



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ELECTION PETITION NO. 4 OF 2017

PETER ODIMA KHASAMULE.....PETITIONER/RESPONDENT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (I.E.B.C)1st RESPONDENT

THE RETURNING OFFICER, BUSIA COUNTY,

FREDRICK APOPA.....2nd RESPONDENT

SOSPETER ODEKE OJAAMONG..... 3rd RESPONDENT/APPLICANT

RULING

1. The 3rd respondent/applicant has moved this court by way of chamber summons dated 5th October 2018 under paragraph 11(2) of the Advocates (Remuneration (Amendment) Order) 2014 and section 3A of the Civil Procedure Act. He is seeking the following orders:

- a) That this court do set aside the ruling of the taxing master dated 28th September 2018 in so far as the same relates to the instruction fees.
- b) That any consequent certificate of taxation be vacated and or set aside.
- c) That this court do award appropriate instruction fees and getting up fees.

2. The application is premised on the following grounds:

- a) The taxing master erred in principle and misdirected herself in awarding instruction fees based on the basic scale fee without considering the complexity of the petition.
- b) The taxing master misdirected herself and erred in taxing the instruction fee at Ksh.500, 000/= which is manifestly low in the circumstances of the petition.
- c) The taxing master misdirected herself and erred in striking off items 10, 33 and 37 of the bill of costs as these were instruction fees for separate applications.

3. The application was opposed on the following grounds:

- a) That the taxing master's award of Kshs.500,000/= was reasonable in the circumstances as it was well within the purview of the Advocates Remuneration Order, 2014 which provides that to present or oppose an election petition the instruction fees is Kshs.500,000/= or such sum as may be reasonable but not less than Kshs.500,000/=.
- b) The award of Kshs.500,000/= in regards to instruction fee in Election Petition No.4 of 2017 is a reasonable amount as the same is not less than Kshs.500,000/ as the minimum amount required by law to be charged as instruction fee in election petitions and therefore there was no violation of the law.

c) The taxing master exercised her discretion in awarding Kshs.500, 000/= as the instruction fee amount based on her evaluation of the tenets to be considered in awarding instruction fees in election petitions which in so doing, found nothing extra-ordinary in the petition as the petition itself only involved an interpretation of the law and was well prosecuted within the timelines given by the law.

d) The taxing master was correct in principle in disallowing instruction fees on items 10, 33 and 37 of the bill of costs as instructions to an advocate can only be given once and in any case treating the same as separate applications will be a duplicity of matters before court.

e) That the 3rd respondent/applicant has not provided any material evidence before the court to warrant the court's interference with the discretion of the taxing mater.

f) It is the petitioner/respondent's position that the 3rd respondent's application is nothing more than a scheme of unjust enrichment.

4. I have been urged by the applicant/ respondent to interfere with the taxing master's award on instruction fees. It was argued that the Deputy Registrar failed to take into account some important factors. In the case of **Premchand Raichand Ltd & Another vs. Quarry Services of East Africa Ltd & Another [1972] E.A. 162**, Spry V-P. (at p.164) observed:

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.

5. In the case of **First American Bank of Kenya vs. Shah & Others [2002] 1 E.A. 64**. Ringera, J (as he then was) made the following remarks:

...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 irrelevant 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.

6. The applicant has urged me to make a finding that this matter was complex and that this can be discerned from the battery of advocates each party had. On this point the respondent argued that the Kshs. 500,000/= awarded as instruction fees was reasonable and anything above that figure would amount to unjust enrichment.

7. The election petition was not, in my view, complicated. The fact that the parties engaged a battery of lawyers cannot be a basis of holding that the matter was complex. I will therefore not interfere with the award as assessed by the taxing master in respect the instruction fees.

8. In the case of **D. Njogu & Company Advocates vs. Panafcon Engineering limited (2006) e KLR** the court held:

A claim for instructions fees is one which accrues to an advocate the moment he is seized of the instructions. As was held in Mayers and Another vs. Hamilton and Others (1975 E.A at page 16, the advocate becomes entitled, at least to the minimum instruction at the time of being instructed.

In the instant case, the taxing master rightly rejected items 10, 33 and 37 for instructions fees is payable once only. Instructions are given once in a matter.

9. From the foregoing analysis I find that I have no reason to interfere with bill as taxed by the taxing master. The application is therefore dismissed with costs.

DELIVERED and SIGNED at BUSIA this 22nd day of July, 2020

KIARIE WAWERU KIARIE

JUDGE