



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ELECTION PETITION NO. 2 OF 2017

BETWEEN

HON. ODERA ARTHUR PAPA.....PETITIONER

VERSUS

OKU EDWARD KAUNYA.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....2ND RESPONDENT

JULIAN GOMITY TESO NORTH CONSTITUENCY

RETURNING OFFICER.....3RD RESPONDENT

RULING

1. The petitioner /applicant has moved this court by way of Chamber Summons dated 13th March 2019 under the provisions of paragraph 11(2) and (4) of the Advocates Remuneration Order, section 1A & 3A of the Civil Procedure Act for the following orders:

- a. That time for filing the Reference be and is hereby enlarged and this Reference be deemed as duly filed.
- b. The entire decision of the Taxing Master on the Party to Party Bill of Costs dated 15th May 2018 be and is hereby set aside.
- c. The Certificate of Costs for Kshs. 1,907,838/= issued on 7th June 2018 be and is hereby set aside.
- d. The costs of the application be provided for.

2. The application is based on the following grounds;

- a. On 31st May 2018 the taxing officer made orders allowing the 1st respondent's Bill of costs and subsequently issued a Certificate of costs for Kshs. 1,907,838/= on 7th June 2018.
- b. Despite a written request dated 14th June, 2018 and several reminders, the taxing officer has failed to supply the applicant with written reasons for the decision under Rule 11(2) of the Advocates Remuneration Order.
- c. The failure to supply written reasons for the decision is a violation of the applicant's right to fair administrative action under Article 47(2) as read with section 4 of the Fair Administrative Action Act, 2015.
- d. As a result of that omission, the applicant has to second guess the manner in which the taxing officer's conclusions on the Bill of costs were arrived at. There is therefore material non-disclosure of the taxing officer's reasoning process to enable the applicant file a reference.
- e. In the absence of written reasons, the authenticity and credibility of the decision is questionable. The applicant is also unable to draw a logical connection between the applicant for taxation and the final decision. Further, the applicant is unable to appreciate

whether or not the taxing officer properly exercised her discretion: whether irrelevant factors were taken into account or if relevant points were ignored or whether the taxing officer committed reviewable errors, or was plainly wrong as would justify interference with her discretion.

f. The delay in availing the reasons for the taxation is not explained; the delay has prejudiced the applicant who is by law entitled to file the reference within 14 days after receipt of reasons. As no reasons have been supplied to date, the applicant cannot file without the court's order enlarging time.

g. In addition to completely failing to give reasons for the taxation, the learned taxing officer further erred in law in failing to give reasons for the award of the entire instruction fees to the 1st respondent which was capped at Kshs.1,000,000/=.

h. The taxing officer made a fundamental error of principle in awarding the Respondents the entire instruction fees capped at Kshs.1,000,000/= in absence of proof or justification from the 1st respondent that would entitle him to the entire figure and further failed to appreciate that the Kshs.1,000,000/= was a capped figure whose entitlement was subject to proof.

i. The Learned taxing officer made a fundamental error of principle in awarding the entire instruction fees of Kshs.1,000,000/= to the 1st respondent without demonstration that the petition giving rise to the taxation was complex warranting the full instructions fee.

j. The taxing officer erred in law in ignoring the directive of the High Court as regards travelling costs; and further in presuming that all items in the Bill of Costs were drawn to scale.

k. That in absence of reasons, the applicant is unable to mount an item to item challenge of all the items as presented in the Bill of costs.

3. The application was opposed on the following grounds:

a. That the applicant has not demonstrated any or any sufficient cause to warrant the grant of the orders sought for stay of execution, granted that there is no Decree, Order or ruling of this honourable court.

b. That the applicant has not satisfied the threshold to warrant the grant of an order for stay of execution pending Reference.

c. That in stark contrast to the applicant's suggestion, there has not been no change of representation in respect of the 1st respondent.

d. That the application is misconceived, devoid of merit and an abuse of the court process intended to deny the 1st respondent from enjoying the fruits of the certified costs.

4. I was urged to dismiss the application for the applicant invoked the provisions of the Civil Procedure Act and Rules whereas the Advocates (Remuneration) Order is self-sufficient. The respondent relied on the case of **Machira & Company Advocates vs. Magugu [2002] 2 EA 428** where at 433 Ringera J (as he was then) held:

First, the Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision the taxing officer and indeed Order XLII of the Civil Procedure Rules is clear that appeals lie either as of right or with leave from orders made under the Advocates Remuneration Order. And it is a basic principle of procedural law that appeals to the High Court lie only where a right of appeal has been conferred by statute. Secondly, as I understand the practice relating to taxation of bills of costs any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a prevalence about the taxation of any item in the bill of costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Order.

This is the legal position which the Court of Appeal confirmed in the case of **Machira & Co. Advocates vs. Arthur K. Magugu & another [2012] eKLR** in the following words:

We agree with the decision of Ringera J (as he then was) in Machira vs Magugu [2002] 2 EA 428 that the Advocates Remuneration Order is a complete code which does not provide for appeals from taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decision through references to a judge in chambers.

5. Though the applicant has cited the Civil Procedure Act and the Civil Procedure Rules, this will only amount to an irregularity which would not prejudice the respondent. On this issue Ringera J, in **Machira & Company Advocates vs. Magugu [2002] 2 EA 428** said:

As regards the omission to include the endorsement required on chamber summons by Order 1, rule 15(2) of the Civil Procedure Rules. I would once again state that the Civil procedure Rules have no application to applications under the Advocate's Remuneration Order. And even if they did, I would have held the omission of the endorsement to be a mere irregularity which had not prejudiced the Respondent in any way and as such excusable.

The application is therefore properly before the court.

6. The Advocates Remuneration Order does not provide for appeals from taxing master's decisions. **Rule 11** provides as follows:

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

(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) 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."

7. I have looked at the notice dated 11th June 2018. This notice does not state which items of taxation to which the applicant objects. There is non-compliance with Rule 11 (1) of the Advocates Remuneration Order. Had there been compliance, the applicant would be justified to complain that the taxing master failed to respond. There was no proper notice to be responded to. Consequently, the application before court is wanting. I dismiss the same with costs.

DELIVERED and SIGNED at BUSIA this 28th day of May, 2019

KIARIE WAWERU KIARIE

JUDGE