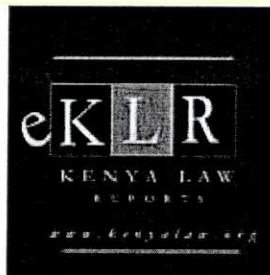


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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 621 of 2000

REPUBLIC PLAINTIFF

-VERSUS-

THE MINISTER FOR AGRICULTURE

Ex parte

1. SAMUEL MUCHIRI W'NJUGUNA

2. NGUGI NJOROGE

3. JOSEPH KARIUKI MUTUA

4. SAMUEL MURIMI KINENE

5. AYUB KABUGI

6. JAMES MAMUNYA MIANO

7. GERTRUDE WAIRIMU

45 (KTDA – managed) TEA FACTORY COMPANIES.....1ST INTERESTED PARTY

TEA BOARD OF KENYA.....2ND INTERESTED PARTY

JUDGEMENT

- A. WAS TAXING MASTER GUIDED BY LAW, IN RAISING INSTRUCTION
FEE FROM THE BASIC FIGURE OF KSHS.20,000/= TO KSHS.20,000,000=? —
THE GRAVAMEN

The instant matter came before me as a *Reference* by virtue of rule 11 of the Advocates (Remuneration) Order, and ss.3 and 3A of the Civil

Procedure Act (Cap.21). There were two different references which were heard together. The first of these was the 1st interested party's Chamber Summons dated and filed on 11th March, 2005. The second was the respondent/objector's Chamber Summons dated 24th March, 2005 and filed on 1st April, 2005.

The interested party sought orders as follows:

- (a) that, the decision of the taxing officer to allow Kshs.20,000,000 on item No. 1 of the bill of costs dated 29th June, 2004 be set aside;
- (b) that, this Court do exercise its inherent jurisdiction and allow such fees in respect of item No. 1 of the bill of costs as it shall deem fit;
- (c) that costs of this application be provided for.

On similar lines, the respondent/objector by the application of 24th March, 2005 sought orders:

- (i) that, the taxation of item No. 1 in the bill of costs dated 29th June, 2004 by the Deputy Registrar under order dated 15th December, 2004 be set aside;
- (ii) that, this Court do proceed and tax item No. 1 of the said bill of costs in such terms and such sum as it may deem just;
- (iii) that costs of this application be provided for.

The grounds in support of the first application are, firstly, that having correctly found that the basic instruction fee was Kshs.20,000/= the taxing officer grossly misdirected herself and exercised her discretion wrongly by increasing the basic fee by 1000%. Secondly it is stated that the taxing officer misdirected herself and erred in holding that "*the application raised a novel point of law*" and so merited an award of instruction fees at the figure of Kshs.20,000,000=/. Thirdly it is stated that the taxing officer erred, and misdirected herself in taking into account issues of public policy when such issues were not relevant to the

proceedings in the main cause. Fourthly it was stated that the taxing officer had proceeded on mistaken principles, and consequently failed to exercise her discretion judicially. Fifthly it was stated that the taxing officer took into account irrelevant factors, and this led to a failure to achieve a judicial exercise of discretion. Sixthly it was stated that the taxing officer erred in failing to take into account relevant factors, and this led to failure to exercise her discretion correctly. Seventhly it was stated that the taxing officer failed to exercise her discretion in accordance with established principles of law. Lastly it was stated that the amount of Kshs.20,000,000/= allowed by the taxing officer was so manifestly excessive as to justify an interference, as it was founded on wrong principles.

Evidentiary material was set out in the affidavit of **Riunga Raiji**, advocate for the 1st interested party, in support of the application. He averred that the applicants had claimed, by their bill of costs dated and filed on 29th June, 2004 as costs the sum of Kshs.68,437,700/= including an instruction fee of Kshs.50,000,000/=. The said bill of costs, it was deponed, was taxed by the taxing officer who, by her ruling of *15th December, 2004* allowed a sum of Kshs.20,161,520 to the applicants including an amount of Kshs.20,000,000/= as instruction fees. The 1st interested party was dissatisfied with the amount allowed, and on 16th December, 2004 the deponent's firm applied for reasons for the Taxing Master's decision – to enable the 1st interested party to file a reference to a Judge in Chambers, in accordance with rule 11 of the Advocates Remuneration Order. The taxing officer's reasons, embodied in her ruling of 15th December, 2004 were supplied to the deponent's firm on *4th March, 2005*. The deponent annexes to his affidavit the judgement in the main proceedings, which led to the taxation now being contested.

In the application by the respondent/objector of *24th March, 2005* the grounds stated are quite similar to those stated in the first application: the taxing officer misdirected herself in taxing advocates' instruction fees at Kshs.20,000,000/=; the said sum of Kshs.20,000,000/= was grossly excessive and betokened an error of principle; the taxing officer misdirected herself and erred in holding that the application raised a novel point of law; the taxing officer did not exercise her discretion in accordance with established principles of law.

The second application is supported by the affidavit of **Allan Otieno Meso**, a State Counsel in the State Law Office. He deposes that the respondent had filed a party-and-party bill of costs

dated 29th June, 2004 which was taxed, on 15th Decmeber,2004 at the sum of Kshs.20,161,520/. The item described as instruction fee in the bill of costs was taxed and allowed at the figure of Kshs.20,000,000/. The objector was dissatisfied with the taxation as done, and filed a notice of objection and sought reasons for the mode of taxation adopted. It is deponed that the instruction fee as taxed by the Taxing Master was grossly excessive and was premised on a wrong exercise of discretion. The deponent avers that the respondent had filed a bill of costs in the Court of Appeal in Civil Appeal No. 144 of 2000 – an appeal which consisted of the same subject-matter as the judicial review proceedings and the same was taxed at Kshs.128,185/. The deponent averred that the party-and-party costs ought to be a fair remuneration of expenses incurred, and not a means for enrichment.

B. DID THE TAXING OFFICER OVERLOOK THE PRINCIPLES OF LAW GOVERNING TAXATION OF COSTS? — SUBMISSIONS FOR THE 1ST INSTERESTED PARTY

Learned counsel **Mr. Kiura** submitted that the taxing officer had set out by properly taking note of the applicable principles of taxation of costs, but she then made short shrift of them. The basic principle cited by counsel is set out in **Premchand Raichand Ltd & Another v. Quarry Services of East Africa Ltd & Another** [1972] E.A. 162. In the words of **Spry, V-P.** (at p.164):

The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

The Court of Appeal in that case had set out certain principles to be taken into account. These were as follows:

- (a) *costs should not be allowed to rise to such a level as to limit access to the courts to the wealthy only;*
- (b) *a successful litigant ought to be fairly reimbursed for the costs he has to incur;*

(c) the general level of remuneration of advocates must be such as to attract recruits to the profession;

(d) so far as practicable there should be consistency in the awards made.

Mr. Kiura submitted that the decision of the taxing officer to raise the instruction fee from Kshs.20,000/= to Kshs.20,000,000/= could not be justified, on the basis of the principles set out in the **Premchand** case. The figure awarded, counsel submitted, did not amount to fair reimbursement; and an award of such a nature would limit litigation to the very rich. Counsel contested the justifications given by the taxing officer: that the case *raised a novel point of law*; and that the matter related to some *45 tea factories*.

Learned counsel submitted that in the judgement, the issue of *locus standi* had been considered, and the Court found that the applicants had brought the suit *as tea growers* and not as representatives of 45 tea factories. The Court had found that the tea factories were independent companies and had not been parties to the proceedings. The Kenya Tea Development Authority which was a party to the proceedings, was not a tea factory but an independent legal entity. It was submitted that even had the said 45 tea factories been involved, this would not of itself, constitute a *novel point of law*. Counsel submitted that in the judicial review proceedings for orders of *certiorari* and *prohibition*, nothing else was sought, and no novel point was raised. Although the taxing officer had also justified her decision on the basis that the judicial review application was *urgent*, counsel noted that only the prayer for leave for orders of *certiorari* had been granted; but the Court found that the prayers for orders of *prohibition* had been *overtaken* by events. Since the leave granted was not to operate as *stay*, counsel submitted, there could not have been any urgency in the matter. It was submitted that even had the application been really urgent, it would not have justified the amount of money allowed in the taxation.

Counsel noted that yet another reason given for the large award of costs was that *a lot of research* had been done, and *a large number of papers* perused by counsel. It was submitted that the need to do research is not a reason to increase *instruction fees*. On this point counsel relied on **First American Bank of Kenya v. Shah & Others** [2002] 1 E.A. 64. In that case **Ringera, J** (as he then was) made the following remarks:

[p.69] "...I find that on the authorities, this Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.... Of course *it would be an error of principle to take into account relevant factors or to omit to consider relevant factors.* And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the *nature and importance of the 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.* Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the Court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment."

Mr. Kiura urged that the Court, in considering the fairness of the taxing officer's award, should focus its attention not just on the *respondent's capacity to pay costs*, but should also ask whether if it was *the applicant being required to bear those costs* it would have been fair.

Counsel urged that the Court do consider the merits of the *precedent* its decision would set. A judicial review matter such as the one in reference, was concerned with *public decision-making*. The question should be asked, it was submitted, whether the Courts should have an approach to *costs in such public matters* altogether different from costs in other kinds of proceedings.

The Court of Appeal decision in **Thomas James Arthur v. Nyeri Electricity Undertaking** [1961] E.A. 492 was cited; in that case at p.494, **Gould, J.A.** stated that a taxing officer does not arrive at a figure by *multiplying the scale fee*, but "places what he considers a *fair value upon the work and responsibility involved.*"

Counsel urged that the responsibility involved in the instant case was to seven applicant-tea-growers; and an instruction fee of Kshs.20,000,000/= was not fair valuation of the responsibility involved. Counsel sought support for this submission in the High Court's

(*Mbaluto, J.*) ruling in *Kayam Madhany & 5 Others v. Industrial Promotion Services (K) Ltd & 2 Others*, Civil Case No. 268 of 1998:

“...it is clear that the claim is big and complex. The plaint runs to 34 paragraphs and has numerous prayers. It avers virtually all the branches of the law of tort and of contract. For all those reasons, I agree with Mr. Magan’s submission that the Deputy Registrar should have increased the basic fee instead of reducing it as he did. Having said so however, I think we should keep a sense of proportion. In that regard, I feel that the substantial sum of Kshs. 7,167,583/70 which I propose to allow as the basic instruction fee goes a long way towards meeting the defendants’ reasonable instruction fees.”

Relying on this persuasive authority, learned counsel made a prayer for a *sense of proportion* in the instant matter. He urged that the taxation as determined by the taxing officer, be set aside.

C. IS COMPARABILITY A RELEVANT FACTOR IN THE TAXATION OF BILLS OF COSTS? ARE THERE CRITERIA TO GUIDE THE TAXING OFFICER? — SUBMISSIONS FOR THE RESPONDENT/OBJECTOR

Learned counsel *Mr. Meso* for the respondent/objector was in agreement with the submissions of *Mr. Kiura*, and, on the need for *comparability* in awards of costs he invoked another judicial review matter in which *Lenaola, J* gave a detailed judgement on 26th January, 2004: *Republic v. Hon. E.K. Maitha & Another, ex parte Joseph Okoth Waudi*, H.C. Misc. Application No. 802 of 2003. The learned Judge in that case remarked: “*The issues of fact...elicited points of law that must be carefully looked at ...*” The bill of costs in this matter had come up for taxation before the very same taxing officer whose award is in issue herein. She gave a ruling which led to the certificate of costs dated 6th May, 2005; and it reads:

“I N. Matheka, Principal Deputy Registrar, High Court of Kenya, Nairobi DO HEREBY CERTIFY that the bill of costs lodged by J.A.B. ORENGO, ADVOCATE for the applicant was taxed in the cause as between the applicant and respondent on 29th April, 2005 and allowed the sum of Kenya Shillings FIVE HUNDRED AND THIRTY THOUSAND, NINE HUNDRED AND FORTY (530,940/=) all inclusive as against the respondent.”

Mr. Meso submitted that the award of Kshs.20,000,000/= in the instant matter was unprecedented, and would give the impression that comparability is not a relevant consideration in the taxation of costs. In learned counsel's words: "Kshs.20,000,000/= as awarded by the taxing master is [so] grossly excessive as to be indicative of an error of principle on her part." Counsel went on to urge: "The taxing master misdirected herself, and erred in saying that the application raised a novel point of law"; "[the] taxing master didn't exercise her discretion in accordance with established principles of law..."

Learned counsel referred to p.5 of the taxing officer's ruling dated 15th December, 2004. The relevant part may be set out here:

"This was an application for judicial review, for orders of certiorari and prohibition. The applicant sought orders in the nature of prerogative writs. These are specifically and specially provided for under the Advocates (Remuneration) Order. This is under Schedule VI 1(j) which provides for a basic fee of Kshs.20,000/=."

Having made those remarks the taxing officer made a statement which she clearly saw as the justification for the award which she then gave, and which is now impugned. She thus said:

"I am of course not unaware that the fees provided for...are minimum [fees] and that the taxing officer has [a] discretion to add [to it], taking into account the complexity of the issues raised by [the] pleadings, the responsibility weighing [on] the shoulder of counsel, the importance of the matter to the parties (the value of the subject-matter would come in here..), the time, research and skill expended in the brief, and in cases of this nature, public policy and the novelty of the issues canvassed."

Such considerations even if they be proper to take into account, learned counsel submitted, were still subject to the principle of reasonableness; and "*increasing the [scale fee] from Kshs.20,000/= to Kshs.20,000,000/= is not reasonable.*" The notion of "*reasonableness*" in the taxation of costs had come up in the High Court appellate case, *Danson Mutuku Muema v. Julius Muthoka Muema & Others*, Civil Appeal No. 6 of 1991 (Machakos), and *Mwera, J* had remarked:

"The taxing officer was entirely right to give the costs here within his discretion. Although the sum would not be less than Shs.4,500/= yet it had to be *reasonable*. Is Shs.40,000/= allowed, about ten times the sum provided for, reasonable? *This Court does not think so.* It is definitely excessive. Three or four times perhaps could be fair but not ten times. Anyway, since the taxing officer was bound to give reasons for exercising his discretion and none were given in the ruling of 10th May, 2001 save to say that he *simply exercised his discretion*, it may as well be just and fair to *set aside* the sum he allowed, and it is so done."

Mr. Meso restated the trite principle that quantum of costs is best left to the discretion of the taxing officer; but he then urged that it was settled law that where the instruction fee was taxed at a level so grossly excessive as to betoken the application of wrong principles, this was an occasion for a Judge to intervene. There is authority for such a proposition; in *Haider bin Mohamed el Mandry & 4 Others v. Khadija Binti Ali Bin Salem alias Bimkubwa* (1956) 23 EACA 313 the Court of Appeal remarked (*per Briggs, J.A.* at p. 316):

"In the main bill only one item is excessive, namely the *fee for instructions* to defend. Shs.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 do not wish to be critical of the taxing officer, particularly since he was almost wholly without experience of taxation when he taxed this bill; but I think he 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... I would *vary the decree* by substituting a sum of Shs.3,788/50 for that of Shs.10,788/50. This involves a notional reduction of the instruction fee from Shs.9,000/= to Shs.2,000/= which I consider to be the *highest figure* which could properly be allowed for instructions in such a case."

The principle in the *Haider bin Mohamed* case, learned counsel submitted, remains valid to-date; and in *Thomas James Arthur v. Nyeri Electricity Undertaking* [1961] E.A. 492 the Court of Appeal (*Gould, J.A.* at p.494) had remarked:

“...a taxing officer, when he has decided that the scale should be exceeded, does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved.”

From the foregoing decisions the correct approach to taxation which ought to guide taxing officers, emerges unambiguously. *Mr. Meso* urged, quite properly, in my view, that the legal principles for the evaluation of the impugned taxation which led to the instant proceedings, are contained in those decisions.

Learned counsel submitted that the Taxing Master had misdirected herself in holding that the judicial review proceedings which had been the subject of the bill of costs being taxed, raised a “*novel point of law*.” At pages 6-7 of her taxation ruling, the taxing officer thus stated:

“I have considered that the instant case raises at least [one] novel point of law, namely, concerning certain regulations which would affect the management of tea farmers in the entire country. Indeed 45 tea factories were involved. I have also considered the urgency involved in the brief; the initial application for leave was turned down and the matter went up to the Court of Appeal.

“...I must add that a lot of research was [involved], the documents involved were numerous and [interests] involved here were largely public...”

It was *Mr. Meso*’s submission that *challenging subsidiary legislation*, which the taxing officer referred to, could not by itself amount to a *novel point of law*. Counsel questions the premises upon which the notion of “*novel point of law*”, in the taxation ruling, rests. I appreciate his point, as I have reappraised the passage in the taxation ruling set out above, and I have not found it to properly focus on any complex concept which is capable of being described as a “*novel point of law*.”

Mr. Meso drew an analogy with another judicial review matter, *Republic v. Hon E.K. Maitha, Minister for Local Government* Miscellaneous Civil Application No. 802 of 2003. There, the applicant had challenged the decision of the Minister for Local Government to revoke the nomination of a councillor, and this entailed *challenges to certain provisions of an Act of Parliament*, the Local Government Act (Cap.265); the Court found in favour of the applicant; this was a challenge to parliamentary enactment, rather than to *subsidiary legislation* as in the instant matter; and yet the Taxing Master there, who is also the Taxing Master in the instant matter, awarded no more than Kshs.530,940/= in costs.

Mr. Meso submitted that the Taxing Master had not maintained *consistency* in the taxation of bills of costs in relation to the two matters – even though she herself (p.6 of the ruling) mentioned consistency as an attribute of taxation of costs properly - conducted. Learned counsel noted too that even as the Taxing Master had cited the trite taxation principle, that the successful party in any proceedings is not entitled to make a profit out of the employment of an advocate, she proceeded to make a hefty costs-award that would end up enriching a particular party, thanks to the employment of *the advocate* in the proceedings.

Learned counsel submitted that there was nothing *complex* in the matter before the Court – a *judicial review* cause just like any other. He urged that it was improper that the taxing master should assign a bare justification under the head “*complexity of the matter*” — she should have made a specific finding on this attribute of *complexity*, and should have taken into account the *directions of the Judge* who tried the substantive cause. The main question before the Court in that cause was set out by *Visram, J* at p.10 of the judgement, in the following terms:

“The central issue in the case before me is whether the Minister had the authority to make the regulations and direction he made. Was he within his powers to do so?”

The object thus stated by the learned Judge, *Mr. Meso* submitted, “*was the only issue to be determined in this case; nothing complex.*” Of the supporting affidavit in the judicial review application, *Visram, J* had remarked:

"Having obtained the requisite leave, the applicants filed their substantive motion for judicial review... The application was supported by an affidavit sworn on June, 9, 2000 by *Mr. Samuel W'Njuguna* who... is one of the applicants. *Mr. W'Njuguna's* affidavit was very brief."

On those facts, counsel submitted, there was no basis on which the taxing officer could arrive at the conclusion that the judicial review matter in question was so complex as to justify a large award in costs.

Learned counsel contended that the history of the proceedings leading to the contested taxation of costs, by itself showed an impropriety in the taxation in question herein. The original applicant's first application in the High Court for leave to move the Court for prerogative orders, had been refused, and an appeal to the Court of Appeal allowed a motion to be filed in the High Court. The original applicant at that point sought costs (for winning on appeal), and set the claim at Kshs.1,500,000/= as instruction fees; this was rejected by the Court of Appeal's Deputy Registrar who allowed only Kshs.178,000=/. *Mr. Meso* was now raising the query: why should *instruction fees* in the High Court, for that very same matter, be taxed at Kshs.20,000,000=?

Learned counsel urged that the contested taxation decision be set aside, and that this Court do proceed to tax item 1 (instruction fees) of the bill of costs in such terms and sums as will be just.

D. VALUE OF THE SUBJECT-MATTER, AND PUBLIC IMPORTANCE OF MATTER TO BE DETERMINED BY TAXING OFFICER — SUBMISSIONS FOR THE ORIGINAL - APPLICANTS/RESPONDENTS

Learned counsel *Mr. Kagiri* and *Mr. Njoroge* began on their submissions for the original applicant on 13th July, 2005, and continued on 5th October, 2005, 29th November, 2005, and 6th December, 2005. During those hearings, the two learned counsel presented a sustained opposition to the taxation-reference applications of 11th March, 2005 and 24th March, 2005 respectively.

Mr. Njoroge noted from the depositions on record that in the substantive cause, the *ex parte* applicants had commenced *judicial review proceedings against the Minister for Agriculture*, seeking orders of *certiorari* to quash the Tea Election Regulations of 2000, made by the Minister purportedly in exercise of his powers under ss.3, 4 and 45 of the Tea Act (Cap. 343); and to quash the tea elections programme dated 18th May, 2000 which had been publicised in respect of tea factories incorporated under the Companies Act (Cap.486). The *ex parte* applicants had also sought orders of *prohibition* to prohibit the said Minister from implementing the Tea Elections Programme. Leave to commence the proceedings had been allowed on appeal, by order of the Court of Appeal of 5th January, 2001; then on 18th January, 2001 the *ex parte* applicants had moved the High Court by Notice of Motion, for issuance of the relevant judicial review orders.

Learned counsel stated that the Attorney-General had come to Court as the representative of the Minister for Agriculture; and that by an order of 1st March, 2001, 45 tea factories had been enjoined as Interested Parties and they filed their notice of appointment on 6th March, 2001. It was stated by counsel that each of the 45 tea factories was a limited liability company even though they appointed one advocate's firm to represent them. Although all the 45 tea factories were listed as 1st Interested Party, learned counsel submitted, this was a misnomer, and they should have been listed as 45 different Interested Parties.

Learned counsel rested his clients' case, *inter alia*, on an aspect of the judgement delivered by *Visram, J.* on 23rd March, 2004. The relevant words of the learned Judge are as follows (p.12):

“...the directive of the Minister has already been acted upon and the same cannot be halted by an order of prohibition as that order applies only to an act that is yet to happen.

“However, for reasons that I have stated, I grant the applicants' prayer seeking an order of certiorari to remove into this Court and quash the Minister's regulations as prayed for and award them the costs of this application. Those costs shall be borne by both the respondents and the Interested Parties.”

Learned counsel contested the competence of the Attorney-General's application, of 24th March, 2005 on several grounds such as: that the application was not timeously filed; that the Attorney-General did not show that he had objected to the taxation; and that the Attorney-General had not annexed to his application the reasons given by the taxing officer for the taxation as carried out.

Such opposition was supported by authority. Counsel cited the High Court case, *Nyakundi & Co. Advocates v. Kenyatta National Hospital Board*, Milimani Commercial Court Misc. Application No. 657 of 2004 in which *Azangalala, J* thus held:

"There is no evidence that the respondent sought and obtained enlargement of time to file its reference. I have no reason to doubt that the respondent's advocates received the reasons for taxation on 23rd February, 2005. Under rule 11(2) of the Advocates (Remuneration) Order, the respondent should have filed its reference on or before 9th of March, 2005. Accordingly, I find and hold that this reference having been filed on 22nd March, 2005 was filed out of time without leave. The reference is incompetent and is struck out with costs."

Mr. Njoroge doubted whether the defect of non-compliance with the time limited for filing reference could be cured, as *Mr. Meso* had in effect proposed, by a *consolidation* of the two reference applications herein. In *Mr. Njoroge*'s submission, the two applications were only directed to be heard together because they raised the same point. The relevant order was made by *Ransley, J* on 27th April, 2005 and thus read: "Both applications be heard on 25th May, 2005."

Learned counsel submitted that it was common cause, among the parties, that item 1 (instruction fees) of the bill of costs had been taxed correctly under Schedule 6, para. 1(j) of the Advocates (Remuneration) Order, and that under that head of taxation, a *minimum* fee of Kshs.20,000/= was prescribed for *prerogative orders*. Counsel submitted that the said sum of Kshs.20,000/= was not the *basic fee* as contended for the applicants herein. In the words of counsel: "Here, the experience of the taxing officer is called into play...Shs.20,000/= is not the starting point, not the *basic fee*; it is the *minimum allowed*."

Mr. Njoroge submitted that “a prerogative order has no monetary value,” but there are specific provisions for various monetary claims. Where one sued for not more than Kshs.500,000/=, the fee prescribed was Kshs.20,000/=; and there are progressive increments from that figure. Schedule 6, para. 1(h), (i), (j) has provided for such sums as may be reasonable; para.1(h) related to adoption and guardianship; para.1(i) to election petitions; and para.1(j) of the Advocates (Remuneration) Order to *prerogative orders* – and provision is made for *such sums as may be reasonable*. The notion of *basic fee*, counsel submitted, is found only in some of the paragraphs of the Advocates (Remuneration) Order: para.1 (e), (f), (g), (k). *Mr. Njoroge* submitted that there was a reason for the difference found in the statutory language; *prerogative orders or elections* fell in a quite special category, and for them, *quantum* was left to the *discretion of the taxing officer*, who is to take into account *all relevant matters*. Even in those cases where there is a *basic fee*, counsel submitted, the taxing officer has a *discretion to increase the fee*.

Was the award of Kshs.20,000,000/= in instruction fees for a judicial review matter, manifestly excessive? *Mr. Njoroge* proposed that this question be answered by considering whether there was an *error*. And in counsel’s view there was no error; because the taxing officer had directed herself that she was to consider: the *complexity of the pleadings; the responsibility resting on the shoulders of counsel; the importance of the matter to the parties; the work, the brief, the documentation; the public policy issues raised by the brief; the novelty raised*.

Mr. Njoroge submitted that the responsibility for identifying the *complexity* of the judicial review matter rested not with the Judge seized of the matter, but with the *taxing officer*. In counsel’s words:

“The Judge was merely adjudicating on specific matters and need not remark the complexity. It is for the taxing officer to take into account whether a novel point has been raised.”

Counsel submitted that the taxing officer had taken into account the pertinent principles which have been set out in the Court of Appeal decision in *Premchand Raichand Ltd v.*

Quarry Services of East Africa Ltd [1972] E.A. 162, and in particular the principle that the successful party is not to be allowed to make a profit out of the practice of the advocate.

Counsel urged that the taxation of costs in question be upheld, for the reason that it was within the *discretion of the taxing officer* to decide which considerations should bear the greatest weight, in her assessment. For this proposition counsel cited the High Court (*Ringera, J*) decision in *First American Bank of Kenya v. Shah and Others* [2002] 1 EA 64. The learned Judge in that case remarked (p.69):

“First, I find that on the authorities, this Court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.... And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him...”

Mr. Njoroge submitted that there had been no specific direction on costs, by the Judge; and therefore it was open to the taxing officer to determine the matter as she saw fit.

In his continued submissions on 5th October, 2005 *Mr. Njoroge* maintained that the judicial review proceedings had raised a *novel point of law* which would justify the taxation of costs as conducted by the taxing officer. And what was the novel point? In counsel’s words: “*whether regulations made by a Government Minister concerning the management of a sector of the economy [tea production sector], [by virtue of an Act of Parliament] can be legally challenged.*” Counsel urged that another novel point was: “*Whether rules made by the Minister contradicted provisions of the Companies Act.*”

To demonstrate this contention, *Mr. Njoroge* recalled the content of the judicial review decision, at p.10. It is worth setting out the relevant terms of that decision. *Visram, J* thus stated (p.10):

"The central issue in the case before me is whether the Minister had the authority to make the regulations and direction he made. Was he within his powers to do so?"

"The preamble to [the Tea Act (Cap.343)] is clear as to the purpose [for which] it was enacted. The Act was designed to 'make provision for regulating and controlling the production, manufacture and export of tea, and for connected purposes.'

"A careful look at the regulations under consideration shows that they have far-reaching implications on independent companies. By independent companies I mean companies that have been incorporated under, and are governed by, the Companies Act [Cap.486]. I say this because regulation 13 defines 'company' as a smallholder tea factory company 'having limited liability.' These are, of course, companies registered under the Companies Act (Cap.486). The regulations go so far as to introduce a new concept of who may be a director. Regulation 14(1) stipulates that all directors shall be 'registered tea growers in that company.' This new concept is not easy to comprehend. Then, in regulation 16, the Minister goes a step further and imposes an extra burden on independent companies to amend their Memorandum and Articles of Association to comply with his regulations."

The ground covered by the foregoing judicial remarks is what learned counsel, in the instant matter, calls "*complex issues*"; he says these issues were canvassed at length during the main proceedings; and he says "*there were no serious authorities dealing with [these issues]*."

Mr. Njoroge sought to distinguish the judicial review cause, Republic v. Hon. E.K. Maitha, Minister for Local Government, H.C. Misc.Civil Application No. 802 of 2003 which Mr. Meso had relied on to demonstrate that there was no novel point of law in the judicial review matter which has led to the applications herein. In learned counsel's words:

"[The Maitha matter] had to do with the revocation of a Ministerial decision in respect of local authorities, and the analogy is the revocation of the appointment of a director to a parastatal corporation. But in the [judicial review matter in reference herein] the object was to quash subsidiary legislation."

I have not, however, been able to see what makes *special* a judicial review challenge to *gazetted ministerial regulations*, as compared to a judicial review challenge to *gazetted ministerial revocation of local authority office-holding*. From a reading of the *Maitha* judicial review decision, it is plain that compliance not only with the *Local Government Act* (Cap. 265) but also with the *Constitution of Kenya*, was in issue; and the proceedings there led to an extremely important judicial review decision touching on *constitutionality* and *public policy*. A generous assessment of the judicial review proceedings in *Samuel Muchiri W'Njuguna v. Minister for Agriculture*, H.C. Misc. Application No. 621 of 2000, therefore, could not possibly portray it as more demanding upon counsel than was the case in the *Maitha* judicial review.

Mr. Njoroge submitted that there was a *special value* to the subject-matter which the taxing officer, in the instant matter, had taken into account. And what was this value? In the words of counsel: “*She said it could not be the basis for a percentage calculation. She only took into account the importance of the suit*”.

On the issue of the status of the relevant judicial review proceedings in terms of public policy, learned counsel relied on R. Kuloba’s work, *Judicial Hints on Civil Procedure*, Vol. 1; the learned author thus states (page 138):

“*Nature and importance of the cause or matter*. The taxing officer must take into consideration the nature and importance of the cause or matter ... As regards ‘importance of the cause’, all suits are obviously of importance to both the plaintiff and to the defendant; but whether a particular case is important in the wide sense (e.g., that it involves matters of law of importance to the commercial community, or that serious points of practice arise, or that its decision will affect the community at large or a section of the community, or other matters of vital interest) is a matter on which the taxing officer has to decide on the particular facts of each case. Generally a suit under a mortgage is straightforward and involves no great study of the law applicable to mortgage suits; what have to be considered are the facts entitling the plaintiff to claim thereunder, and those facts must relate to the breaches of the covenants, such as failure to pay interest or capital on due date; there is nothing complicated or difficult about that – it does involve a close perusal of the mortgage deed but little else ...”

Mr. Njoroge sought to compare the costs allowed by the taxing officer in the instant matter with costs allowed in ordinary civil suits – notably *Kayam Madhany & 5 Others v. Industrial Promotion Services (K) Limited & 2 Others*, Milimani Commercial Courts Civil Case No.268 of 1998 in which the value of the subject-matter was Kshs.475,000,000/=; and the Judge in a reference increased taxed costs to Kshs.7.66 million. Other civil cases cited include: *L.Z. Engineering Construction Limited v. Trade Bank Limited & 2 Others*, HCCC No. 3791 of 1993.

Mr. Njoroge submitted that the matter in reference, in the judicial review proceedings in question herein, was “*the running of the entire tea sector in Kenya; so costs here are bound to be much higher [than in the Maitha judicial review matter, Misc. Civil Application No. 802 of 2003]*”. Counsel urged that “*what was at stake was the control of the tea industry in Kenya*”, and “*the share capital of the tea industry is Kshs.18 billion*”. On that basis Counsel submitted, “*costs could have been Kshs.270 million*”; and hence, it was submitted, Kshs.20,000,000/= was not excessive, especially when the figure demanded in the bill of costs was Kshs.50,000,000/=. Learned counsel submitted: “*The respondents herein can comfortably bear the assessed costs*”. Counsel proposed that each of the 48 tea factories would make its individual contribution, and the taxed amount of Kshs20,000,000/= would in this way be easily raised. It was urged that each of the factories had filed an affidavit, and this had placed a burden on counsel, and “*a claim for professional negligence against the advocate would have been very huge*”. The costs as taxed cannot be manifestly excessive, **Mr. Njoroge** urged, given the “*importance of the matter – management of the tea industry in Kenya*”.

E. THERE IS NO COMPLEXITY, NO NOVELTY, JUDICIAL REVIEW APPLICANTS WERE NOT TEA-SECTOR REPRESENTATIVES AND CANNOT LOAD THEIR FEES ON TEA SECTOR —

APPLICANTS' REPLIES

Learned counsel **Mr. Kiura** contested the exclusivity which appeared to be attributed by the *ex-parte* applicants/respondents to the taxing officer's discretion, in the determination of level of costs: “*The sum of Kshs.20,000/= is provided for as a guide to the Taxing Master – to ensure uniformity ...;*” and there was “*no requirement under the*

Advocates (Remuneration) Order as to how much experience a taxing master should have"; Schedule 6 of the Order, paragraph 1(j) makes specific reference, on bill of costs figures, to "*such sum as may be reasonable*". Counsel urged that there was no reason for allowing as much as Kshs.20,000,000/= in instruction fees on account of the affidavits sworn for the several tea factories – because an allowance had already been made under paragraph 8, Schedule 6 in the Remuneration Orders for "*perusal costs*".

Mr. Kiura submitted that even if it were to be found that the judicial review matter had been complex; that it was important to the parties; that it was of great public importance; that upon the matter counsel had expended time, research and skill – the increase by as much as Kshs.19,980,000/= as effected by the taxing officer, would be unreasonable. Learned counsel submitted that the taxing officer when requested for her reasons, supplied copy of her *ruling* rather than reasons as such – and in the ruling, "*novelty*" was not treated as a key issue, and indeed even counsel for the respondent had focused his attention on *complexity* and not novelty. In the High Court (*Mbaluto, J.*) case, *Kayam Madhany & 5 Others v. Industrial Promotion Services (K) Limited & 2 Others*, Milimani Commercial Courts Civil Case No. 268 of 1998 upon which counsel for the respondent had relied, and in which the taxing master reduced a bill of costs of Kshs.74,085,244/= to Kshs.2,088,244/= but the Judge raised it to Kshs.8,275,072/=, *Mr. Kiura* noted that the position there was different from that in the instant matter: in the *Kayam Madhany* case the Judge had clearly identified *what was complex* in the matter and so would justify higher fee allowance. In the words of *Mbaluto, J.* in that case:

"There are numerous other items claimed in the plaint in respect of which it is clearly not possible to give a value at this stage. They include such items as damages for the alleged fraudulent misrepresentation, value of a large number of shares, exemplary damages and the like. All these claims must be taken into account in determining the instruction fees to be allowed. In addition, the nature of the suit must also be considered. In that respect, although Mr. Billing for the plaintiffs does not accept it, it is clear that the claim is big and complex. The plaint runs to 34 paragraphs and has numerous prayers. It covers virtually all the branches of law of tort and of contract. For all those reasons, I agree with Mr. Magan's submission that the Deputy Registrar

should have increased the basic fee instead of reducing it as he did. Having said so however, I think we should keep a sense of proportion.”

*Mr. Kiura submitted that such specification of what is so complex as to justify an increased fee allowance, was lacking in the instant matter; and hence the *Kayam Madhany* case could not be a proper precedent for the judicial review matter which is the subject of the instant reference.*

Learned counsel submitted that there had been nothing complex in the judicial review in issue herein, judging from the terms of the judgment by *Visram, J.* In that judgment, delivered on *23rd March, 2004* the learned Judge remarked (page 6):

“The respondent and the interested parties in the matter filed replying affidavits in which they did not dispute the applicant’s version of facts even though they were entitled to do so. In fact, a careful look at the replying affidavits shows that the respondent and the Interested Parties admitted the applicant’s version of facts.”

Learned counsel submitted that the issue in the judicial review matter in reference was whether the *Minister had authority to make the regulations and directions he made*; and that it was clear the applicants were not challenging *the legislation – the Tea Act (Cap. 343)*. What was in issue, it was submitted, was “*whether the Minister had exceeded his powers under [the Act]*”.

Mr. Kiura submitted that although counsel for the applicant in the judicial review had contended before the taxing officer that “this was the first time subsidiary legislation was being challenged”, the taxing officer’s reasons do not indicate a finding on her part that truly in Kenya, “this was the first time subsidiary legislation was being challenged”. Therefore, Mr. Kiura submitted, if novelty could be associated with the contention that “this was the first time subsidiary legislation was being challenged”, then this was not a reason to justify the instruction fee allowance of Kshs.20,000,000/=.

Learned counsel disputed the position taken for the *ex parte* applicants in the judicial review matter – that that matter was “*of great precedent value*”; and he urged that the

respondents herein did not show any instance in which the said judicial review matter had served as precedent in other proceedings.

Mr. Kiura contested the submission made for the respondents herein: that the importance of the pertinent judicial review matter inhered in its being concerned with ‘*the running of the entire tea sector*’. Instead, learned counsel submitted, the judicial review matter in question “*was about whether the Minister had exceeded his powers in making the tea regulations*”. The outlook in those proceedings, counsel submitted, was “*not what the entire tea sector would gain or lose*”, but “*what the applicants would gain or lose due to those regulations*”; and the *ex parte* applicants in the judicial review had brought their application not as *representatives of the tea production sector*, but in their individual capacities as *tea farmers*.

Learned counsel *Mr. Meso* in his rejoinder returned to the issue of the competence of the objector’s application of 24th March, 2005. He urged that this point could not arise, because there was an *order on record* consolidating this application with the 1st Interested Party’s one of 11th March, 2005 for the purpose of being heard and determined.

F. ANALYSIS, AND ORDERS

The question for resolution herein is whether the taxing officer would have been justified in allowing substantial figures in advocate’s instruction fees in a judicial review matter, from a “basic” or “minimum” figure of Kshs.20,000/= to a figure of Kshs.20,000,000/=.

This matter has been much canvassed by counsel. The main plank in the judicial review applicants’ (now respondents’) case has been that the taxing officer’s position should be preserved, because she had in her taxation of costs exercised a discretion, and taken into account all the factors she was entitled to take into account. And what were those factors: (i) the financial standing of the “tea sector” in the country; (ii) the responsibility entrusted to counsel; (iii) the importance of the matter to the parties; (iv) the volume of work involved; (v) the public policy issues raised by the brief; (vi) the novelty raised by the proceedings.

Item 1 (advocate's instruction fees) in the bill of costs is one of the very few which were not based on consent. The figure of Kshs.20,000,000/= which is now contested was the taxing officer's own decision. It is necessary to ascertain how she arrived at that figure; for although the judicial review applicants' firm position is that it was an exercise of lawful discretion which, therefore, this Court should uphold, the correct perception of a discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by *transparent, regular, reliable and just criteria*.

The taxing officer expressed what had guided her in her decision as follows (page 5):

"I am of course not unaware that the fees provided for under paragraph 19 (j) are the minimum and that the taxing officer has a discretion to add to [the basic scale fees], taking into account the complexity of the issues raised by [the] pleadings, the responsibility weighing [on] the shoulders of counsel, the importance of the matter to the parties (the value of the subject-matter would come in here ...), the time and skill expended in the brief, and in a case of this nature, public policy and the novelty of the issues raised."

The taxing officer indicated she was guided by other considerations as well (p. 6):

"The first principle is that the successful party who is awarded costs is not entitled to make profit out of the employment of an advocate. However, the successful party should be fairly remunerated, bearing in mind, of course, that [the level of costs should not rise to the point of making litigation the preserve of the rich]."

On those principles the learned taxing officer proceeded, by stating (p. 6):

"I have considered that the instant case raised at least [one] novel point of law, namely, concerning certain regulations which would affect the management of tea [farming] in the entire country. Indeed 45 tea factories were involved I have also considered the urgency involved in the brief ...".

The taxing officer went on to state (pages 6-7):

“... I must add that a lot of research was [conducted], the documents involved were numerous and [the] interests involved here were largely public ... The importance of this matter to the parties and the public cannot be overemphasised.”

It is on the basis thus outlined, that the taxing officer taxed the bill on advocate's instruction fees from the claimed sum of Kshs.50,000,000/= to Kshs.20,000,000/= which she described as “fair and reasonable”.

In summary, the reasons the taxing officer raised advocate's instruction fee from the basic figure of Kshs.20,000/= to Kshs.20,000,000/= were as follows:

- (a) *Complexity of issues in the judicial review cause;*
- (b) *amount of responsibility entrusted to the advocates;*
- (c) *importance of the matter to the parties (including value of the subject-matter);*
- (d) *public policy;*
- (e) *novelty;*
- (f) *time, research and skill;*
- (g) *volume of documents;*
- (h) *urgency;*
- (i) *interests involved;*
- (j) *importance of the matter to the public.*

Some of these considerations are broad, general, and loose-textured in character; and in this category fall the following items: (a) interests involved; (b) importance to the public; (c) importance to the parties; (d) public policy. However, most of the considerations which avowedly guided the taxing officer were focussed on the judicial review proceedings which had been concluded. These are:

- (i) *complexity of issues;*
- (ii) *responsibility reposed in the advocates;*
- (iii) *novelty;*
- (iv) *time;*
- (v) *research;*
- (vi) *skill;*
- (vii) *volume of documents;*
- (viii) *urgency.*

All these considerations refer to the proceedings in *Samuel Muchiri W'Njuguna & 6 Others v. The Minister for Agriculture*, H.C. Misc. Application No. 621 of 2000, the outcome of which is set out in the 12-page judgment delivered on 23rd March, 2004.

In the said judicial review matter, are there specific *complex elements* which in particular weighed in the mind of the taxing officer? What level of *responsibility* did the canvassing of the application place upon counsel? What was the *novel element* in the proceedings, which guided the exercise of discretion by the taxing officer? How much *time*, how much *research*, how much *skill* was necessary for the prosecution of the application? What *volumes of documents* did counsel have to classify, to analyse, to rationalise and to simplify for possible adoption in the judgment ultimately rendered? And must this item on “*quantity of documentation*” be provided for in the bill of costs under “*advocate's instruction fees*”? Was there a real *urgency* in the judicial review application?

Although such heads of costs-assessment have been invoked, *specific description* which would import credibility has, in my judgment, basically been lacking. Since *costs* are the ultimate expression of essential liabilities attendant on the litigation event, they cannot, I will hold, be served out without either a specific statement of the *authorising*

clause in the law, or a particularised justification of the mode of exercise of any discretion provided for.

The **complex elements** in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the **forensic responsibility** placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If **novelty** is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of **industry** and was inordinately **time-consuming**, the details of such a situation must be set out in a clear manner. If large volumes of **documentation** had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.

It is clear that the main proceedings in reference in this matter were judicial review proceedings. The Minister for Agriculture had issued a *Kenya Gazette* Supplement (No. 32 of 12th May, 2000) in which, purportedly in exercise of his powers under the Tea Act (Cap. 343), ss.3, 4 and 25 he made **subsidiary legislation** known as the Tea (Elections) Regulations, 2000. Seven persons, being the *ex parte* judicial review applicants, were unhappy with these regulations and, in their private capacities, challenged the same and sought orders of *Certiorari* and *Prohibition* directed at the Minister. The judicial review motion filed on 18th January, 2001 was supported by an affidavit by *Mr. W'Njuguna* which *Mr. Justice Visram* in his judgment of 23rd March, 2004 described as “*very brief*”. Of still another affidavit, a “*verifying affidavit*”, by *Mr. W'Njuguna* sworn on 18th January, 2001 the learned Judge remarked:

“This later affidavit did not contain anything more than was said in the earlier affidavit and appears to me to be an attempt to comply with procedural steps only. I will, therefore, not refer to it in any decision.”

I understand the learned Judge to be far from perceiving the inputs into the judicial review application as by any means colossal. I also need to note that no contentious response to those inputs came forth from the respondents in those proceedings; *Visram*,

J. on this point remarked: “... a careful look at the replying affidavits shows that the respondent and the interested parties admitted the applicants' version of facts”.

The design and purpose of the judicial review proceedings in reference herein, is clearly stated by *Mr. Justice Visram*:

“The central issue in the case before me is whether the Minister had the authority to make the regulations and direction he made. Was he within his powers to do so?”

So, as is quite apparent, the essence of the proceedings was to achieve the well known end of judicial review, stated in *de Smith's, Woolf's and Jowell's Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) [paragraph 1-042] as: “*the legality of administrative action*”. Judicial review is further defined in *Black's Law Dictionary*, 8th ed. (2004) as:

“*A Court's power to review the actions of other branches or levels of government; esp. the court's power to validate legislative and executive actions as being unconstitutional*”.

Thus, in a *direct manner*, the proceedings sought only the *public law remedy* of judicial review – for the purpose of ensuring the *Minister's compliance with the governing law* as enacted by Parliament. Only very remotely could the proceedings have contemplated the *cause of profit* in the tea production sector – which is not to be, I would hold, regarded as the object of the public law remedy of judicial review.

The purpose of the judicial review proceedings, I would hold, remains the same – and is nowise qualified by the remarks of the learned Judge, regarding likely impacts of the impugned regulations on the profit-oriented activities of the tea-factory companies. The learned Judge had thus remarked:

“A careful look at the [impugned] regulations ... shows that they have far-reaching implications on independent companies. By independent companies I mean companies that have been incorporated under, and are governed by, the Companies Act ... (Cap. 486). I say this because regulation 13 defines 'company' as a smallholder tea factory company 'having limited liability' Then, in regulation 16 the Minister goes a step further and imposes an extra burden on independent companies to amend their

memoranda and articles of association It is not difficult for one to ask, where does the Minister derive all this power to order such fundamental changes to private limited companies”.

I think it emerges that the learned Judge’s interest in private limited companies, such as the tea-factory companies, was not so much within the framework of profit-oriented *private law claims*, as it was an attempt to illustrate the public law question of *excess of statutory remit* by the Minister – the classic object of judicial review which, as I have already noted, is a *public law remedy*.

I will, therefore, strike a clear distinction between the public purpose of the main proceedings (judicial review) and the profit-making activities of the tea - production sector. And on that basis I will now hold that the taxing officer would have been wrong *in law* to incorporate profit levels of the tea-production sector as an element in her taxation of costs in a judicial review matter.

It is to be noted that the judgment was in favour of the *ex parte* applicants, in the judicial review proceedings. The learned Judge thus held:

“Whereas this Court recognises the Government’s desire to protect and promote the tea industry, this Court cannot allow a Government Minister to do an act that is illegal and manifestly beyond his authority I am of the view that the regulations made by the Minister in this case and his subsequent directive were beyond his authority as donated to him by [The Tea Act (Cap. 343)]... It is also not enough that the Minister had engaged in consultations as required by the Act. He simply cannot go beyond his authority as provided by law.”

It is my opinion that the learned Judge, in his judgment, had set out to resolve a question regarding *excess of powers* pure and simple – a question of *judicial review* as a public law remedy. He could not, I think, have been concerned with issues linked to business and profitability in tea-factory companies; and if such companies benefited by the decision this would not be a matter in contemplation in the judicial review proceedings. This point was, in my opinion, misunderstood by the taxing officer when she made reference in her taxation to the *financial standing* of the tea-production sector;

the *importance of the matter to the parties*; the *volume of forensic work involved*; the *public policy issues raised by brief*; the *novelty* raised by the proceedings.

Although the taxing officer referred to *complexity of issues* in the judicial review proceedings, my analysis of the judgment has not shown anything in the application to have risen at all above the workaday chores of legal practitioners. It follows, in my view, that the *responsibility entrusted to counsel* in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field. I have to state that there was nothing *novel* in the proceedings, on such a level as would justify any special allowance in costs. I have also not been able to see what, in the apparently brief proceedings, could have been so greatly *time-consuming*, so *research-involving*, so *skill-engaging* as to justify an enhanced award of “instruction fees” – what *Briggs, J.A. in Haider bin Mohamed el Mandry & 4 Others v. Khadija Binti Ali Bin Salem alias Bimkubwa* (1956) 23 EACA 313 (at page 316) typifies as “merely a ‘getting-up’ fee”. There is also no great volume of *crucial documents* which counsel for the judicial review applicants had to refer to, to prosecute their cause successfully. I think it is also not the case, as suggested, that this matter was all that *urgent*; for urgency would have mainly attached to the prayer for orders of *Prohibition*, yet this particular prayer was refused, as the claim in that regard was already overtaken by events.

Since *Mr. Justice Ransley* had on 27th April, 2005 ordered that both the taxation-reference applications of 11th March, 2005 and of 24th March, 2005 be heard together, I do not accept the contention made for the respondents herein that one of those applications was not properly before this Court; and so I will take into account the representations of materiality made by counsel for *all* parties.

It was submitted for the judicial review applicants that the proceedings leading to the judgment of 23rd March, 2004 deserved an enhanced costs allowance under the head of instruction fees, because the proceedings represented the “first occasion ever”, in Kenya, in which subsidiary legislation had been challenged on grounds of *ultra vires*; therefore, it was urged, the judicial proceedings were of great *precedent value*. It was not made clear whether such a claim was factual and even if it was, whether the mere

fact of the time of occurrence of those proceedings ought to be rewarded with enhanced levels of allowance under the head of instruction fees.

There will, I believe, be a good number of judicial review decisions of earlier occurrence, in which similar issues had been dealt with. As just one example, there was *Republic v. The Minister for Transport & Communications et al, ex parte Gabriel Limion Kaurai & Another*, H.C. Misc. Application No. 109 of 2004 which came before me, and judgment was delivered on 4th March 2004. I had there stated in one of the passages in the judgment:

“It is quite evident that certain aspects of the Minister’s Legal Notice No. 161 of 2003 [subsidiary legislation] are not in keeping with the terms of the statutes that delegated the powers to him.”

From the foregoing analysis it is clear that I am *not* of the opinion that the taxing officer was properly guided when she conducted the taxation which has been challenged in the two applications – and certainly not, with regard to the item on *advocate’s instruction fees*. Her exercise of *discretion* was, in my view, and with much respect, done perfunctorily and as a mere formality. It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by *principles*, the *elements* of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs. Since the sum awarded as instruction fees herein, namely Kshs.20,000,000/=, was not shown to have been guided by the relevant principles, nor was it transparently accounted for, it appeared, in my assessment, as a mystical figure which cannot be allowed to stand. Taxation of costs as a *judicial function* is to be conducted *regularly*, on the basis of *rational criteria* which are *clearly expressed* for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding *fairness* as between the parties; the taxing officer is to provide only for reasonable compensation for *work done*; the taxing officer should avoid the possibility for *unjust enrichment* for any party and ought to refuse any claim that

tends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as *public policy, interests affected, importance of matter to parties, or importance of matter to the public*; the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of *time, research and skill* entailed in the professional work of counsel.

It is noteworthy that counsel for the respondents herein invoked many authorities from private-law claims sounding in damages and entailing pecuniary awards. Such examples do not, in my opinion, fall in the same class as *most public-law claims* – such as those in judicial review, in constitutional applications, in public electoral matters, etc. Such matters are in a *class of their own*, and the instruction fees allowable in respect of them should not, in principle, be extrapolated from the practices obtaining in the private law domain which may involve business claims and profit calculations.

The foregoing analysis leads me to make *orders* as follows:

1. The decision of the taxing officer to allow Kshs.20,000,000/= on item 1 of the bill of costs dated 29th June, 2004 is hereby set aside.
2. The bill of costs dated 29th June, 2004 is hereby remitted for fresh taxation by a different taxing officer who will be guided by the principles enumerated in this judgement, and more particularly by the following principles –
 - (i) 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*;

- (ii) the taxation of advocates' instruction fees is to seek no more and no less than *reasonable compensation for professional work done*;
- (iii) the taxation of advocates' instruction fees should avoid any prospect of *unjust enrichment*, for any particular party or parties;
- (iv) so far as apposite, *comparability* should be applied in the assessment of advocate's instruction fees;
- (v) objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
- (vi) where *complexity* of proceedings is a relevant factor, firstly, the *specific elements* of the same are to be identified and stated; and secondly, complexity is to be judged on the basis of the express or implied recognition and *mode of treatment by the trial Judge*;
- (vii) where *responsibility* borne by advocates is taken into account, its nature is to be specified;
- (viii) where *novelty* is taken into account, its nature is to be clarified;
- (ix) where account is taken of *time spent, research done, skill deployed* by counsel, the pertinent details are to be set out in summarised form.

3. The costs of the applicants herein, for the reference of 11th March, 2005 and that of 24th March, 2005 shall be borne by the respondents herein.

DATED and DELIVERED at Nairobi this 28th day of April, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Judicial Review Applicants/Respondents: Mr. Kagiri, Mr. Njoroge instructed by M/s Kagiri & Associates Advocates

For the Judicial Review Respondent/Objector-Applicant: Mr. Meso, instructed by the Hon. The Attorney-General

For the 1st Interested Party: Mr. Kiura, instructed by M/s. Riunga Raiji & Co. Advocates

For the 2nd Interested Party: Mr. Kuria, instructed by M/s. Nguku & Co. Advocates