



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO 433 OF 2013

CANNON ASSURANCE LIMITED.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

ANTONY THUO KANAL.....2ND RESPONDENT

RULING

1. This is a reference from the taxing officer's decision, *Hon. S Mwayuli*, dated 9th January 2018 on the respondent's Party and Party Bill of costs dated 20th September 2017. The Party and Party Bill of costs was taxed at Ksh508, 952 all inclusive. The reference is by way of chamber summons dated 23rd January 2018 and challenges the taxing officer's decision on items 1, 12, 14, 20, 33, 34, 38, 39, 47, 48, 55, 56, 73, 74, 76 and 82. On item 1, the taxing officer taxed item 1 at Ksh100,000/- taxing off Kshs417,307.26 while item 76, getting up fees, was taxed at Ksh30,000/- taxing off Ksh142, 436. The rest of the items which relate to service were taxed at Ksh1, 000 each taxing off ksh2500.

2. Regarding item 1, the applicant contended that the taxing officer erred by assessing instruction fees under Schedule VA (1) (j) of the Advocates Remuneration Order, 2009 instead of Schedule V1A (1) (b) of the Order as read with V1A (1) (a), to determine instruction fees. It was contending that no prerogative orders were mentioned in the petition hence the taxing officer could not rely on Schedule VA (1) (j). It was the applicant's further contention that the petition was anchored on specific constitutional provisions which had no bearing on prerogative orders and the taxing officer could not therefore, equate constitutional provisions to prerogative orders filed pursuant to Order 53 of the Civil Procedure Rules. The applicant maintained that the taxing officer having applied the wrong paragraph and arrived at a wrong decision on item 1, it followed that even her decision on item 76 was equally erroneous.

3. As to the rest of the items regarding service, that is; items 1, 12, 20, 33, 34, 38, 39, 47, 48, it is contended that the taxing officer erred by failing to take into account paragraph 9(a) in Schedule V1 which provides for service fees of Kshs1000/- within 3km from the High Court with corresponding increase where service is done beyond 3 kms. It is also the applicant's contention that the taxing officer erred by failing to take into account paragraph (0)V111 of schedule V1A with regard to instructions fee on applications arising within the proceedings and declined to award costs on item 14.

4. The respondent filed a replying affidavit by *Elizabeth Ngonde* sworn on 12th February 2018 and fled in

Court on 13 February 2018. **Ms Ngonde** deposed that the taxing officer did not err in principle and therefore, did not arrive at a wrong decision; that the taxing officer did not err on item 1 or 76 and that the Bill of costs was correctly assessed under Schedule V1 A (1) (j) of the 2009 Order since it fell under matters or disputes in the nature of prerogative orders. She deposed that assessment of costs is at the discretion of the taxing officer.

5. It was the respondent's contention that the petition before Court had sought declarations which did not contain monetary value of the subject matter and that there was neither a determination by the Court as to the value of the claim since the petition was dismissed on jurisdictional basis. It was **Ms Ngonde's** deposition that a constitutional petition filed under Article 22 cannot be taxed under schedule V1A. (b).

6. Regarding items on service, **Ms Ngonde** deposed that there were no material availed to the taxing officer to show the distance from the court to where service was effected hence the taxing officer cannot be faulted. She contended that this Court exercises appellate jurisdiction over the reference and not original jurisdiction. It was her deposition that the applicant's advocates' counsel did not justify the claim with respect to service hence the taxing officer applied the law in awarding Kshs. 1000 for service

Submissions

7. **Mr. Thuo**, learned counsel for the applicant, submitted highlighting their written submissions dated 12th April 2018 and filed in 13th April 2018 that the applicant objects to the taxing officer's decision on items 1, 12, 14, 20, 33, 34, 38, 39, 47, 48, 55, 56, 73, 74, 76 and 83 in the Bill of costs. Learned counsel faulted the taxing officer's decision for relying on Schedule V1 (1) (j) to assess instruction fee instead of Schedule V1A 1(b). He contended that the paragraph relied on covers judicial review matters and as a result, the taxing officer wrongly awarded Kshs100, 000/- instead of 517,306.26. Learned counsel agreed that the applicable Order was that of 2009 since the petition was filed in 2013 and indeed the taxing officer used the said Order, she applied a wrong paragraph, namely V(1)(j) which gives the minimum instruction fee of Ksh28,000/- instead of V1(1)(b) with a minimum based on percentage.

8. Reliance was placed on the cases of **Kamunyori & Co. Advocates v Development Bank of Kenya** (CA No 206 of 220) for the submission that failure to ascertain the correct subject matter in a suit for purposes of taxation is an error of principle; **Four Form limited v Agricultural Finance Corporation** (petition No. 45 of 2011 MSA) for the proposition that the principles of taxation of party and party Bill of costs are set in Schedule V1 of the Advocates Remuneration Order and that applicable instruction fee is provided by schedule V1 A(1)(b) of the Order. Counsel therefore faulted the taxing officer for ignoring the above decision. He also relied on the case of **Rift Valley Sports Club v Patrick James Ocholla** (HCCC No 179 of 2003) on the importance of *stare decisis*. **Mr. Thuo** contended that the total amount in the Bill of costs contained in the petition was Kshs17, 020, 484 and for that reason, the matter fell under Schedule V1A paragraph 1(b) of the Order.

9. Regarding item 76- getting up fees, it was counsel's submission that the taxing officer erred on this item and relied on the case of **Geoffrey Asanyo v Nakuru Sanitation Services Company Limited & 8 Others** (NKR Petition No 4 of 2014) where party and party costs were assessed at Ksh300, 000/- and getting up fees of 100,000/- awarded even though the petition had sought declaratory orders with no monetary claim. It was further submitted that the applicant is entitled to instruction fee (item 14) for successfully opposing an application, and relied on paragraph 0 (V11) of Schedule V1 which provides a minimum of Kshs35000 and asked for Ksh15, 000/- on this item.

10. **Miss Ngonde**, learned counsel for the respondent, submitted also highlighting their written submissions dated 25th April 2018 and filed in Court on the same day that the taxing officer was correct in her determination of costs on all items. According to learned counsel, what was before High Court was a constitutional petition hence costs were awarded after considering the correct paragraph given that there was no monetary claim in the petition.

11. In their written submissions it was contended that the correct paragraph for determining costs was V1 (1) (j) of the 2009 Order and that the taxing officer correctly determined the issues. Further contention

was that the petition had sought declaratory orders hence the taxing officer used the correct Schedule V1A (1) (j). Reliance was placed on the case of *Kenyariri Associates Advocates v Salama Beach Hotel Limited & 2 Others* [2015] eKLR for the submission that taxation of Bill of costs arising out of public law matters such as applications for prerogative orders and petitions alleging violation of constitutional rights falls under Schedule V1(1)(j). Counsel further relied on the case of *R v Minister for Agriculture & 2 Others Ex parte Samuel Muchiri W'njuguna & 6 others* [2006]eKLR on the inapplicability of decisions on private law to public law matters.

12. The respondent also relied on the case of *Geoffrey Makana Asanyo v Nakuru Water & Sanitation Services Company Ltd & 8 others*[2015] eKLR for the submission that under Schedule VI paragraph 2(j) the prescribed fees for taking instructions to present or oppose applications for constitutional orders is set at Kshs100,000/- where there is opposition. Regarding getting up fee, it was submitted that this is directly determined by instruction fee hence the taxing officer did not err by allowing Kshs. 33000 for that item.

13. Regarding the items on service, it was contended that the award of Kshs1000/- for each occasion was based on the material before Court at the time of taxation. It was the respondent's submission that there was no evidence either in form of affidavit or otherwise on the distance covered for purposes of service hence the taxing officer cannot be faulted.

Determination

14. I have considered the reference; objection thereto; submissions by counsel for parties and the authorities relied on. The applicant has impugned the taxing officer's decision of 9th January 2018 in which decision, she taxed instruction fee at Ksh100, 000/-, getting up fee (item 76) at Ksh30, 000 (1/3) of the instruction fee) while the items on service were allowed at Ksh1000/- each and not 3500 as sought by the applicant. The applicant has faulted these figures arguing that the taxing officer erred by relying on the wrong Schedule of the Advocates Remuneration Order thus arrived at a wrong decision. The respondent has on its part contended that the taxing officer used the correct Schedule and paragraph and that she arrived at a correct decision.

15. It is important to reiterate here 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.

16. In the case of *First American Bank Ltd v Shah & another* [2002] 1 EA 64. *Ringera J*, (as he then was), expressed himself thus;

“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... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...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...” (emphasis)

17. It is undisputed that the Bill of costs before the taxing officer arose from dismissal of a constitutional petition. There is also no denial that the applicable Advocates Remuneration Order is that of 2009. What is however in dispute is the Schedule and paragraph that were applicable.

18. The taxing officer used Schedule V1 (1) (j) which the respondent agrees with while the applicant argues that the applicable Schedule should have been V1A1 (b). Schedule V1 A1 (b) guides the taxing officer on taxation of Bill of costs where the sum claimed in the pleadings or the value of the subject matter is ascertainable. The amount on instruction fee is then calculated based on percentages of the total

value of the subject matter.

19. The taxing officer applied Schedule V1(1)(j) stating; ***“the instruction fees herein is taxed under Schedule VI(I)(j) where the statute(sic) provides for a minimum of Kshs. 28000/= and the taxing officer has discretion to increase the said figure upon considering a myriad of factors and as long as such discretion is exercised judicially.”*** The taxing officer the proceeded to tax item 1 at Kshs. 100,000/=.

20. As correctly stated by the learned taxing officer, the Schedule VI (I) (j) applies to applications for judicial review and constitutional petitions and gives a minimum instruction fee of Kshs. 28000. The applicant has argued that the taxing officer should have used Schedule V1A(b) because the petition contained Bills of costs and that the total amount in those Bills of costs was about Kshs. 17 million which should have given the figure of over Kshs. 500,000/- as instruction fees. It was their contention that item 1 should have been allowed at Kshs. 517, 307. 26.

21. I have perused the petition that was filed in Court and which gave rise to the Bill of costs and there after this reference. From paragraph 18(1) of that petition, it enumerates Bills of costs that were due for taxation in various courts which end at paragraph 18 XL. That means the amount payable from those Bills of costs was yet to be ascertained. Further, the reliefs sought in that petition as can be seen from prayers 3 to 8 of the petition, were for declarations without identifying the monetary value, while from prayer 8(1) to 8(XL), the petitioner had sought orders striking out the miscellaneous causes the respondent had filed as identified in those paragraphs. Those paragraphs did not also identify any monetary value at all. That being the nature of the pleadings and nature of the reliefs sought in that petition, there would be no basis for the applicant to rely on Schedule V1A(1)(b) to claim instruction fee of over 500,000/- in item 1.

22. It is settled law that instruction fee will be ascertained from the pleadings or judgment. In the case of ***Joreth Limited v Kigano & Associates Advocates*** [2002] EA 92 the court stated thus;

“the value of the subject matter of a suit for purposes 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 so 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 relevant circumstances.”

23. As the court has pointed out earlier, there was no monetary value or value of the subject matter identifiable from the pleadings and there was no way the taxing officer could ascertain such a value from any of the materials on record to enable her apply the Schedule of the applicant’s choice. What was before Court was a constitutional petition and not a normal civil suit. The taxing officer correctly, in my view, applied Schedule V1 (1) (j) which covered the subject before her and assessed instruction fee at Ksh100, 000/-. I neither find an error of principle nor anything to suggest that the taxing officer took into account irrelevant factors nor failed to take into account relevant once leading her to arrive at an erroneous decision.

24. In that regard, I agree with the Court’s holding in ***Geoffrey Makana Asanyo v Nakuru Water & Sanitation Services Company Ltd & 8 others*** (supra) that in determining appropriate fees the taxing officer is obliged to consider the nature and importance of the petition; complexity of issues raised; difficulty or novelty of questions raised; time expended and value of the subject matter. And in ***Kenyariri Associates Advocates v Salama Beach Hotel Limited & 2 others*** (supra), the court was clear and I also agree, that it is fairly settled now that taxation of bills of costs arising out of public law matters such as applications for prerogative orders and petitions alleging violation constitutional rights, falls under Schedule VI (1) (j) of the Advocates Remuneration Order. The taxing officer cannot therefore use decisions under private law as a guide for determining matters under public law.

25. That being the position regarding item 1, and having held that the taxing officer did not err in applying Schedule VI(1)(j) and taxing that item at Kshs. 100,000/=, it follows that there is no justifiable

complaint regarding item 7 6 on getting up fees which was taxed at Kshs. 30,000/= being a third of the instruction fee.

26. That leaves the complaint on the items regarding service. The applicant had sought Kshs. 3,500/= for each service effected. The taxing officer awarded Kshs. 1000/= on those items, an amount the applicant argues was too low and at variance with that provided for in the Remuneration Order. I have on my part perused the Party and Party Bill of costs dated 30th September 2017 which was before the taxing officer. The items on service do not state where service was effected or the Kms. covered by the process- server.

27. Speaking by way of example, item 12 states ***“Service of the Replying Affidavit on the Petitioner.”*** Regarding item 20, the bill simply states; ***“Service of letter dated 13th September 2013 on the petitioner’s Advocates.”*** As can be seen from the above examples which speak for the rest of the items on service, the place of service or distance covered was not disclosed. That being the case, the taxing officer cannot be faulted for taxing those items at Kshs. 1000/=. This court would also have no legal basis to interfere with the taxing officer’s exercise of discretion on those items.

28. Regarding the submission that the taxing officer failed to award costs on item 14- instruction fee for opposing an application, it is clear to me after perusing the High court record, that the application complained of was dated 29th August 2013 and was filed and served together with the petition. That being the case, I do not think the applicant could have been instructed twice; first on the application and then on the petition. Instruction fee was for purposes of defending the petition and any applications file with it. Instruction fee for an application would be rightly payable where the application is filed subsequent to filling the petition. I therefore see no justification in this complaint.

29. Having carefully evaluated the reference, submissions and the law, I am unable to agree with the applicant that the taxing officer committed either an error of law or principle while taxing their Bill of costs. I am satisfied however, that she applied the correct Schedule and paragraphs of the Advocates Remuneration Order and arrived at the correct decision. For the above reasons, the reference dated 23rd January 2018 is declined and dismissed with costs.

Dated, Signed and Delivered at Nairobi this 31st Day of August 2018

E C MWITA

JUDGE