



**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**

*(Coram: M.K. Ibrahim, SCJ)*

**ELECTION PETITION (REFERENCE APPLICATION) NO. E026 OF  
2023**

**-BETWEEN-**

**AHMED BORAY ARALE.....APPELLANT/RESPONDENT**

**-AND-**

**THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**ABDIBASHIR ALI NOOR IBRAHIM  
THE CONSTITUENCY RETURNING OFFICER  
ELDAS CONSTITUENCY.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**MARYAN HASSAN MOHAMED  
THE DEPUTY CONSTITUENCY RETURNING OFFICER  
ELDAS CONSTITUENCY.....3<sup>RD</sup> RESPONDENT/APPLICANT**

**FEISAL ABDI BILLOW  
PRESIDING OFFICER  
OROTE POLLING STATION.....4<sup>TH</sup> RESPONDENT/APPLICANT**

**ADAN KEYNAN WEHLIYE.....5<sup>TH</sup> RESPONDENT**

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*(Being a Reference seeking to set aside or vary the taxation decision of Hon.  
Nelly Kariuki, Deputy Registrar, dated and delivered 1<sup>st</sup> December, 2023)*

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**Representation:**

Ms. Moturi for the Appellant/Respondent  
*(Ondieki, A. Hashi & Company Advocates)*

Mr. Kibihi holding brief for Mr. Mwiti for the 1<sup>st</sup> to 4<sup>th</sup> Respondents/Applicants  
*(Mwiti & Partners Advocates, LLP)*

## **RULING OF THE COURT**

**[1] UPON PERUSING** the Motion dated 4<sup>th</sup> December, 2023 by the 1<sup>st</sup> to 4<sup>th</sup> Respondents/Applicants (hereinafter referred to as “Applicants”), filed pursuant to Rules 60 and 62 of the Supreme Court Rules, 2020 in which the Applicants seek to have a single Judge review the decision of the Deputy Registrar dated 1<sup>st</sup> December, 2023 on their bill of costs concerning item 1 being the instruction fees; and either set it aside, issue direction for re-taxation or to tax it afresh; and

**[2] UPON PERUSING** the grounds on the face of the application, the supporting affidavit by Duncan Mwiti Kinyua, Counsel for the Applicants, sworn on 4<sup>th</sup> December, 2023 and submissions dated 5<sup>th</sup> November, 2023 contending that the Taxing Officer admitted as crucial evidence the instruction letter dated 31<sup>st</sup> August, 2023 disclosing the instruction fees between the 1<sup>st</sup> Applicant and its Advocate as a fee of Ksh. 3,500,000/- but failed to consider the same in awarding the fees claimed by the Applicants without giving any justification; that in the consideration of the bill of costs, the Taxing Officer failed to consider the rejoinder submissions dated 22<sup>nd</sup> November, 2023 and further failed to give reasons as to how the low amount of Ksh.600,000/- was arrived at; that the Taxing Officer gave undue regard to the cost cap of Ksh.1,000,000/- by the High Court and consequently made an unreasonable consideration in arriving at a very low instruction fee of Ksh.600,000/-; that the Taxing Officer in considering the issue of novelty and complexity of the matter, held that with the matter having been settled by consent, there was no opportunity to consider these issues, then proceeded to award instruction fees without considering any other legal principles as enumerated in the Applicants’ rejoinder submissions dated 22<sup>nd</sup> November, 2023; and

**[3] UPON PERUSING** the response by the Appellant/Respondent (hereinafter referred to as “Respondent”) by way of replying affidavit sworn by Ahmed Boray Arale on 21<sup>st</sup> December, 2024 and submissions of even date contending that the application does not raise any grounds for the interference

with the decision of the Taxing Officer; that the amount awarded by the Taxing Officer was reasonable and sound in regards to the principles of taxation especially in election petitions; the Taxing Officer in her ruling clearly stated that she had considered all submissions including the Applicants' rejoinder submissions and the reasons for the award had been clearly stated in the ruling; the taxation process is a discretionary one and therefore the Taxing Officer was not bound by the amounts alleged in the letter of instruction dated 31<sup>st</sup> August, 2023 and in any case and as this Court held in ***Fredrick Otieno Outa Vs Jared Otieno Odoto & 3 Others SC Petition No 6 of 2014; [2023] KESC 75 (KLR)***, costs are not meant to punish an unsuccessful litigant or create a barrier to access to justice under Article 48 of the Constitution; that she had awarded costs having considered all the relevant principles of taxation including the public interest nature of the matter, the compromise reached by the parties, the lack of alleged novelty and complexity as the same was not heard and the capping of costs by the High Court in its Judgment dated 6<sup>th</sup> March, 2023 at a sum of Ksh.1,000,000/-; that the capping of costs was pursuant to Rule 30(1)(b) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and if the Applicants were dissatisfied with the decision to cap, they ought to have appealed the same, which they did not; and

**HAVING** considered the totality of the application, response and rival arguments by the parties, **I NOW OPINE** as follows:

**[4] GUIDED** by the provisions of Rule 60 of the Supreme Court Rules, 2020, the Registrar and by extension, courtesy of Section 2 of the Supreme Court Act, the Deputy Registrars, have the power to tax costs arising out of any proceedings between the parties. In the taxation exercise, the Registrar must adhere to the scale set out in the Third Schedule of the Supreme Court Rules on party and party costs and in particular Paragraph 9 on quantum of costs; while the jurisdiction of a single Judge is to entertain a reference made within seven days by a person who is dissatisfied with a decision of the Registrar in the taxing of costs.

[5] This Court in the case of ***Fredrick Otieno Outa v Jared Otieno Odoto & 3 Others SC Petition No 6 of 2014; [2023] KESC 75 (KLR)*** highlighted the following principles to be considered in an application for setting aside a taxation decision:

*“(11) A certificate of taxation will be set aside, and a single Judge can only interfere with the taxing officer’s decision on taxation if;*

- a. there is an error of principle committed by the taxing officer;*
- b. the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy;(and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).*
- c. the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and*
- d. the award proposed is so far as practicable, consistent with previous awards in similar cases.*

*To these general principles, I may add that;*

- i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,*
- ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,*
- iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer’s shoes.”*

[6] Bearing these principles in mind, I note that the only item in contention is item no. 1 which was on the instruction fees. The Applicants had sought the instruction fees to be taxed at Ksh.3,500,000/- as per the instruction letter

dated 31<sup>st</sup> August, 2023 between the Applicants and their Counsel on record. The Respondent on the other hand had proposed a figure of Ksh.600,000/-. The Taxing Officer expressed herself as follows in her consideration of item no. 1 on instruction fees before arriving at the sum of Ksh.600,000/-:

*“7. It is acknowledged that the subject matter was of public interest and revolved around constitutional issues on election matters. However, the appeal was compromised through consent and, therefore, was not heard. Considering that novelty and complexity of the matter was not determined and given that costs were already capped at the High Court, I am of the view that the proposed amount of Ksh.3,500,000/- is excessive and unreasonable considering the range of costs already determined as reasonable in election petitions as cited in the case of **Fredrick Otieno Outa vs. Jared Otieno Odoto & 3 Others (2017) e KLR**. I find the sum of Ksh.600,000/- to be reasonable in the circumstances and award it accordingly under this heading and the balance taxed off.*

[7] Guided by the multitude of decisions on costs of election petitions cited in the Ruling of **Fredrick Otieno Outa v Jared Otieno Odoto & 3 Others** SC Petition No 6 of 2014; [2023] KESC 75 (KLR), it is my considered view that the Taxing Officer properly set out her reasons for finding that the amount of Ksh.3,500,000/- was manifestly excessive. However, she failed to give the same due consideration in why the figure of Ksh.600,000/- was appropriate. Although taxation is not a mathematical exercise but a discretionary process, the Taxing Officer merely purported to pick the proposal by the Respondent mechanically. There has to be some justification for doing so.

[8] The Court recently restated in its decision in the case of **Kenya Airports Authority v Otieno Ragot & Company Advocates**, SC Petition No. E011 of 2024 delivered on 2<sup>nd</sup> August, 2024, that the fees allowed for instructions to appeal or to oppose an appeal is at the discretion of the taxing officer; and nonetheless the absolute least is that fees must be commensurate to work done, and it will amount to unjust enrichment if it is not awarded for this purpose. In

any case, the Supreme Court Rules, 2020 at paragraph 9 (1) of the Third Schedule, peg this absolute least figure at Ksh.1,000/-.

**[9]** I take note that the substantive cause of action and genesis of the reference is an election petition for the election of the Member of the National Assembly, Eldas Constituency where both the Appellant and the 5<sup>th</sup> Respondent were contestants, with the 5<sup>th</sup> Respondent emerging victorious. The matter began at the High Court, progressed to the Court of Appeal to finally reach this Court through Petition of Appeal dated 31<sup>st</sup> August, 2023 and filed on 1<sup>st</sup> September, 2023; the High Court dismissed the Appellant's Petition for failing to prove his allegations while the Court of Appeal struck out both the Notice of Appeal and Record of Appeal for being filed and served outside the prescribed timelines; while the main contestation before this Court revolved around the legal framework of electronic filing of election appeals and the enforcement of the filing timelines. Shortly after filing the appeal, the parties entered into a consent dated 14<sup>th</sup> September, 2023 which was adopted by the Court in an Order dated 15<sup>th</sup> September, 2023 officially withdrawing the appeal in less than a month from the date of filing. However, save for the 5<sup>th</sup> Respondent who chose not to pursue costs, the parties left the issue of costs of the appeal to the Court's determination, with the Applicants filing their bill of costs dated 3<sup>rd</sup> October, 2023 for taxation claiming a total sum of Ksh.4,709,049/-.

**[10]** Having considered the history of the matter and the fact that the Petition of Appeal was short-lived before the Court, I also note the industry of the Applicants in filing their respective responses to the Petition of Appeal in the form of grounds of objection, written submissions as well an application to strike out the Appeal for want of jurisdiction. Taking that into account, alongside their Advocate's attendance before the Court and the reasons I stated in the preceding paragraphs, I would be hesitant to interfere with the award of Kshs.600,000/- by the Taxing Officer, which in my opinion was commensurate to the work done and therefore a fair and reasonable award.

**[11]** On costs, the award of the same is discretionary and follows the principle set out by this court in ***Jasbir Singh Rai & 3 other v Tarlochan Singh***

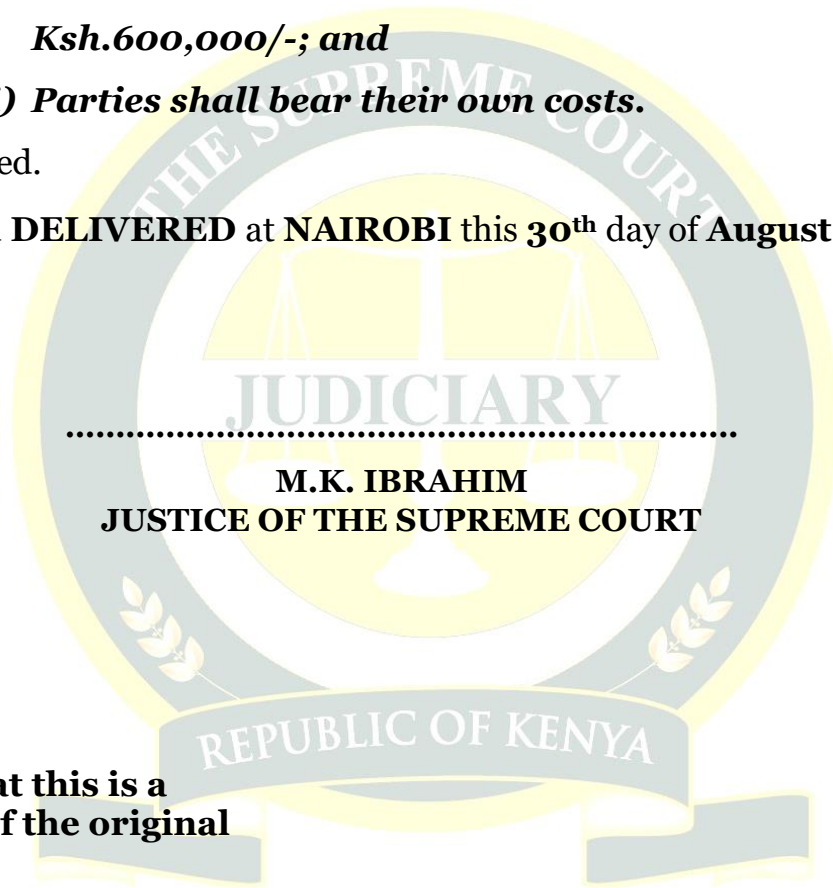
**Rai & 4 others**, SC Petition No 4 of 2012; [2014] eKLR that costs follow the event. I exercise my discretion to order that each party shall bear its costs.

[12] **ACCORDINGLY**, and for the reasons aforesated, I disallow the Reference dated 4<sup>th</sup> December, 2023 and make the following orders:

- (i) Notice of Motion dated 4<sup>th</sup> December, 2023 by the 1st to 4<sup>th</sup> Respondents/Applicants be and is hereby dismissed;**
- (ii) Item No. 1 on the instruction fees shall remain at Ksh.600,000/-; and**
- (iii) Parties shall bear their own costs.**

It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of August 2024.**



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**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**