



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS SUIT NO. 513 OF 2016

NATIONAL LAND COMMISSION.....APPLICANT

VERSUS

PROF. TOM OJIENDA & ASSOCIATES.....RESPONDENT

RULING ON REFERENCE

1. On 20th April 2016 the learned Taxing Officer, Ms Tanui delivered her Ruling on Taxation, when she held that the Advocates were entitled to costs amounting to Kshs. 112,741,002/-.
2. The client has now lodged a Reference at the High Court, to challenge the Ruling of the Taxing Officer.
3. The grounds upon which the reference are founded are as follows;
 - a) **THAT the Taxing Officer erred and completely misdirected herself in confirming the taxed Bill without due regard to the provisions of schedule III of the Advocates Act and Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014.**
 - b) **THAT the Taxing Officer took into account irrelevant factors and therefore failed to exercise her discretion judiciously.**
 - c) **THAT the amount of Kshs. 112,741,002 taxed by the taxing master was manifestly excessive, exorbitant, unreasonable and grossly exaggerated.**
 - d) **It is in the interests of justice that this application be allowed?.**
4. By way of background, the **NATIONAL LAND COMMISSION**, who is the applicant herein, had moved the Supreme Court, seeking its Advisory Opinion.
5. The applicant wished to get the Court's opinion regarding its Powers and Functions clarified, as there had been disagreement and confusion between the applicant and the **MINISTRY of LAND, HOUSING AND URBAN DEVELOPMENT**, regarding their respective mandates.
6. After the Supreme Court had delivered its Opinion, the advocates filed their Advocate/Client Bill of Costs, for taxation.

7. Although the Bill of Costs was initially lodged at the Supreme Court, the parties consented to having it transmitted to the Taxing Officer of the Commercial & Tax Division of the High Court, for the purposes of taxation.

8. When challenging the decision of the Taxing Officer, the client says that when it was clear that the value of the subject matter cannot have been determined from the pleadings or the opinion of the Supreme Court, the Taxing Officer ought to have, but failed to take into account the following criteria;

i) The nature and importance of the proceedings;

ii) The complexity of the matter and the difficulty of the question raised;

iii) The amount or value of the subject matter;

iv) The time expended by the advocate(s);

v) The number and importance of the documents prepared or perused, without regard to length.

9. It is because of that alleged omission on the part of the Taxing Officer that the client believes the result was the excessive award of Kshs. 112 Million.

10. The client cited the case of **PREMCHAND RAICHAND LIMITED Vs QUARRY SERVICES of EAST AFRICA LIMITED [1972] E.A. 162** as authority for the proposition that costs ought not to be allowed to rise to levels which would allow only wealthy persons to access justice.

11. I have no doubt that that reasoning is sound. I so hold because if costs were permitted to escalate to such levels that cannot be afforded by the average Kenyan, the bulk of the society would effectively be deprived of an access to legal services.

12. Article 48 of the Constitution of the Republic of Kenya stipulates as follows;

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”.

13. Although the provision is directly talking about fees, I hold the considered view that the right of access to justice should also be safeguarded in relation to costs payable to advocates.

14. In her Ruling, the learned Taxing Officer held that the advocates had done a lot of research and work towards the preparation for and the presentation of the submissions to the Supreme Court.

15. The Taxing Officer also noted the nature, the interest and the importance of the cause to the parties. She said that it was a matter of National importance.

16. It is because of those reasons that the Taxing Officer allowed the sum of Kshs. 65,000,000/- in respect to Instruction Fees.

17. First, it is clear to me that the learned Taxing Officer took into account relevant factors.

18. Secondly, the applicant has not satisfied me that there was any irrelevant factor which the Taxing Officer had taken into account.

19. Nonetheless, I still find that the final award of Kshs. 65,000,000/- was so high in itself that it cannot be rationalized with the constitutional imperative, which is to ensure that all persons may be able to access justice.

20. For that reason, I set aside the sum awarded in respect to the Instruction Fees. I order that the Advocate/Client Bill of Costs be taxed afresh, by a Taxing Officer other than Hon. Elizabeth Tanui.

21. However, as the applicant had not challenged the other items on the Bill of Costs, I find that it is not open to it to challenge those other items when the Bill is being taxed anew.

22. As the reference has succeeded only partially, I order each party to bear his own costs of the reference.

23. Finally, I find that the reference cannot be deemed unsustainable just because it was brought pursuant to paragraph 12, instead of paragraph 11 of the Advocates Remuneration Order.

24. The respondent was not prejudiced at all, and therefore by giving consideration to the substantive issues, instead of the applicable rule *simpliciter*, the court rendered justice without undue regard to technicalities.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of July 2017.

FRED OCHIENG

JUDGE

Ruling read in open court in the presence of

Gichuru for the Client

Miss Otieno for the Advocates

Collins Odhiambo – Court clerk.