



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PETITION NO. 21 OF 2014

JOHN GITHINJI WANG'ONDU & OTHERS....PETITIONERS

VERSUS

NYERI SOUTH SUB-COUNTY

CO-OPERATIVE OFFICER & OTHERS.....RESPONDENTS

RULING

Vide a chamber summons dated 20th December, 2016, filed in court on 10th January, 2017, the respondents contested the taxation of their bill of costs by the taxing master on 20th April, 2016. According to their counsel's affidavit sworn on 23rd December, 2016 in support of the reference, the respondents' primary bone of contention with the bill as taxed is that the taxation is inconsistent with **Schedule 6** to the **Advocates (Amendment) Remuneration Order, 2014** and in particular paragraph (j) (ii) thereof. They have therefore sought for the setting aside of the order taxing the bill and for a fresh taxation of that bill.

Mr Kiminda for the petitioners opposed the reference and filed grounds of opposition to that effect. According to him, both the objection to the taxation and the reference do not comply with paragraph 11(1) and 11(2) respectively of the Advocates Remuneration Order.

I have given regard to the brief submissions by the learned counsel in support of the respective positions they have adopted in support of and in opposition to the reference.

In her ruling on the taxation of the respondent's Bill of Costs, the taxing master assessed the instructions fees in the constitutional petition, which was the substantive matter between the parties, at Kshs. 45,000; this she did on the basis that the petition was not complex and, in any event, it was dispensed with by way of affidavits and written submissions. For the same reason, she disallowed the quest for getting up fees.

The assessment of party and party costs in constitutional petitions and prerogative orders is provided for in Schedule 6 paragraph 1(j) of the **Advocates Remuneration Order, 2014**. It provides as follows:

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master 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 and the 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 be reasonable but not less than 100,000

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

The figures are in Kenya shillings.

The constitutional petition in issue was opposed and for this very fact, it cannot be said to fall within the category of matters that are not opposed and whose minimum fee has been set by paragraph 1(j)(i) of Schedule 6 at Kshs 45,000/= .

Considering that the petition was opposed, the closest applicable scale is that stipulated under paragraph 1(j) (ii) of the Schedule.

I appreciate the dilemma the taxing master may have found herself in; it is quite probable that as much as the petition was opposed, the learned taxing master may have found it not to have been that complex or difficult or raised any novel question; the amount involved or the value of the subject matter may not have been that much too. In other words, the matter may not have completely satisfied all the criteria set forth in paragraph 1(j). However, the Remuneration Order does not provide for assessment of fees in a constitutional petition or in an application for prerogative orders which is opposed but which may not necessarily meet the criteria set forth in paragraph 1(j). In my humble view, it would be safer, in these circumstances, to assess the instruction in accordance with the scale that caters for opposed petitions or applications for prerogative orders, as the case may be, rather than proceed on the assumption that since the application is deemed to be neither complex nor raised any novel question or the amount involved is minimal, it should be treated as unopposed application. The taxing master certainly cannot proceed to assess the costs payable on the basis that the petition was not opposed when it is obvious that it was not only opposed but there is a scale of fees that has been specifically and expressly provided to assess this sort of petition.

It is noted that the taxing master has a wide discretion in assessment of fees under paragraph 1(j) but this discretion is subject to the minimum prescribed fee. What this entails, in my humble view, is that as long as a petition or an application for prerogative orders is opposed, it is not open to the taxing master to award anything less than the prescribed minimum amount notwithstanding that the petition or the application may be a regular or a simple pleading deficient of any novel question and whose subject matter is not worth talking about.

Turning to the question of fees for getting up or preparing for the trial, the learned taxing master disallowed this particular item for the same reasons that she assessed the instruction fees as if the petition was not opposed. The basis of fees for getting up or preparing for trial is catered for under paragraph 2 of the same schedule 6. It provides as follows:

In any case in which the 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 is allowed in addition to the instruction fee and shall not be less than one-third of the instruction fee allowed on taxation:

provided that-

(i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

(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;

(iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

Contrary to the taxing masters view, it is apparent from this provision that the decision to award or not to award fees for getting up for trial is not based on the complexity of the matter; or whether the is any novel question; or on the value of the suit or the worth of the subject matter; rather, it based on whether the suit has been confirmed for trial.

In the present petition, there is no doubt that the petition was heard except that it was disposed of by way of written submissions. The fact that it was determined in this manner does not necessarily mean that it was not heard as understood under paragraph 2(ii) of the schedule. In short, this item was disallowed on the wrong premise.

I am persuaded, for the foregoing reasons that the respondents' reference is merited and it is hereby allowed; accordingly, the taxing master's order made on 20th April, 2016 with respect to the taxation of the respondents' bill of costs dated 18th January, 2016 is set aside. The bill shall be taxed afresh by a different taxing officer. The respondents shall have the costs of this application. It is so ordered.

Signed, dated and delivered in open court this 16th March, 2018

Ngaah Jairus

JUDGE