



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 639 OF 2006

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DISCIPLINARY COMMITTEE

LAW SOCIETY OF KENYA (LSK).....RESPONDENT

AND

DAVID IUEAN JENKINS.....1ST INTERESTED PARTY

AMBROSE RACHIER.....2ND INTERESTED PARTY

RACHIER & AMOLO ADVOCATES.....3RD INTERESTED PARTY

HARDEV SINGH PALL.....4TH INTERESTED PARTY

LAW SOCIETY OF KENYA.....5TH INTERESTED PARTY

ATTORNEY GENERAL.....6TH INTERESTED PARTY

EX PARTE APPLICANT:

DAVID RN ODHOCH

RULING

The Application

1. This ruling is on a Chamber Summons application dated 6th February 2020 by the Respondent, seeking orders that the ruling delivered herein on 11th December 2019 by the Taxing Master, Hon. L.A. Mumassabba, taxing the Party and Party Bill of Costs dated 2nd October 2019 at Kshs 466,123/30 be set aside and/or vacated. The said application is supported by affidavits sworn on 6th February 2020 and 13th July 2020 by James Nyiha from the firm of Nyiha, Mukoma & Company Advocates, the Respondent's advocate on record. The said Advocates also filed submissions dated 13th July 2020 in support of the application.

2. The Respondent averred that on 11th December 2019, when the said ruling on taxation of the said Bill of Costs was delivered, no typed copy of the same was available to file a Reference, and that it therefore had to follow the procedure laid out in Rule 11 of the Advocates (Remuneration) Order. That the Respondent accordingly filed a Notice of Objection dated 19th December 2019, a copy of which was annexed. Further, that the said ruling was subsequently typed and made available on 9th January 2020, which is when the Respondent started preparing their Reference.

3. In addition, that efforts by the Respondent to serve its Notice of Objection on the advocates for the *ex parte* Applicant were futile, as the said advocates had relocated their offices without notice. However, that in the meantime the said advocates erroneously extracted a Certificate of Costs dated 15th January, 2020 and served the same on the Respondent on 22nd January 2020 with a letter dated 20th January 2020, in which they threatened to levy execution against the Respondent. The Respondent asserted that it was still within the timelines set out in Rule 11(2) of the Advocates (Remuneration) Order at the time of service of the said Certificate of Costs.

4. The Respondent also faulted the Taxing Master's ruling dated 11th December 2019, on the grounds that the Taxing Master erred in law and fact in failing to appreciate that the applicable law for instruction fees herein is Rule 1(j) of Schedule 6 as opposed to Rule (5) (I) of Schedule 6 of the Advocates (Remuneration)(Amendment) Order 2006 which was relied upon, and awarded an amount of Kshs 300,400/- being over and above what is allowed in Schedule 6 Rule 1(j). Further, that the Taxing Master erred in law and fact in awarding the *ex parte* Applicant the sum of Kshs 100,133.30 as getting up fees. The Respondent also challenged the taxing decision on items 4 and 8 of the subject Bill of Costs, and that the Taxing Master failed to appreciate that the alleged disbursements were not supported by receipts.

The Response

5. The *ex parte* Applicant filed a replying affidavit he swore on 17th February 2020 in response to the application. He averred that the Bill of Costs dated 2nd October 2019 was drawn to scale, duly filed, served and considered by the Taxing Master as per the law. Further, that after the ruling was delivered on 11th December 2019, the Respondent was required to file their reference within 14 days, but instead went silent and only filed the present application after the *ex parte* Applicant had served them with a demand for payment and the certificate of costs.

6. Therefore, that the said application is an attempt to delay the payment of, and deny the *ex parte* Applicant's duly awarded costs. Lastly, that the Respondent's advocate was aware of the new location of the *ex parte* Advocate's offices.

7. The *ex parte* Applicant's Advocates, Kimanga & Company Advocates also filed submissions dated 21st August 2020 in opposition to the application.

Determination

8. Arising from the pleadings and submissions filed, the issues in dispute are first, whether the Respondent's application is brought in compliance with Rule 11 of the Advocates Remuneration Order, and if not, whether the non-compliance is fatal. If the application is found to be properly before this Court, a consideration of the second and third substantive issues will follow, namely whether the taxation by the Taxing Master of the disputed items in the *ex parte* Applicant's Party and Party Bill of Costs dated 2nd October 2019 was made in error of principle, and whether the remedies sought are merited.

Compliance with Rule 11

9. On the issue of compliance, the Respondent's Advocate submitted that Rule 11 of the Advocates (Remuneration) Order, 1962 is clear that the Court has the discretion to extend the time for lodging a Reference notwithstanding the expiry of the 14 days prescribed to file the Reference from the Taxing Officer's decision on costs. Further, that the instant ruling on taxation was rendered by the Taxing Master on 11th December 2019, and the Respondent filed its Notice of Objection on 19th December 2019 in compliance with Rule 11(1) and was diligent in seeking to have the dispute on taxation of the costs determined expeditiously.

10. However, that the Reference was filed on 6th February 2020, fourteen (14) days outside the timelines set out in Rule 11(2) due to the reasons they explained in their pleadings. Therefore, that the Court in exercising its discretion should consider whether there has been no inexcusable delay in presenting the application. The Respondent submitted that it had demonstrated to the required standard that the delay was not inordinate delay and is therefore excusable, and sought for extension of time for filing the Reference. The decision in the case of **Peter Julius Njoroge vs. Fidelity Commercial Bank Ltd & Anor, Civil Case No. 1001 of 2001** was cited in this respect.

11. The *ex parte* Applicant on his part raised two limbs of this issue in his submissions. The first limb was in relation to the Notice of Objection dated 19th December, 2019 which he submitted is misleading, fatally defective and should be struck out, as it clearly states that the Objector is "David R N Odhoch" (the *ex parte* Applicant herein), a fact which has been denied. Further, that despite this error being raised in the replying affidavit, the Respondent failed to address the same thus leaving this Court with no option, but to struck out the entire defective reference with costs.

12. The second limb of the *ex parte* Applicant's arguments was that this reference was filed out of time without leave, and should be struck out. The *ex parte* Applicant cited and relied on paragraph 11 of the Advocates Remuneration order for the submissions that the reasons for the decision are to be sought for by way of a notice within 14 days of the decision and the reference is to be lodged within 14 days of the receipt of the reasons. According to the *ex parte* Applicant, the ruling of the Taxing Master was delivered in the presence of both parties and a copy of the same was immediately available for any party who wanted it, and there is no proper and convincing reason for the delay. Further, that the Respondent made no effort to seek leave of court to file reference, even after clearly seeing that they were out of the time limit.

13. The procedure for challenging a taxing master's decision is provided under the Rule 11 of the Advocates Remuneration Order as follows:

“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

14. From the foregoing, an objector to a decision of a taxing officer is required to give notice within 14 days thereof of the items objected to, and the reference is to be filed within 14 days of receipt of the reasons for the decision from the taxing master. In the present case, it is not in dispute that the Respondent filed a Notice of Objection on 19th December 2019, which was eight (8) days after the delivery of the ruling on taxation on 11th December 2019. The *ex parte* Applicant’s contestation of the Notice of Objections does not revolve around the date of filing, but the format and error in the said Objection which states that it was being made by the *ex parte* Applicant, and not the Respondent.

15. I am however not persuaded that the error in the Notice of Objection is a fatal error, for reasons that the Respondent’s advocates have admitted and it is on record that they are the ones who filed the said Notice of Objection, and have owned and relied on it, while the *ex parte* Applicant has denied having filed it. Therefore, no party will be prejudiced if it is admitted as the Respondent’s pleading. In addition, the provisions of Article 159(2) of the Constitution, require that substantive justice should be delivered expeditiously and should not be sacrificed at the alter of procedural technicalities.

16. The present reference was thereafter filed on 6th February 2020, and the Respondent avers that this was done after it received the ruling on 9th January 2020. The reference was therefore filed outside the timeframe of fourteen days of receipt of the reasons of the decision provided for in Rule 11 of the Advocates Remuneration Order. The provisions of Rule 11 of the Advocates Remuneration Order do however grant this Court discretion to extend time for lodging a reference from the taxing master’s decision, notwithstanding the expiry of the 14 days’ period prescribed. In exercising such discretion, the court acts judiciously bearing mind the facts placed before it and to meet the ends of justice. In addition, and guided by the provisions of Article 159(2) of the Constitution cited in the foregoing, this court can extend time upon application or *suo moto*.

17. In the present case the Respondent explain the events leading to the delay in filing the reference, namely the application for and delay in procuring the typed ruling delivered by the Taxing Master, and that it could only start preparation of the reference after receipt of the said ruling on 9th January 2020. I am of the view that the Respondent has shown reasonable justification as to why it was not able to comply with the timelines set in Rule 11 of the Advocates Remuneration Order as to the filing of the reference, and given that the delay was also not inordinate, this Court will exercise its discretion in the Respondent’s favor. I accordingly find that the Respondent’s application dated 6th February 2020 is properly on record for the foregoing reasons.

The Disputed Items

18. On the second issue as regards any errors of principle in the decision of the taxing master, the Respondent submitted on the various items of the Party and Party Bill of Costs that it disputes. The first disputed item is that on Instruction Fees, and the Respondent submitted that the subject Bill of Costs arises from the *ex parte* Applicant’s substantive application in JR. No. 639 of 2006 in respect of which the prayers sought were of a prerogative nature. Therefore, that the applicable legal provision is Schedule 6 (l)(j) of the Advocates Remuneration Order 2006, as opposed to Schedule 6 (5)(1) relied upon by the Taxing Master which is non-existent. The Respondent thus contended that the Taxing Master while assessing instruction fees quoted the wrong provision of the law being Schedule 6 (5)(1), and as such she committed an error of principle.

19. In addition, that the instruction fees arrived at, being Kshs. 300,400/= , was manifestly excessive as to justify an inference that the same was based on an error of principle. Reliance was placed on the decision in **Kipkorir Titoo & Kiara Advocates vs. Deposit Protection Fund, C.A. No. 220/2004 U.R.** for this position. Further to the foregoing, that the Taxing Officer contradicted herself by awarding instruction fees of Kshs. 300,400/= for a matter that she confirmed as not being complex. Furthermore, that the orders sought were ordinarily of a prerogative nature and as such did not require extensive research and or huge documents to be prepared and perused by the advocates for the *ex parte* Applicant, and that the matter herein stalled in the year 2010 with seven years of absolute inactivity before it was resurrected in the year 2017.

20. The Respondent’s case therefore is that the Taxing Master failed to take into consideration such relevant factors when assessing instruction fees and as such, she misdirected herself by arriving at instruction fees, ten times the basic minimum. Reliance was placed on the decision in the case of **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others**, and the Respondent submitted that instruction fees of Kshs. 50,000/= would have been reasonable in the circumstances. Further reliance was placed on the principles set out in the case of **First American Bank of Kenya vs. Shah and Others (2002) 1 EA 64** that this Court can only interfere with the taxing officer’s decision on taxation when it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify inference that it was based on an error of principle.

21. The second disputed item was that on getting up fees, and the Respondent in this regard submitted that the matter herein proceeded by way of affidavit evidence and submissions, and did not proceed for trial. Further, that that getting up fees are not awarded in matters which

are determined by way of affidavits, and where there was no preparation of witnesses and witness statements written for the trial. The Respondent place reliance on **Ramesh Naran Patel vs Attorney General (2012) e KLR** for the position that the item on getting up fees contemplates involvement by counsel in the preparation of witnesses, witness statements and determination of the matter by viva voce evidence. Further reliance was placed on **Republic vs. National Environmental Tribunal ex parte Silverste N. Enterprises Limited (2010) eKLR** for the holding that on a matter of judicial review, getting up fees would not be allowed as evidence was contained only in the affidavits. The Respondent therefore urged the Court to disallow the award on Getting Up fees herein.

22. The third set of disputed items were No. 4,6, & 8 which the Respondent contended were not drawn to scale, while the last set of disputed items were Items 22, 23, 24, 25, 26, 27, 28, 29 & 30 which the Respondent submitted related to filing fees but the same was taxed without reference to receipts. The Respondent cited the cases of **A. M Kimani & Co. Advocates vs. Trident Insurance Co. Limited (2016) eKLR** and **P. M. Mulwa Vs. Mavoko Municipal Council, [20091 eKLR]**, for the position that allowing the said items without receipts in support thereof was bad in law.

23. The *ex parte* Applicant on the other hand submitted that the Taxing officer made no errors and the bill is reasonably taxed. Further, that the value of the case was Ksh 13,500,000/-, and the Taxing Officer awarded a total of Ksh 466,123.30. which was reasonable. The decisions in the cases of **First American Bank Ltd vs Shah & Another (2002) 1 E.A. 64** and **Cannon Assurance Limited vs The Hon. Attorney General and Antony Thuo, Nairobi Petition No. 433 of 2013**, that taxation of Bill of costs is at the discretion of the taxing officer, and this Court will only interfere where it is shown that the taxing officer applied a wrong principle of law or took into account irrelevant matters or failed to take into account relevant ones thus arrived at a wrong decision.

24. According to the *ex parte* Applicant, the awards given by the taxing officer were very much within the allowed figures. Furthermore, that other than the instruction fees which was based on the value of the case and which was awarded as per the scale, the others were merely court attendances which are on the record and proceedings, the court filing fees with all the receipts available on the court file and drawing of the pleadings. Therefore, that there was nothing out of the ordinary that may warrant intervention and interference by this Court.

25. I have considered the pleadings and arguments made by the Applicant and Respondent on this issue of the taxation of the disputed items of the subject Bill of Costs. It is notable that this suit was filed in November 2006, when taxation of Party and Party Bill of Costs was regulated by Schedule VI(A) of the Advocates (Remuneration) Order 2006. Paragraph 1(j) of the said Schedule provided for the instruction fees in matters seeking prerogative orders as in the present suit.

26. In addition, the applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer's decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in **First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69** by Ringera J. (as he then was) who delivered himself thus;

“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”.

27. These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) 1 EA 92**, wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

28. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others, (2006) e KLR** :

- “ 1. 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;**
- 2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;**
- 3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**
- 4. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;**
- 5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;**
- 6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**
- 7. where responsibility borne by advocates is taken into account, its nature is to be specified;**

8. where novelty is taken into account, its nature is to be clarified;

9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”

29. These guidelines were also applied by Odunga J. in Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd. [2014] eKLR, and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

30. I have perused the ruling by the Taxing Master dated 11th December 2019, wherein it was noted that this matter was filed in the year 2006 and concluded in the year 2018, and hence the applicable Advocates Remuneration (Amendment) Order was that of 2006 and 2014. While taxing on the item on instruction fees, the Taxing Master proceeded to identify applicable law as Schedule 6 (5) (1) of the Advocates Remuneration Order 2006 which provided as follows:

"To sue or defend in any case not provided for above such sum as may be reasonable but not less than Kshs.6,000/=".

31. It is not in contest that the matter herein was filed in November 2006, and to this extent the Taxing Master did correctly find that the Advocates Remuneration (Amendment) Order of 2006 did apply as regards taxation of the item on instruction fees. While the Taxing Master in her ruling affirmed that the suit herein concerned a prayer for prerogative orders, she however applied the wrong provision of Advocates Remuneration (Amendment) Order of 2006 to tax the item on instruction fees. Schedule V(A) paragraph 1 (j) of the said order specifically provided for instruction fees for presenting or opposing an application for a prerogative order, and a minimum instruction fee of Kshs 28,000/=. There was thus an obvious error of law made by the Taxing Master in her finding that applicable law as Schedule 6 (5) (1) of the Advocates Remuneration Order 2006, and that the minimum instruction fee was Kshs 6,000/=

32. As regards the taxation of item on getting up fees and award of Kshs 100,133.30 by the Taxing Master for this item, contrary to the Respondent's arguments, paragraph 2 of Schedule VI(A) of both the Advocates (Remuneration) Order of 2006 only requires denial of liability in a case or joinder of issues for trial by the pleadings, for getting up fees to payable. It is not disputed that the present application was contested and proceeded to trial. However, and this finding notwithstanding, the getting up fee that is awarded is dependent on the instruction fees that are taxed, to the extent that it should not be less than one-third of the instruction fees. This item will also therefore need to be taxed afresh together with that on instruction fees, since this Court has found the taxation of the instruction fees to have been erroneous.

33. On items 4, 6, & 8 which the Respondent contended were not drawn to scale, a perusal of the ruling does show that the even though the Taxing Master did indicate in her ruling that items 4 and 8 were taxed to scale, she did not indicate the amount the said items were taxed at. It is therefore not possible to surmise if they were indeed taxed to scale or not. The objection on the taxation of the said items is therefore justified. Item 6 was however correctly indicated as having been taxed to scale at Kshs.1680 as per Schedule 6 (7)(b) of the Advocates Remuneration (Amendment) Order of 2006 for attending court for half a day.

34. The last set of disputed items were Items 22, 23, 24, 25, 26, 27, 28, 29 & 30 which the Respondent submitted were taxed without reference to receipts. It is notable that these items related to filing fees for court documents which were on record, and on which fees are regulated by law. In addition, the Taxing Master specifically stated that the said items were supported by receipts, and that she relied on the said receipts. There is thus no basis for the objection on the taxation of the said items.

The Relief

35. In the premises I find that the decision of the taxing master in awarding instruction fees of Kshs 300,400/= was made in error of the law, as the applicable law, being paragraph 1(j) of Schedule VI(A) of the Advocates (Remuneration) Order of 2006 was not applied. Likewise, the taxation of the getting up fee at Kshs 100,133.30 was also consequently erroneous. Lastly, there was no indication as regards the amount taxed in relation to items 4 and 8 of the subject Bill of Costs, to facilitate the determination one way or the other as to whether the taxation of the said items was to scale.

36. These errors of principle by the Taxing Master therefore justify interference by this Court, and the Respondent's Chamber Summons dated 6th February 2020 is allowed to the extent of the following orders:

I. The Taxing Master's decision in the ruling delivered on 11th December 2019 taxing item 1 on instruction fees at Kshs 300,400/=, item 2 on getting up fees at Kshs 100,133.30, and item 4 and item 8 of the Interested Party's Party and Party Bill of Costs dated 2nd October 2019, be and is hereby set aside only with respect to the said items.

II. The Interested Party's Party and Party Bill of Costs dated 2nd October 2019 shall be remitted to another Taxing Master in the Judicial Review Division of the High Court at Nairobi, for the re-taxation of item 1, 2, 4 and 8 only.

III. Each party shall meet their respective costs of the Respondent's Chamber Summons dated 6th February 2020.

37. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the *ex parte* Applicant's Respondent's counsels email addresses.

P. NYAMWEYA

JUDGE