex parte; Patel Maulik Prasun [2020] eKLR, where the learned judge held that:

> " The Taxing Master taxed off the entire sum claimed as getting up fee. Her reasoning is that this was a Judicial Review Application that did not require preparation for trial involving witnesses. However, getting up fees are payable even for trials or court cases which do not require preparation of witnesses. For example, the Schedule envisages getting up fees for appeals which, obviously, do not involve preparation of witnesses. There is no good reason why getting up fees should not be payable for preparing for trial for Judicial Review Applications."

Without belabouring the point, the taxing officer in this case would have been entitled to award getting up fees if instruction fees had been properly assessed.

The applicant's grievances on the taxation of the rest of the items in the bill of costs have not been controverted by the 1st interested party.

45. For reasons I have given I hereby allow the applicant's reference and set aside the taxing officer's ruling dated 15 June 2023. In the same breath, I hereby order that the 1st interested party's bill of costs dated 29 October 2019 be remitted for taxation afresh before a different taxing officer other than the one whose taxation has been impeached. Parties will bear their respective costs. It is so ordered.

Signed, dated and posted on CTS on 29 June 2024

Ngaah Jairus

JUDGE