



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL PETITION 39 OF 2017**

**HON. ELISHA OCHIENG ODHIAMBO.....APPLICANT**

**VERSUS**

**HON. WASHINGTON JAKOYO MIDIWO.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a Reference by way of Chamber Summons dated 6<sup>th</sup> October 2017 and filed in court on the same day, **Hon. Elisha Ochieng Odhiambo**, the applicant, sought to set aside the taxing officer's decision, (**Hon. S. Mwayuli, Deputy Registrar**), dated 25<sup>th</sup> September 2017. The impugned decision relates on the 1<sup>st</sup> respondent's party and party Bill of costs dated 29<sup>th</sup> May 2017 which was taxed and allowed at Ksh528,725 all inclusive. Item 1 was taxed and allowed at ksh500, 000.

2. The reference is based on the grounds on the face of the summons and the supporting affidavit by **Evans Umidha Oruenjo**, counsel for the applicant sworn on 6<sup>th</sup> October 2017 and filed together with the summons. The applicant contends that the taxing officer did not consider their written submissions dated 24<sup>th</sup> July 2017 and filed in court on 2<sup>nd</sup> August 2017; that the taxing officer misdirected herself in holding that the 1<sup>st</sup> respondent was entitled to instruction fee; that the taxing officer erred in holding that what was before the High Court was an election petition, and as a result, she erred in relying on Schedule V1 1(i) of the Advocates' Remuneration (Amendment) Order 2014. It is also contended that the taxing officer's decision does not contain reasons for taxing items 7, 8, 9 and 10 as she did.

3. The applicant also states through the supporting affidavit that the appeal before High court was not an election petition but an appeal from Political Parties Disputes Tribunal's (PPDT) decision on nomination and therefore, the taxing officer erred by using wrong Schedule when taxing the party and party Bill of Costs which amounted to a wrong principle. The taxing officer is also faulted for allowing instruction fee of Kshs. 500, 000 as though the matter was an election petition when it was in fact a normal appeal.

4. It is the applicant's contention therefore; that the matter before High Court was an appeal from PPDT and the party and party Bill of costs should have been treated as arising from a normal appeal and the Schedule on appeals in the Advocates Remuneration (Amendment) Order 2014 which provides for minimum instruction fee of 25,200 should have been used. It is also contended that items 5, 6, 7, 8, 9 and 10 which were filed for purposes of filing the Bill of Costs dated 27<sup>th</sup> May 2017 should not have been taxed as they were.

5. The 1<sup>st</sup> respondent filed a replying affidavit by **Isaiah Munje** Advocate sworn on 26<sup>th</sup> March 2017 in response to the reference. **Mr. Isaiah Munje**, counsel for the respondent who has conduct of this matter, deposes that the appeal in the High Court had sought to have the matter referred back to the PPDT; that parties filed submissions to the Bill of costs which the taxing officer considered; that the taxing officer was right in deciding that the 1<sup>st</sup> respondent was entitled to instruction fees; that the nature of the matter before High Court was an election petition over a Parliamentary seat and that the taxing officer used the applicable Schedule in taxing the Bill of costs. It is further contended that the fact that the matter arose from the PPDT did not mean it was not an election petition.

6. **Mr. Were**, learned counsel for the applicant, submits that the taxing officer's decision on item 1 was erroneous in that she treated the Bill of costs as arising from an election petition. Learned counsel contends that the respondent's advocates were not properly on record before the High Court because they had not filed a notice of appointment and, therefore, the taxing officer was wrong in allowing item 1 at Kshs500, 000. In learned counsel's view, the party and party Bill of costs should have been taxed as a normal appeal under Schedule VI. **Mr. Were** also submits that the amount allowed on item 1 was inordinately high hence erroneous. He urges that the reference be allowed.

7. **Mr. Malenya**, learned counsel for the 1<sup>st</sup> respondent, submits relying on their replying affidavit filed in response for the reference that the matter before the High Court arose from an electoral dispute as an appeal to the High Court which was however was withdrawn. In learned

counsel's view, the matter before the High Court was an election petition and once counsel appeared for the respondent, they were entitled to instructions fees. He urges the court to uphold the taxing officer's decision and dismiss the reference with costs arguing that the taxing officer used the correct schedule of the Order.

8. I have considered the reference; the response and submissions by counsel for the parties. The party and party Bill of costs arose from the order of this court (**Muchelule, J**) made on 18<sup>th</sup> May 2017 allowing withdrawal of an appeal from a decision of PPDT. He awarded costs of the appeal to the 1<sup>st</sup> respondent following that withdrawal.

9. The 1<sup>st</sup> respondent then filed his party and party Bill of costs dated 29<sup>th</sup> May 2017. The Bill of costs was taxed and in a decision dated 25<sup>th</sup> September 2017, the taxing officer allowed it at the sum of Ksh528725, all inclusive taxing off Ksh1,122,600/-. Item 1, instructions fee, was allowed at Ksh500,000/- applying Schedule VI 1 (i) of the Advocates Remuneration (Amendment) Order, 2014 on grounds that the Bill of costs arose from an election petition.

10. The applicant has challenged that decision arguing that the taxing officer erred in taxing the Bill of costs as if it was an election petition thus took into account a wrong Schedule and that the amount allowed on item 1 was inordinately high hence unlawful. The respondent has argued in support of the taxing officer's decision contending that the matter was indeed an election petition and that the taxing officer took into account the relevant schedule and therefore arrived at the correct decision.

11. It is settled law that taxation is a matter of discretion of the taxing officer and this court will not ordinarily interfere with the taxing officer's exercise of discretion unless it is shown that the taxing officer took into account irrelevant factors or failed to take into account relevant factors and as a result caused an injustice.

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

***“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...”***

12. In ***National Oil Corporation Limited v Real Energy Limited & another*** [2016] eKLR the Court restated these principles thus;

***“The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that 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; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.”***

13. And in ***Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd*** [1972] EA 162, the court observed that costs should not be allowed to rise to such a level that would confine access to courts to the wealthy. The court maintained that successful litigant should be reimbursed for the costs incurred while the general level of remuneration of advocates should be such that they will attract more members to the profession but they remain consistent with the awards already made.

14. There is no dispute that the matter before the High Court was an appeal from a decision of the PPDT over nomination process. When parties appeared before **Muchelule, J**, the appellant's counsel sought to withdraw that appeal because it had been overtaken by events. The respondent's counsel had no objection to the request to withdraw the appeal but asked for costs. The court allowed the appellant to withdraw the appeal but awarded costs to the 1<sup>st</sup> respondent leading to the party and party Bill of costs and subsequently the impugned decision of the taxing officer through this reference.

15. I have perused the record of the trial court and it is clear that at the time parties appeared before the Judge, the respondents had not filed their documents. Counsel indicated to court as much which means the appeal was withdrawn before the respondents filed their responses including notices of appointment.

16. Secondly, it is true that the taxing officer taxed the party and party Bill of costs on the basis that it arose from an election petition and in the process, used the schedule for election petitions. While doing so, the taxing officer observed that the Advocate Remuneration Order 2014 schedule was the applicable law since the matter was an appeal and the nature of the appeal before the High court was an ***“election petition”*** related matter and, therefore, Schedule 6 1(i) would apply. She then proceeded to tax item 1 at Kshs 500,000, under the head; ***“To present or oppose an election petition”*** in that Schedule.

17. There can be no doubt therefore that the taxing officer proceeded on the premise that the matter before the High Court was an election petition and she applied the schedule applicable for taxing bills of costs arising from election petitions to tax the party and party Bill of costs before her.

18. But was the matter before the High court an election petition? The answer must be an emphatic no. The matter was an appeal from the decision of the PPDT over nomination process hence the appeal from the decision of PPDT was a normal appeal. I say so because election petitions are heard by election courts which must be gazetted by the Chief Justice under Election Petition Rules and come after elections.

19. Furthermore, Election appeals save for those from MCA's Party lists, are heard by the Court of Appeal and not the High Court. For that reason, it is clear to me and I agree with the applicant's counsel, that this was not an election petition but a normal civil appeal. The fact that

it was headed Election Petition Appeal did not make it an election petition hence the Bill of costs could not be taxed under the schedule for election petitions. The learned taxing officer was therefore in error when she considered the matter as an election petition and proceeded to tax the party and party Bill of costs as such.

20. In that regard, the taxing officer took into account irrelevant matters and failed to take into account the relevant factors namely that this was a normal appeal and that the applicable schedule was that for normal appeals. As stated in In *National Oil Corporation Limited v Real Energy Limited & another* (supra) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors which would lead to a fundamental error enough to justify interference with the taxing officer's exercise of discretion.

21. That being my view of the matter, the taxing officer was wrong in using the schedule on election petitions rather than that on appeals hence once again fell into error in taxing item 1 at Ksh500,000 instead of using the schedule for appeals.

22. Where the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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 and the Court is not entitled to upset a taxation in *National Oil Corporation Limited v Real Energy Limited & another* supra)

23. Having come to the conclusion that the taxing officer was in error, the best course to take in such circumstances, is to return the party and party Bill of costs to the taxing officer to tax it using the correct schedule. As to whether instruction fee was payable, that is a matter the taxing officer should first decide on

24. Consequently, I allow this reference dated 6<sup>th</sup> October 2017, set aside the taxing officer's decision dated 25<sup>th</sup> September 2017 in entirety and remit the matter to the taxing officer for fresh taxation of Party and party Bill of costs dated 29<sup>th</sup> May 2017. The applicant will have costs of this reference.

**Dated, Signed and Delivered at Nairobi this 21<sup>st</sup> September 2018**

**E C MWITA**

**JUDGE**