McKean & another v Kenya Motorsport Federation Ltd (Judicial Review Application E142 of 2021) [2022] KEHC 13384 (KLR) (Judicial Review) (29 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13384 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E142 OF 2021

AK NDUNG'U, J

SEPTEMBER 29, 2022

BETWEEN

RORY HUGH THOMAS MCKEAN & ANOTHER ..... APPLICANT

AND

KENYA MOTORSPORT FEDERATION LTD ..... RESPONDENT

RULING

1. By way of a chamber summons dated October 13, 2021, the applicants seek orders that:
    a. The decision of the taxing master, the Hon C A Muchoki, taxing the bill of costs dated January 27, 2020 at Ksh 433,845 contained in the ruling dated September 27, 2021 be varied and/or set aside.
    b. This honourable court does order that the bill of costs dated January 27, 2021 ne placed before another taxing master for taxation.
    c. This honourable court do make any additional orders as the demands of justice dictate.
    d. The costs of this application be provided for.
2. Twelve grounds are listed in support of the application namely;
    1. The taxing master applied the wrong legal principles in taxing items 1 and 2 of the respondent's party and party bill of costs dated January 27, 2020, with respect to instruction fees and getting up fees.
    2. The Kshs 300,000.00 awarded by the taxing master as instructions fees is inordinately high and against the principles of taxation in judicial review matters as the judicial review proceedings (the JR) the subject of the bill of costs was neither set down for hearing nor heard on merits.

The JR was dismissed on a technicality during a mention date by a ruling of the Hon Justice John Mativo delivered on September 19, 2019.

3. The applicants have since lodged an appeal against the ruling of September 19, 2019 at the Court of Appeal, being Civil Appeal No 100 of 2020 (the appeal). The appeal is awaiting directions for hearing before the Court of Appeal.

4. At the time of dismissal of the JR, the applicants had not filed the substantive motion in the JR and the respondent had consequently not filed a replying affidavit in opposition to the substantive motion. The respondent had only filed a replying affidavit in response to the applicants' application seeking leave to institute the JR.

5. The JR was not complex, did not raise a novel question of law, the amount or value of the subject matter was minimal, i.e. quashing of, inter alia, the decision of the respondent to levy a fine of Kshs 10,000 on one of the applicant minors, and the time expended by the advocate for the respondent was minimal as the JR was terminated at the leave stage before filing of the substantive motion.

6. There was no justification given by the taxing master for increasing instruction fees beyond Kshs 100,000 as prescribed by the *Advocates Remuneration Order* (ARO) at schedule 6A paragraph 1 (j) (ii) as there were no extraneous factors to justify an increment of the prescribed basic instruction fees.

7. The increment of instruction fees to Kshs 300,000 in the circumstances went against the principle that costs in litigation must be kept at such level as to ensure that parties can access court and seek justice and amounts to unjust enrichment of the respondent.

8 The taxing master erred by allowing item 2 of the bill of costs, getting up fees, contrary to the provisions of schedule 6A paragraph (2) (ii) and (iii) of the ARO as the JR had neither been set down for hearing nor been fixed for trial and was simply dismissed in limine on technical and unjustified points of law. No justification was given by the taxing master for allowing this item yet the two cardinal considerations under the ARO were not met. Furthermore, no substantive motion had been filed by the time the JR was dismissed.

9. The taxing master further erred in fact and in law in allowing items 7 & 15 of the bill of costs, contrary to the provisions of the *Advocates Remuneration Order* and well-established principle that the party seeking recovery of its costs bears the burden of proving the amount and necessity of its costs.

10. Item 7 described as "Presenting our application dated September 16, 2019 under certificate of urgency' was taxed at Kshs 5,000 yet it ought to have been taxed-off in its entirety as the respondent had already charged for drawing the application in question at Kshs 9,800 in item 4 of the bill of costs and charged for filing fees of the same application at Kshs 2,285 in item 6 of the bill of costs. The two items, 4 and 6, were allowed as drawn by the taxing master.

11. Item 15 described as "Court attendance on September 19, 2019" was taxed at Kshs 7,100. This amount is prescribed for court attendances that take half a day. The court record shows that the attendance in question was a mention for directions which took less than 30 minutes and ought to have been taxed at Kshs 1,900 under Schedule 6A paragraph 4 (d) of the *ARO*.

12. The taxing master's decision contained in the ruling dated September 27, 2021 is manifestly wrong both in law and fact.

3. The application is further supported by the affidavit of Abas Esmail sworn on October 13, 2021 which more or less reiterates the grounds in which the application is based.

4. The application is opposed and in a replying affidavit Mercy Waliaula Advocate has stated that the amount of instruction fee at Kshs 300,000 is fair and reasonable based on the circumstances of the case as indeed the matter was complex. The pleadings were voluminous and the history of the matter complex as the applicant had filed similar suits seeking the same orders.

5. It is deponed that the matter was heard and a ruling delivered. Both parties made their arguments and getting up fees is thus deserved.

6. Item 7 was taxed fairly at Kshs 5,000 as the respondent's application came for hearing before the judge on the same date. The attendance on September 19, 2019 is stated to have been a hearing where 2 applications came up for hearing. Each party orally submitted and therefore the attendance was a hearing and the taxing officer was right to consider it as such.

7. The application was disposed of by way of written submissions which I have had the advantage to consider and will advert to them in my analysis which analysis shall put into account all the submissions even on parts I may not necessarily mention herein.

8. The issues for determination crystalize into:

    1. Whether the taxing officer applied the correct legal principles in her assessment of the Instruction fees awarded.

    2. Whether the respondents were entitled to Getting Up fees as awarded by the taxing officer.

    3. Whether item 7 and 15 of the bill of costs which were awarded at Kshs 5000 and 7100 respectively offended the *Advocates Remuneration Order*.

The applicable legal principles:

9. The circumstances under which a judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. The court in the case of *First American Bank of Kenya vs. Shah and Others 120021 1 EA 64* set the applicable principles. These principles are:

    1. That the court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle;

    2. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

    3. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

    4. It is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

5. The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;

6. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;

7. The mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. The position was reiterated in *Karen & Associates Advocates vs. Caroline Wangari Njoroge [20191 eKLR*, in which the Court cited the decision of the Court in *Ochieng, Onyango, Kibet and Ohaga Advocates vs. Adopt Light Ltd. HC Misc 729 of 2006* where the court stated that;

> " .....The taxing master must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject... "
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> In the same case, it was held that:
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> " The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in line to the material presented before court. "

Whether the Taxing Officer applied the correct legal principles in her assessment of instruction fee

10. Before the court was a Judicial Review Misc Application no 235 of 2019 which sought orders suspending National Karting Championship races and scheduled for August 3rd to 4th, 2019. Leave to institute judicial review proceedings was granted but the court declined to issue stay orders.

11. Soon thereafter, the respondent scheduled the 2nd round of the 2019 races for 7th and 8th September, 2019. This prompted the filing of juridical review application no 260 of 2019. Leave was granted and a stay order against further races was issued by Korir J staying further action.

12. These orders elicited the filing of an application dated September 16, 2019 seeking to set aside the *ex parte* orders of stay and the dismissal of JR 260 of 2019 for being res judicata.

13. Both JR 235 of 2019 and JR 260 of 2019 were set for mention on September 19, 2019. At the mention, the respondent sought to have JR 260 of 2019 be dismissed for being *res judicata*. The court dismissed both applications after making a finding that both cases were res judicata as they had already been determined in JR. 10 of 2019.

14. A bill of costs in respect of JR 260 of 2019 (relevant to these proceedings) was drawn at Kshs 516,658 in party and party costs. The bill was allowed *vide* a ruling dated September 29, 2021 at Kshs 433,845. It is this finding that is challenged.

15. In her assessment of the instruction fee, the taxing officer awarded Kshs 300,000. The Instruction fee in judicial review suits is found in Schedule 6 (i)(ii) of the *Advocates Remuneration Order* and is set at Kshs 100,000. The Taxing Officer thus increased the instruction fee threefold.

16. In *Kyalo Mbobu T/A Kyala Associates Advocates v Jacob Juma [2015] eKLR*, the court held that a taxing officer must apply the laid down principles and specify, not generalize his or her justification for increasing or reducing the instructions fees.

17. In *Joreth Ltd v Kigano & Associates [2012] 1EA 92*, the Court of Appeal stated that the taxing officer must give reasons for increase of instruction fee such as care and labour required by the advocate, the volume of papers to be perused, the nature and the importance of the matter, the value of the subject matter and novelty of the matter.

18. In Nairobi *JR Misc Application no 143 of 2021*, (unreported) this court stated:

> "It follows then that it is not enough for a taxing master to give a general narrative of complexity of a matter, the scope, the level of responsibility, novelty of the matter, time spent, research done or skill deployed. The taxing master must employ some degree of specificity. Only then can the exercise of discretion to increase or decrease fees can be said to have been exercised judiciously as per the demands of the law. As held in *Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna & 6 Others* (supra);
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> "... It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant's firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the 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.....it was necessary to specify clearly and candidly how she exercised her discretion... it is not enough to set 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...complex elements 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 details of such a situation must be set out in a clear manner..."

19. In our instant suit, the taxing officer failed to demonstrate with precision the justification for the increase of the instruction fee threefold. The discretion was thus not exercised judiciously and this court has the power to interfere with the exercise of the discretion.

Whether the respondents were entitled to getting up fees as awarded by the taxing officer

20. In the case of *Ramesh Naran Patel vs. Attorney general [2012] eKLR*, Emukule J stated:

> "The item in the Advocates Remuneration Order on getting up fee contemplates involvement by counsel in the preparation of witnesses, witness statements and determination of the matter by viva voce evidence."

21. In *Nyangito & Co. Advocates vs. Doinyo Lessos Cremeries Ltd [2014] eKLR*, it was held:

> "With respect to fees for getting up and preparing for trial under schedule vi paragraph 2, no fees is chargeable under the said paragraph until the case is confirmed for hearing and in case where the case is not heard, the taxing master must be satisfied that the case has been

prepared for trial. It is obvious that the case which gave rise to these proceedings was not heard. There is no evidence that the case was prepared for trial. Accordingly, this paragraph did not apply."

22. JR 260 OF 2019 was never set down for hearing. Both JR 235 and 260 were dismissed at the preliminary stage for being res judicata. I resonate with the decisions in *Ramesh Naran Patel vs. Attorney General and Nyagito & Co. Advocates vs. Doinyo Lessos Cremeris Ltd* (Supra) that getting up fees is only applicable where a suit has been set down for hearing necessitating a party to make preparations for hearing e.g. taking witnesses through pre trials, preparing exhibits and all other activities that would be required for proper preparedness for trial. In our instant suit, getting up fee ought not to have been applicable.

Whether items 7 and 15 of the bill of costs which were awarded at KshS 5000 and 7100 respectively offended the Advocates Remuneration order.

23. Item 7 of the bill of costs is describes as "presenting our application dated September 16, 2019 under a certificate of urgency". This charge is alien to the *Advocates Remuneration Order* and finds no support thereof. The taxing Officer fell into error by allowing the same.

24. Item 15 of the bill of costs is described as "Court attendance on September 19, 2019 at Kshs 7100". From the record of the proceedings, I note that the matter was before court on this day for a mention for directions. The short proceedings on record are indicative of the fact that the mention took a short time, not more than 30 minutes. The taxing officer fell into error by allowing the fee applicable for attendance to court for half a day. The correct charge ought to have been Kshs 1900 under schedule 6A paragraph 7 (d) of the *Advocates Remuneration Order*.

25. The cumulative effect of the above analysis is that the application herein is wholly successful and is allowed. I make the following orders:

    1. The ruling of the taxing officer dated September 29, 2021 is hereby set aside.

    2. The bill of costs filed on January 27, 2020 seeking to recover the sum of Kshs 516, 658 is remitted to a taxing officer other than Hon C A Muchoki for taxation.

    3. Each party is to bear own costs of the reference.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 29TH DAY OF SEPTEMBER, 2022.

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A. K. NDUNG'U

JUDGE