



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 321 OF 2019

VIOLET OMBAKA OTIENO.....1ST PETITIONER/RESPONDENT
OBEGI MALAK OCHWERI.....2ND PETITIONER/RESPONDENT
NDIRANGU TABITHA.....3RD PETITIONER/RESPONDENT
VERAH SHAWIZA MANYONYI.....4TH PETITIONER/RESPONDENT
MAUREEN KWAMBOKA.....5TH PETITIONER/RESPONDENT
YVONNE AKHAGO BULUMA.....6TH PETITIONER/RESPONDENT
OMONDI LINDA AKINYI.....7TH PETITIONER/RESPONDENT
JOHN KAMAU MUTHONI.....8TH PETITIONER/RESPONDENT
SARAH KARANJA WANJIKU.....9TH PETITIONER/RESPONDENT
JAKAYO PAULLETE AKINYI.....10TH PETITIONER/RESPONDENT
RUTH WAMBOI MWANGLI.....11TH PETITIONER/RESPONDENT
KARANJA SUSAN WAITHIRA.....12TH PETITIONER/RESPONDENT
PATIENCE MBITHI KAMUTU.....13TH PETITIONER/RESPONDENT

-VERSUS-

MOI UNIVERSITY.....RESPONDENT/APPLICANT

RULING

1. In a judgement delivered on 21st August, 2019 this Court (P. Nyamweya, J) entered judgement in favour of the thirteen petitioners led by Violet Ombaka Otiemo against the Respondent, Moi University. Each petitioner was awarded nominal damages of Kshs. 50,000 for infringement of their constitutional rights under Articles 27, 28, 29(d) and 47 of the Constitution. Subsequently the petitioners' counsel filed a party and party bill of costs which was taxed at Kshs. 3,078,520.

2. Moi University through the chamber summons application dated 4th March, 2020 challenges the decision by the taxing officer delivered on 20th February, 2020 and prays for an order of re-taxation in respect of item numbers 1, 2, 4, 5, 7, 11, 12, 14, 15 and 16 of the petitioners' bill of costs dated 21st October, 2019. The application is supported by the grounds on its face and an affidavit sworn by Dr. Benard Kibet Malakwen, the Director of the Respondent's Nairobi Campus. I will henceforth refer to Moi University as the Applicant and the petitioners as the respondents.

3. It is the Applicant's contention that the taxing officer failed to correctly apply the principles of taxation and this Court is therefore seized with jurisdiction to interfere with the discretion of the taxing officer.
4. In respect of the instruction fees of Kshs. 2,600,000, the Applicant submits that the taxing officer erred in law and principle in basing her ruling on a judgement issued on 9th December, 2019 in another suit and taxing the instruction fees contrary to the principle that the instruction fees must be based on the value of the subject matter if the same can be discerned from the pleadings, judgement or settlement between the parties.
5. The Applicant further contend that the taxing officer erred in law and principle in applying the wrong scale and schedule of the Advocates (Remuneration) (Amendment) Order, 2014 ('Remuneration Order'). It is submitted that the taxing officer erred in relying on Paragraph (j) of Schedule 6 which deals with costs in respect of constitutional and prerogative orders instead of Paragraph 1(b) since the value of the subject matter was determined in the judgement as Kshs. 650,000. It is stated that the failure to pay regard to the damages awarded in the judgement and relevant provisions of the Remuneration Order led to the taxing officer misdirecting herself on matters of principle.
6. It is the contention of the Applicant that the taxing officer failed to give any substantial reasons for taxing the instruction fees as drawn at Kshs. 2,600,000. According to the Applicant, the taxing officer failed to exercise her discretion judiciously when she increased the instruction fees from the Kshs. 100,000 provided in the Remuneration Order to Kshs. 2,600,000 without assigning specific reasons for the decision.
7. It is the Applicant's contention that the taxing officer's failure to consider its submissions in opposition to the bill of costs on disputed items 1, 2, 4, 5, 7, 11, 12, 14, 15 and 16 was contrary to the rules of natural justice. The Applicant further averred that the decision was contrary to the established principles of taxation. It is the Applicant's case that it will suffer humongous prejudice if the orders sought are not granted since the taxing officer awarded enormous costs which are prejudicial to the principles of access to justice.
8. The respondents opposed the reference through a response dated 25th March, 2020. It is the respondents' case that the bill of costs was taxed to scale and among the reasons provided by the taxing officer included the number of the petitioners, and the responsibility shouldered by counsel based on the nature and importance of the subject matter. It is therefore the respondents' case that there was no error of fact or law.
9. The respondents emphasised the taxing officer's considerations stating that it would have amounted to gross injustice to award thirteen petitioners costs similar to those normally awarded to a single petitioner. It is averred that the number of the petitioners meant a lot of paper work as counsel had to scrutinize each petitioner's set of documents with extra caution.
10. According to the respondents, a team of three advocates and four support staff had to be deployed to exclusively scrutinize the paper work in the matter from 10th to 19th August, 2019 and the same team was on standby on 21st August, 2019, an exercise which as observed by the taxing officer required extra diligence.
11. The respondents additionally averred that while the matter was not complex, the circumstances already stated and the limited time available due to the urgency of the matter constrained counsel and made it extremely crucial to ensure the law and supporting authorities were properly analysed before being presented in Court. The respondents depose that the matter was of great importance as it concerned issues that would determine the respondents' future thereby placing immense responsibility on the legal team which acted as both counsel and counsellor to the respondents.
12. The respondents aver that the Applicant had erroneously interpreted the judgement dated 21st August, 2019 as at no point did the Court determine that the nominal figure of Kshs. 650,000 was the subject matter or the discernible value of the constitutional petition. According to the respondents, the nominal award of Kshs. 50, 000 to each petitioner was meant to be a recognition of the breach of the petitioners' constitutional rights. Further, that there was no subject matter capable of monetary valuation as what was before the Court was a constitutional petition on breach of fundamental rights and freedoms.
13. The respondents cited several authorities in support of the submission that a taxing officer has discretion to increase but not decrease the figures in the Remuneration Order and that courts will not interfere with the discretion unless it appears that the discretion has not been exercised judiciously or properly.
14. It is the respondents' case that the taxing officer correctly applied Schedule 6(j) & (ii) of the Remuneration Order to tax the bill of costs.
15. In further advancing their case, the respondents averred that the discretion of the taxing officer had been exercised judiciously. The respondents cited several authorities that guide this Court as to when to interfere with the discretion of a taxing officer.
16. In conclusion, the respondents averred that the taxing officer had considered the submissions of all the parties as evidenced in the lengthy ruling. Further, that there was in fact no error in principle or fact in the matter. The Court is therefore urged not to interfere with the taxing officer's decision and dismiss the reference.
17. Through written submission dated 4th March, 2020, counsel for the Applicant submitted that there was an error of principle and law on the part of the taxing officer with respect to her decision on the instruction fees and items 2, 4, 5, 7, 11, 12, 14, 15 and 16. Counsel urged that the reference is legitimate and reasonable as the taxing officer had failed to take into consideration the principles governing the assessment of costs as established in the cases of **Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] E.A. 162** and **Peter Muthoka & another v Ochieng & 3 others [2019] eKLR**. In contesting the instruction fee, the Applicant also relied on the decisions in **KANU National Elections Board & 2 others v Salah Yakub Farah [2018] eKLR** and **Dennis Moturi Anyoka v Kenya Revenue Authority & 2 others [2014] eKLR**.

18. The argument raised against the decision of the taxing officer is that the same was issued in error of law and principle as the relevant section of the Remuneration Order was not applied. Further, that the discretion was exercised erroneously since no reasons were advanced for the final determination.

19. I take note that the taxing officer indicated in her ruling that the taxed bill of costs was in respect of a judgement issued on 9th December, 2019. I take it that this is an error as the judgement which gave rise to this reference was delivered on 21st August, 2019. This, in my view, is a mere technicality as the impugned decision of the taxing officer is clear that it was meant for the judgement delivered on 21st August, 2019 in this petition.

20. I have perused the ruling delivered on 20th February, 2020 by C. A. Muchoki. I have also considered the issues raised in the reference, the response thereto and the submissions of the parties. In my assessment, the issues that arise for determination are:

- a) The applicable Paragraph in Schedule 6 of the Advocates (Remuneration) (Order), 2014;
- b) Whether the taxing officer exercised her discretion judiciously; and
- c) Whether the taxation ruling delivered on 20th February, 2020 should be set aside or varied.

21. In her ruling, the taxing officer indicated that Paragraph 1(j)(ii) of Schedule 6 of the Remuneration Order was applicable to the bill of costs. The Applicant submits that the taxing officer erred as she was supposed to apply Paragraph 1(b) of Schedule 6.

22. Sub-paragraph 1(b) of Schedule 6 provides a scale for the determination of instruction fees where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and a defence or other denial of liability has been filed. Where the value of the judgement is between Kshs. 500,000 and Kshs. 750,000 the instruction fee is Kshs. 90,000. The Applicant's case is that since Kshs. 650,000 was awarded to the respondents as damages, the instruction fees should have been Kshs. 90,000.

23. The respondents, however, contend that Paragraph 1(j)(ii) is the correct provision and the taxing officer did not commit any error in applying that provision. Paragraph (j) states:

1. Instruction fees

Subject as hereinafter provided, the fees for instructions shall be as follows-

....

(j) Constitutional petitions and prerogative orders

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing officer in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

(i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000

(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000

(iii) to present or oppose application for setting aside arbitral award 50,000.

24. A reading of the provision clearly shows that the Remuneration Order specifically provides the instruction fees for constitutional petitions and applications for prerogative orders. In light of that express provision, the taxing officer was correct in relying on Paragraph 1(j)(ii) of Schedule 6 as the matter before her was a defended constitutional petition and Kshs. 100,000 is the provided minimum instruction fees. The instruction fees can however be increased based on the factors specified therein.

25. In my view, even where damages have been awarded in a defended constitutional petition, there is no room to fall back on the provisions of Sub-paragraph 1(b) because Paragraph 1(j) is clear that one of the factors to be considered in determining the instruction fees is the amount or value of the subject matter. The taxing officer can only use Sub-paragraph 1(b) as a guide as to the awardable instruction fees for the given amount or value of the subject matter. In my view, any damages awarded in a constitutional petition is one of the factors to be taken into account by a taxing officer when assessing the instruction fees payable.

26. Accepting the Applicant's submission that Sub-paragraph 1(b) is applicable in defended constitutional petitions where damages have been awarded will lead to confusion in taxation of bills of costs. In any event, it would be unfair and prejudicial to the respondents to award them Kshs. 90,000 as instruction fees based on the award of Kshs. 650,000 as nominal damages in a situation where the primary applicable law (Paragraph 1(j)(ii)) provides minimum instruction fees of Kshs. 100, 000.

27. The Supreme Court of the United States of America in **Carey v Piphus, 435 U.S. 247 (1978)** noted that:

“Nominal damages serve a special purpose in the protection of constitutional rights because they may be the only available remedy to the plaintiff for a constitutional violation.”

28. Nominal damages help individuals and courts protect constitutional rights. They are granted to vindicate proved violation of constitutional rights. In most cases nominal damages are awarded in addition to other remedies. The value of the judgement cannot therefore be discerned by considering the awarded nominal damages alone.

29. From the above analysis, it follows that the Applicant’s claim that the taxing officer applied the wrong provisions of the Remuneration Order to the bill of costs is without merit. As has been demonstrated, the taxing officer cannot be faulted for taxing the respondents’ bill of costs in compliance with Paragraph 1(j)(ii) of the Remuneration Order.

30. In determining the second issue as to whether the taxing officer exercised her discretion judiciously, the starting point is to identify the legal parameters within which this Court can interfere with a taxing officer’s discretion. In the case of **Premchand Raichand Ltd v Quarry Services of East Africa Ltd [1972] E.A. 162** it was held that:

“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.”

31. Further, in **Peter Muthoka & another v Ochieng & 3 others [2019] eKLR** it was held that:

“It has long been the law as was stated in ARTHUR -vs-NYERI ELECTRICITY (Supra), that where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional cases.”

32. Additionally, in **First American Bank of Kenya v Shah & others [2002] E.A.L.R. 64**, as cited in **Lubelellah & Associates Advocates v Baranyi Brokers limited & 2 others [2014] eKLR**, it was stated that:

“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.”

33. It is apparent from the cited authorities that the Court will only interfere with the discretion of the taxing officer where there is an error of principle or the sum awarded is either noticeably high or low as to lead to injustice to either of the parties to the dispute.

34. It is appreciated that the law under which the bill of costs was taxed grants discretion to the taxing officer. As already stated, factors to be considered in exercising that discretion are listed as the **“nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate.”**

35. As was pointed out by the Court of Appeal in **Peter Muthoka & another v Ochieng & 3 others [2019] eKLR**, discretion must be exercised judiciously. The Court in that regard held that:

“It is not lost to us ... that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in MBOGO -vs- SHAH (Supra), then the decision though discretionary, may properly be interfered with. See also ATTORNEY GENERAL OF KENYA -vs- PROF. ANYANG’ NYONG’O & 10 OTHERS, EACJ App. No. 1 OF 2009.”

36. The only way to demonstrate that discretion has been exercised judiciously is by giving plausible reasons for reaching the decision. It is not enough to state the principles guiding the exercise of discretion. It must be demonstrated in the decision that those principles were indeed applied.

37. In **Republic v Minister for Agriculture & 2 others Ex-Parte Samuel Muchiri W’njuguna & 6 others [2006] eKLR** it was held that:

“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...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... 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.”

38. In the case before this Court the taxing officer correctly stated the principles to be considered in taxing a bill of costs. She stated that in allowing the instruction fee as prayed for by the petitioners she had taken into account the fact that the petitioners were many. She, however, expressed in her ruling that the matter was not complex.

39. I have perused the petition and find that there was indeed nothing complex about it. The matter concerned maladministration in respect of the respondents who were the Applicant's students. The issues were simple and did not require the input of three advocates as submitted by counsel for the respondents. Indeed, no certification was sought for costs to be assessed for more than a single counsel.

40. The number of the parties in a case may indeed justify an award of instruction fees higher than the minimum. However, in this case the number of the petitioners, as correctly observed by the taxing officer, did not make the matter complex.

41. There were no other reasons given by the taxing officer for increasing the fees twenty-six times from the minimum of Kshs. 100,000 to Kshs. 2, 600, 000. In the case of **Khushbir Harjeet Singh Chadha v Wesley Maranga Robinson Gichaba [2020] eKLR**, the Court observed as follows:

“The rationale for giving reasons in a judgment or ruling or decision was espoused in the persuasive authority in the case of Soulmezis Versus Dudley (Holdings) PTY Limited, 1987 10 NS WLR 247,279, where MC Hugh JA held as follows:

“The giving of reasons for a judicial decision served three purposes:

First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the Judge's decision. As Lord Macmillan has pointed, the main purpose of a reasoned judgment is not only to do but seem to do justice. Secondly, the giving of reasons furthers judicial accountability. A requirement that Judges give reasons for the decisions, grounds of decision that can be debated, attacked and defended – serves a vital function in construing the Judiciary's exercise of power. Thirdly, under the common law system of adjudication, courts not only resolve disputes, they formulate rules for application in future cases.”

42. A perusal of the ruling also indicates that the taxing officer failed to illuminate how the factors governing increment in instructions fees were applicable in the case. Further, the taxing officer did not indicate any additional action or special services undertaken by the respondents' advocates that prompted her to increase the instruction fees. She indeed had a duty to make formal and specific references to what she considered to be the relevant factors that guided her in exercising her judicial discretion.

43. It is the Applicant's case that the taxing officer erred in law and principle in allowing items 2, 4, 5, 7, 11, 12, 14, 15 & 16. The taxing officer in determining items 2 to 16 simply stated that the items were drawn to scale and proceeded to tax them as drawn. It is noteworthy that the conclusion was made without giving any specific reasons for the determination.

44. I reiterate that taxation must be accompanied by reasons. In case of a reference, the reasons will guide the Court handling the reference in determining whether the discretion granted to the taxing officer has been exercised judiciously.

45. In view of what I have already stated, I reach the conclusion that the taxing officer erred in principle in failing to specify and establish the factors and sufficient reasons that informed the increase in the instruction fees.

46. From the foregoing analysis I am consequently of the view that it is just and fair that this Court upsets the taxed bill of costs. The ruling of the taxing officer dated 20th February, 2020 is therefore set aside.

47. Having set aside the ruling of the taxing officer, the next course of action is that illuminated by the Court of Appeal when it stated in **Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR**, that **“if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer.”**

48. The respondents' bill of costs dated 21st October, 2019 is remitted for taxing before any taxing officer other than C. A. Muchoki. The Applicant is awarded the costs of the reference.

Dated, signed and delivered virtually at Nairobi this 25th day of February, 2021.

W. Korir,

Judge of the High Court