



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO.25 OF 2015

IN THE MATTER OF: ARTICLES 22, 23, 40, 47, 48,

60 AND 165(30) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: PART III OF THE LAND ACT 2012

AND

IN THE MATTER OF: THE REGISTRATION OF LAND ACT 2012

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION

OF RIGHTS TO OWN PRIVATE PROPERTY

BETWEEN

DIRECTORS AND SHAREHOLDERS OF NAKUMATT

INVESTMENTS LIMITED.....PETITIONERS

AND

1. COUNTY GOVERNMENT OF MOMBASA

2. NATIONAL LAND COMMISSION (NLC).....RESPONDENTS

RULING OF THE COURT

The Application

1. The application before the court is brought by way of Chamber Summons dated 17th February, 2017 under Rule 11 (1) and 2 of the Advocates (Remuneration) Order Cap 16, Sections 3A & 63 of the Civil Procedure Act and Article 159 of the Constitution of Kenya by the Petitioner who seeks an order to vary or set aside or review the award and Certificate of Costs issued on 27th January, 2017 and 1st February,

2017 respectively by the Honorable Deputy Registrar/ Taxing Master. The application is supported by the affidavit of **ATUL SHAH** sworn on 17th February, 2017.

2. The Petitioner alleges that **Item 1** on the Respondent's Bill of Costs dated 17th August, 2016 and taxed on 27th January, 2017 which is the instruction fee was taxed based on the wrong value of the subject matter hence making the entire Bill of Costs defective. The Petitioner also alleges that **Item number 22** of Costs was taxed wrongly as it was based on **Item number 1** which in itself was wrong.

3. The Petitioner also alleges that the taxing master ought to have declined to tax the entire bill as proceedings against the Government do not attract costs as it will prejudice an aggrieved citizen. The Petitioner also claims that there is no item for revenue generation from litigation against the Government.

4. The Petitioner further alleges that the Taxing Master did not give his/her reasons for the decision in accordance with the provisions of Section 11 (2) of the Advocates (Remuneration) Order Cap 16, Laws of Kenya.

5. The Petitioner prays that the Taxing Master's award be set aside and the matter be referred back to be taxed by an independent taxing Master.

Response

6. The application is opposed by the 1st Respondent vide a replying affidavit sworn by Jimmy Waliula on 29th March, 2017. The Respondent's case is that the Taxing Master's reasons for the award were given in the Ruling and therefore the Petitioner's allegations that it has not received reasons for the award are untrue. Further, the Respondent submitted that that the Petitioner did not object or contest the Bill of Costs that was filed by the Respondent neither did the Petitioner appear before the Taxing Master to contest the Bill of Costs.

7. The Respondent's case is that the requisite principles were applied in awarding the costs which included the value of the subject matter, the complexity of the matter, the seriousness of the matter and the nature and importance of the matter to the parties. The Respondent's case is that the Item 1- instruction fees and Item 2- getting up fees were reasonable, judicious and fair hence the Petitioner's application should be dismissed with costs.

Submissions

8. Parties made oral submissions in court which I have carefully considered. In my view the following are issues to be determined by this court.

i. Whether proceedings against the government attract costs.

ii. Whether the taxing Master gave reasons for the award.

iii. Whether items 1 and 22 in the Respondent's Bill of Costs were wrongly taxed.

9. On the first issue, Section 17 of the Government Proceedings Act, Cap 40, Laws of Kenya provides:

"In any civil proceedings or arbitration to which the Government is a party, the costs of and incidental to the proceedings shall be awarded in the same manner and on the same principles as in cases between subjects, and the court or arbitrator shall have power to make an order for the payment of costs by or to the Government accordingly:

Provided that—

(i) in the case of proceedings to which by reason of any written law or otherwise the Attorney-

General, a Government department or any officer of the Government as such is authorized to be made a party, the court or arbitrator shall have regard to the nature of the proceedings and the character and the circumstances in which the Attorney- General, the department or officer of the Government appears, and may in the exercise of its or his discretion order any other party to the proceedings to pay the costs of the Attorney-General, department or officer, whatever may be the result of the proceedings; and

(ii) nothing in this section shall affect the power of the court or arbitrator to order, or any written law providing for, the payment of costs out of any particular fund or property, or any written law expressly relieving any department or officer of the Government of the liability to pay costs.”

10. From a reading of this Section, it is evident that litigation involving the Government attracts costs either to its detriment or in its favour and the costs are to be awarded in the “*same manner and on the same principles as in cases between subjects*” and therefore the Petitioner’s allegations on this are unfounded. In any event, when the Petitioner lost the proceedings leading to the filing of Bill of Costs, they were also ordered to pay costs. They did not appeal against that order, and so the costs remain payable by the Petitioner.

Whether the Taxing Master gave reasons for the award.

11. Having perused the court file, I am inclined to believe the Respondent’s assertion that the Petitioner never requested the Taxing Master for reasons for the award as there is no document to show that the Petitioner wrote to the Taxing Master requesting for reasons for the award. Instead, the Petitioner filed a Notice of Objection to Taxation (herein after to be referred to as the “notice”) dated 31st January, 2017. In the Notice, the Petitioner only states that it objects the Taxing Master’s reasons given on Items 1 and 22 of the Respondents’ Bill of Costs.

12. An analysis of the Ruling dated 27th January, 2017, shows that the Taxing Master referred to Schedule 6 Paragraph 1 of the Advocates Remuneration Order (2014) while taxing Item 1-Instruction fees and to Paragraph 2 of the same schedule while taxing Item 22-Getting up fees. I find these to be reasons for the taxation and therefore find no basis for the Petitioner’s claim that reasons for the award were not given.

Whether items 1 and 22 in the Respondent’s Bill of Costs were wrongly Taxed

13. Item 1 on the Respondent’s Bill of Costs is the Instruction Fees while Item 22 on the Bill of Costs is the Getting up fees. Schedule 6 of the Advocates Remuneration Order (2014) at Paragraph 1 (j) states that:

“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 or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate...”

(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than - 100,000/=”

14. The matter before this court was a Constitutional Petition with prerogative orders which was opposed by the Respondent thus fitting the criteria set out by the above provision. The above provision warrants a minimum of Kshs 100,000 payable as instructions fees. The Provision also requires the Taxing Master to exercise his/her discretion in adjusting the amount. The Taxing Master in this case considered the value of the land which was the subject matter of the dispute between the two parties and the importance of the Petition and increased the basic fee from Kshs 100,000 to 20,000,000 and taxed off Kshs 55,200,000 from the Kshs. 75,200,000 which the Respondent had indicated in its Bill of Costs. The Taxing Master

exercised her discretion and provided reasons for the same stating that:

“... this was a matter that was of great importance to both parties given the value involved. ...This value placed a great burden on the shoulders of both counsel... However, Kshs. 75,200,00/= is not justified and is on the higher side. In exercise of the court’s discretion... I will increase the basic fee... and award Kshs. 20,000,000/=. I therefore tax off Kshs. 55,200,000.00.”

15. I have carefully considered the latitude within which I can interfere with the discretion of the Taxing Master. Where discretion is exercised, and reason given for the same, the High court should refrain from interference except where the discretion is not founded in law or is plainly not justified. In my view, it does not matter that I would grant a lower sum of money than the Kshs. 20,000,000/=. The subject matter of the suit was Kshs. 2,000,000,000/= and if the suit had succeeded it would have affected property worth over Kshs. 5,000,000,000/=. It was therefore within acceptable reason for the Taxing Master to award Kshs. 20,000,000/= for instruction fees.

16. In relation to **Item 22**, Schedule 6 of the Advocates Remuneration Order (2014) at Paragraph 2 provides:

“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”

17. I agree with the Taxing Master’s finding that Item 22 should be allowed at $\frac{1}{3}$ of the instruction fee.

18. For the foregoing reasons, I dismiss the Petitioners’ application dated 17th February, 2017 with costs to the Respondent.

Dated, Signed and Delivered in Mombasa this 21st day of June, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

M/s Oyier holding brief Mr. Were for Petitioners

M/s Bakari holding brief M/s Ngigi for 1st Respondent

Mr. Kaunda Court Assistant