



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION NO. 5 OF 2017

EVANS NABWERA TARACHA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE CONSTITUENCY RETURNING OFFICER,

ENOCK GICHABA OTARA.....2ND RESPONDENT

ENOCK WAMALWA KIBUNGUCY.....3RD RESPONDENT

(Being a reference filed against the ruling of Hon. JN Maragia (the taxing officer) on the 1st and 2nd respondents' party and party bill of costs dated 5th April 2018)

RULING

1. The advocate for the 1st and 2nd respondents filed the instant reference by way of Chamber Summons on 18th April 2019 seeking for orders *inter alia* that:

- a) The honourable court be pleased to order that the taxation ruling delivered by Hon. JN Maragia, the taxing officer, on 13th March 2019 in relation to the 1st and 2nd respondents' party and party bill of costs, dated 5th April 2018, be set aside and/or varied;
- b) The honourable court be pleased to order for re-taxation of the bill of costs dated 5th April 2018 on the disputed items as set out in the grounds;
- c) The costs of the application be borne by the petitioner herein; and
- d) The honourable court be pleased to make any such order and/or orders as it may deem just and appropriate in the circumstances.

2. The 1st and 2nd respondents' application was supported by an affidavit sworn on 18th April 2019, by the 2nd respondent, setting out various grounds for the orders sought, *inter alia*: that the taxed bill of Kshs. 1,682,444.00 was replete with errors of principle which invited the court to interfere with the taxed bill so as to correct those errors. The 1st and 2nd respondents further averred that the taxing officer failed to tax the instructions fees at Kshs. 2,000,000.00 for each of the respondents as was ordered by the election court and that the award of Kshs. 1,000,000.00 as instruction fees and Kshs. 333,334.00 as getting up fees for preparing trial was so low as to indicate that it must have been arrived at unjudicially and or on erroneous principles. The 1st and 2nd respondents stated that the tax officer erred in law and principle in disallowing items 54, 56, 58, 59, 61, 62, 66 and 67 on travel costs on the ground that the same were not provided for in the Advocates (Remuneration) (Amendment) Order, 2014 yet the same were provided for in the Advocates (Remuneration) Order, 2009 which was the principal Order. The 1st and 2nd respondents further stated that the taxing officer erred in principle in failing to award the costs of taxation to them even after seeking the same in the bill of costs that was before the honourable taxing officer, which error offended paragraph 77(1) of the Advocates (Remuneration) Order, 2009. The 1st and 2nd respondents further stated that the taxing officer failed to appreciate that paragraph 17(1) of the Advocates (Remuneration) Order, 2009 provides that the length of one folio is 100 words and one page of typed document certainly exceeds one folio.

3. There was no rejoinder to the reference application by the petitioner, in as much as the said application, together with the supporting affidavit, were duly served upon the petitioner's advocates, as evidenced by the affidavit of service sworn by one Daisy Nabalayo Wakoli, on

6th May 2019. The reference thus proceeded as undefended.

4. The following are the issues for determination:

- a) Whether the taxing officer erred in awarding the sum of Kshs. 1,000,000.00 as instructions fees to the 1st and 2nd respondents;
- b) Whether the taxing officer erred in awarding Kshs. 333,334.00 as getting up fees/preparing for trial to the 1st and 2nd respondents;
- c) Whether the taxing officer erred in failing to award costs of taxation to the 1st and 2nd respondents; and
- d) Whether the taxing officer erred in awarding the sum of Kshs. 1,000,000.00 as instructions fees to the 1st and 2nd respondents.

5. It was said in *Rachier & Amollo Advocates LLP vs. National Hospital Insurance Fund Board of Management* [2019] eKLR, that:

“The principle to be applied when assessing instruction fee in a suit are well settled. The Court of Appeal in the case of Joreth Ltd v Kigano & Associates [2002] eKLR outlined the principle as follows:

“We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”

Similarly, the principles upon which a judge of the superior court interferes with the taxing officer’s exercise of discretion are well settled. Ojwang J (as he then was) outlined these principles in the case of Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & others [2006] as follows: -

“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, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... 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. 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 case 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularized justification of the mode of exercise of any discretion provided for... 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....”

(See also John Maina Mburu t/a John Maina Mburu & Co. Advocates vs. George Gitau Munene (sued as Administrator of the Estate of Samuel Gitau Munene) & 3 others [2015] eKLR).

6. In *KANU National Elections Board & 2 others vs. Salah Yakub Farah* [2018] eKLR, it was held that:

The general principles governing interference with the exercise of the taxing master’s discretion were authoritatively stated by the South African court in the case of Visser vs Gubb [1981 \(3\) SA 753 \(C\)](#) 754H – 755C as follows:-

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

Differently put, before the court interferes with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling. (see *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* [1984] ZASCA 2; 1984 (3) and *Legal and General Insurance Society Ltd vs Lieberum NO and Another* 1968 (1) SA 473 (A) at 478G.)

It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision. (*Johannesburg Consolidated Investment Co. vs Johannesburg Town Council* 1903 TS 111).

The Taxing Master is required to take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The ultimate question raised by the applicant for review/setting aside the taxation is therefore whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case.

The scope of this application requires this court be satisfied that the Taxing Master was clearly wrong before interfering with her decision. The quantum of such costs is to be what was reasonable to prosecute or defend the proceedings and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles.

It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.' (Per SMIT AJP in *Preller vs S Jordaan and Another* 1957 (3) SA 201 (O) at 203C - E.)

Guidance can also be obtained from the Canadian case of *Reese vs. Alberta* {1993} 5 A.L.R. (3rd) 40 in which McDonald J. sets out the general principles applicable to awarding costs, at page 44: -

"While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice..., the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees ... plus, reasonable disbursements..."

In principle, costs are awarded, having regard to such factors as: - (a) the difficulty and complexity of the issues; (b) the length of the trial; (c) value of the subject matter and (d) other factors which may affect the fairness of an award of costs. The law obligates the taxing master to take into account the above principles.

Restating the principles of taxation of costs, the Ugandan Supreme Court in *Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC)*. stated: -

"Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

...The principles guiding the review of taxation in this court were settled in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*:

"a. Costs are awarded to a successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.

b. A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.

c. The taxing master must strike this equitable balance correctly in the light of all the circumstances of the case.

d. An overall balance between the interests of the parties should be maintained.

e. The taxing master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.

f. And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate the ruling."

7. The 1st and 2nd respondents have contended that the taxing officer ought to have taxed the instructions fees to each of them at Kshs. 2,000,000.00 as was ordered by the Election court at paragraph 119 of the judgment. A look at the said paragraph 119 of the judgment of the election court stated that:

"...I have considered relevant and recent election petition decisions on costs. I award instructions fees to each of the three respondents a maximum of two million shillings but subject to taxation"

8. It is clear from the verbatim extract of the election court's judgment that the term "subject to taxation" meant that the said cost of two million was not conclusive and that the same was to be conclusively determined by the taxing officer but which could not have exceeded the said two million. It is misleading for the 1st and 2nd respondents to state that the election court ordered that they be awarded Kshs.2,000,000.00 as a matter of right because the election court only capped the total costs that could have been awarded to the three respondents in the election petition meaning that the taxing officer was free to exercise judicious discretion in determining the instructions fees payable to the 1st and 2nd respondents and that the said fees could not exceed Ksh.2,000,000.00. The taxing officer took into account the complexity of the case and the minimum scale fees payable as per the Advocates Remuneration Order, 2014 in arriving at the decision to tax the instructions fees at Kshs. 1,000,000.00. This amount was in line with the decision of the election court as the same did not exceed the capped amount of Kshs. 2,000,000.00 and that she took into account the relevant factor of the "complexity of the case vis a vis the principle of access to justice." I find that decision to be sound and judicious and I see no reason why this court should interfere with the same as the said amount was not manifestly low so as to occasion an injustice on the part of the 1st and 2nd respondents. It is also not correct that the taxing officer applied the wrong principles in arriving at the decision to tax the instructions fees as was contended by the 1st and 2nd respondents.

9. As stated here before, the 1st and 2nd respondents faulted the taxing officer for awarding them the sum of Kshs. 333,334.00 as getting up fees for preparing trial which amount they claimed was too low and they further indicated that the taxing officer applied the wrong principles in awarding the said sum. In her decision on the issue, the taxing officer stated that "*paragraph 2(ii) schedule VI of the Advocates Remuneration Order, 2014 provides that getting up fee or preparing for trial is only charged when the matter is confirmed for hearing ...*" and proceeded to tax the same at one third of the instructions fees.

10. A look at the provision of the Order referred to by the taxing officer states that:

"2. Fees for getting up or preparing for trial

In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

(ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned ..."

11. A perusal of the record of the election court shows that the matter was set down for hearing between 30th October 2017 up to 8th November 2017 and there was no adjournment. I find that the taxing officer applied the correct principles in awarding the sum of Kshs. 333,334.00 as getting up fees or preparing for the trial as she applied the permissible formula of one-third of the instructions fees. The 1st and 2nd respondents contended that the taxing officer erred in principle in failing to award the costs of taxation to them even after seeking the same in the bill of costs that was before the honourable taxing officer, which error offended paragraph 77(1) of the Advocates (Remuneration) Order, 2009. A perusal of the 1st and 2nd respondents' party and party bill of costs, dated 5th April 2018, indicates that they had sought costs of taxation as 'item No. 70.' The taxing officer does not make any determination on the same in her ruling dated 13th March 2019.

12. In *Bernard Gichobi Njira vs. Kanini Njira Kathendu & another* [2015] eKLR, it was said that:

"The Black's Law Dictionary defines "Taxation of Costs" as follows:

"The process of fixing the amount of litigation-related expenses that a prevailing party is entitled to be awarded."

On the other hand, the same dictionary defines assessment of costs as follows:

"Determination of the rate or amount of something (costs in this instance) – imposition of something (costs) e.g. fines ..."

The Oxford English Dictionary defines "taxation of costs" as follows:

"To examine and assess the costs of a case."

The same dictionary (Oxford) defines 'assessment' as follows:

“To evaluate or estimate the nature, value or quality.....to set the value of a tax, fine etc. for a person at a specified level.”

13. The issue of 'costs of the taxation' is not provided for in the Advocates Remuneration Order, 2014 but the 1st and 2nd respondents have claimed that the applicable Order is the Advocates Remuneration Order, 2009. In *NO Sumba & Co Advocates vs. Piero Cannobio* [2017] eKLR, it was held that:

“The applicable Advocates (Remuneration) Order for the purpose of ascertaining instruction fees would be that which was operational at the time of filing suit ...”

14. In the instant case, the petition in the election court was filed on 6th September 2017 and Legal Notice Number 35 of 2014 deleted all schedules of the principal Order and substituted therefor with new schedules. It is clear that the operational remuneration order at the time of filing the suit was the Advocates Remuneration Order, 2014 and that the Advocates Remuneration Order, 2009 does not apply in this particular case as was contended by the 1st and 2nd respondents. It is also worth noting that the 1st and 2nd respondents' own submissions, dated 20th November 2018, stated that their bill of costs were drawn in accordance with the Advocates Remuneration Order, 2014.

15. In conclusion, I find that the taxing officer applied her mind and principles of taxation correctly when she awarded the 1st and 2nd respondents the sum of Kshs. 1,000,000.00 as instructions fees and Kshs. 333,334.00 as getting up fees for preparing for trial. I find that the taxing officer correctly applied various factors such as the complexity of the election petition, the judgment of the election court and the Advocates Remuneration (amendment) Order, 2014 in arriving at her decision which was sound and judicious and that I have no reason to interfere with the said decision. I find that the applicable remuneration order is the Advocates Remuneration Order, 2014 which was operational at the time of filing the case in the election court. The 1st and 2nd respondents could not, therefore, rely on paragraph 77(1) of the Advocates Remuneration Order, 2009 for costs of taxation and the said Order as a whole to demand for travel costs and the length of a folio which was not applicable in this instance.

16. In light of the foregoing, I find that the 1st and 2nd respondents' reference, dated 18th April 2019, is devoid of merit and that the same is hereby dismissed. I uphold the decision of the Deputy Registrar/Taxing Officer, dated 13th March 2019, that the 1st and 2nd respondents' party and party bill of costs be taxed at Kshs. 1,682,444.00. Any party aggrieved by the orders made herein is at liberty to move the Court of Appeal appropriately.

DELIVERD DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER, 2019

W MUSYOKA

JUDGE