



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 57 OF 2012

HON. GIDION MBUVI KIOKO alias SONKO.....
PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST
RESPONDENT

**THE KENYAN SECTION OF THE
INTERNATIONAL**

COMMISSION OF JURISTS (ICJ)-KENYA.....2ND RESPONDENT

AND

**PAUL KOBIA M'IBURI.....INTERESTED
PARTY**

RULING

1. This is a reference from the taxing officer’s decision dated 27th February 2014. It is brought by way of chamber summons dated 16th April, 2014 filed in court on 17th April, 2014. The applicant, **The Kenyan Section of the International Commission of Jurists (ICJ Kenya)** objected to the taxing officer’s decision to tax item 1 (instruction fee) in the applicant’s Party and Party Bill of Costs at kshs. 400,000. The applicant felt the amount was inordinately low and now wants that decision set aside, and the Bill of costs referred back to the taxing officer for reconsideration.

2. The grounds upon which the reference is premised, are that the taxing officer having found that the applicable scale was **Schedule VI (i)(b) of the Advocates Remuneration (Amendment) Order**, failed to proceed accordingly and therefore fell into error while determining the amount to award on item 1 (instruction fee). The other ground was that even after the taxing officer found that the amount of **US Dollars 90,000,000 (kshs 7,650,000,000.00)** was part of the subject matter in the pleadings, he still fell into further error, in failing to find that the amount formed a factor in determining instruction fee. The applicant, therefore, contended that the taxing officer fell into further error in failing to appreciate that instruction fee is payable upon counsel receiving instructions to act in a matter.

3. The summons is supported by an affidavit sworn on 16th April, 2014 which more or less reiterated the grounds on the face of the Summons and urged that the application be allowed.

4. The respondent filed a replying affidavit sworn on 27th May, 2014 by **Alphonse Mutinda**, and filed in court on the same day. It was deposed that the applicant's Bill of costs was taxed in the absence of counsel for respondent due to non-service of a taxation notice, and that counsel wrote a protest letter and requested for written reasons for the taxing officer's decision. The respondent's counsel further deposed that the respondent was dissatisfied with the taxing officer's decision and wants the decision set aside and the Bill referred back to the taxing officer for taxation afresh. It was also deposed that **Schedule VI (i)** of the **Advocates Remuneration (Amendment) Order, 2009** was not applicable to the taxation in this matter since there was no monetary claim, given that the petition sought declarations only, and that any mention of monetary claims was made by someone else and not the petitioner. It was the respondent's case, therefore, that the taxing officer erred in basing his decision on an issue that was not raised by the main parties to the petition.

5. Parties filed written submissions which counsel highlighted. **Mr. Nderitu**, learned counsel for the applicant, submitted that the taxing officer having agreed that **Schedule VI (i)(b)** was applicable, and that from the pleadings, the value of the subject matter involved was **US Dollars 90 million or Kshs 7,650,000,000.00**, instruction fee ought to have been pegged on that amount. Counsel submitted that the taxing officer erred in disregarding the provisions of **Schedule VI (i) (b)** by allowing only Kshs.400,000 on instruction fee. Learned counsel referred to the case of *Joreth Limited v Kigano & Associates Advocates* [2002] EA 92 for the proposition that the value of the subject matter ought to be taken into account for the purpose of taxation of the Bill of costs, among other factors. Where the value of subject matter is unknown the court would consider other factors. Counsel contended that as far as the petition was concerned, the value of the subject matter was easily ascertainable, and for that reason, the taxing officer was wrong in allowing instruction fee at Kshs400,000 only.

6. **Mr. Nderitu** further contended that the taxing officer erred in failing to find that the value of the subject matter was the determinant factor in arriving at instruction fee. He faulted the taxing officer's failure to properly exercise his discretion when he overlooked the value of the subject matter in making a determination on instruction fee. In counsel's view, the fact of the value of the subject matter was clear in the interested party's pleadings, it should have been used in determining instruction fee. Reliance was placed on the case of *Republic v Minister of Livestock and Development & another Exparte the Association of Sugar Importers* Misc. application no. 453 of 2003, where 50 million was awarded in pleadings in which an amount of Kshs. 8 billion had been quoted. Counsel further relied on the case of *Orion East Africa Limited v Permanent Secretary Ministry of Agriculture & another* [2013] eKLR for the proposition that the value of the subject matter should be reflected in the quantum fee and even though it is not decisive, it is sufficiently substantial to be reflected in the amount awarded for instruction fee.

7. **Mr. Nderitu's** further submission was that the taxing officer committed an error of principle when he failed to find that instruction fee is earned once instructions are given. Counsel referred to the taxing officer's suggestion that in determining instruction fee, time expended by parties has to be taken into account. He also contended that the taxing officer took a wrong view of the matter when he concluded that the petition had been withdrawn before submissions had been filed and without going to full hearing which wrongly influenced the taxing officer's determination on instruction fee. In counsel's view, instruction fee is earned once instructions are given. He once again referred to the case of *Joreth Limited v Kigano & Associates, Advocates (supra)*, to support the position that instruction fee is an independent item charged once and is not affected or determined by the stage the suit reached.

8. Finally, counsel contended that the taxing officer should have taken into account the complexity of the matter in determining instruction fee. In counsel's view, the petition and response raised novel points for determination hence this fact should have been taken into account in arriving at the instruction fee to award. Learned counsel further faulted the taxing officer for failing to take into account or appreciate the importance of the matter to the parties when determining instruction fee. According to counsel, the matter was exceptional since it related to a warrant of arrest issued against the sitting **President of Sudan**, a fact that should have been taken into consideration in determining instruction fee in this matter.

9. The respondent's counsel on his part faulted the taxing officer's decision to award instruction fee of

kshs,400,000 which he considered in ordinally high. He differed with the applicant's submission that instruction fee should have been based on the averments by the third party who claimed to have suffered some economic loss. In counsel's view, the petition did not mention any monetary value hence the taxing officer would be wrong in taking into account the subject matter in pleadings filed by a third party as a basis of determining instruction fee.

10. Counsel maintained that the amount of **US Dollars 90,000,000** equivalent to **Kshs. 7,650,000,000/=** was not pleaded by the petitioner, but the taxing officer allowed it to influence his determination on item I. Counsel further contended that **Schedule VI** of the **Advocates Remuneration (Amendment) Order, 2009** did not apply to the applicant's Bill of costs. In his view, the applicable Schedule is **Schedule VI (i)** of the **Advocates Remuneration (Amendment) Order, 2014**, which gives a minimum of Kshs 45,000 where the matter is not complex, and Kshs 100,000 where the matter is opposed and satisfies the criteria set in that **Schedule**.

11. According to counsel, Kshs.100,000 would have been sufficient in the circumstances of this petition. He also relied on the case of ***Orion East Africa Limited v Permanent Secretary Ministry of Agriculture & another*** (supra) to support the submission that value of the subject matter was important but not decisive in determining instruction fee. Counsel contended that the petition was filed in public interest and an award of heft fee would be contrary to **Article 48** of the Constitution. He prayed that the decision of the taxing officer be set aside and the Bill be remitted to the taxing officer for reconsideration.

i. Analysis and determination

12. I have considered the reference herein, response thereto, submissions by counsel for parties and the authorities cited. This reference challenges the decision of the taxing officer which allowed item 1 (instruction fee) at **Kshs 400,000**, instead the claimed amount of **Kshs 50 million**. The applicant has argued that the amount allowed was low and contrary to the applicable legal principles, while the respondent argued that the amount was high and against the applicable law. Each side wants the applicant's Bill of costs remitted to the taxing officer for re-consideration.

13. The reference arose from the taxation of the applicant's party and party Bill of costs dated 13th August, 2013. The applicant was dissatisfied with that decision and filed this reference. Brief facts of the petition are necessary. On 6th March, 2012, the respondent filed a petition seeking declarations that his rights had been violated by issuance of a warrant of arrest against the President of Sudan by the High Court Criminal Division. The said warrant was issued following the warrants issued by **ICC** against the President of Sudan. The petitioner contended that the warrants issued by the High Court was null and void among other reasons. The petition had been filed against the Attorney General only. On 20th March, 2012, **Paul Kobia M'buri**, a director of Great Lakes Holdings Co. Limited and Great Lakes Energy Limited, filed an affidavit, as an interested party, sworn on the same day supporting the petition. He deposed at **paragraphs 10 and 11** of his affidavit that his Companies had secured contracts worth **US Dollars 60,000,000** and **30,000,000 USDs**, making a total of **US Dollars 90,000,000/=**.

14. He deposed at paragraphs 19 and 20 as follows;

i. "THAT when I read about this petition, I consulted my advocates and we came into an agreement that I have to be enjoined as an interested party since the warrants have seriously affected my business.

ii. "THAT I verily believe that I have demonstrated good reasons to show that the issuance of the said warrants has violated and continue to violate my fundamental rights guaranteed under chapter 4 of the Constitution.

15. He then concluded at paragraph 21 that the warrant had affected his business, and further that the warrants had been issued by a court that did not have jurisdiction.

16. On 18th April, 2012, the applicant filed an application to be enjoined into those proceedings, and was,

on the same day, enjoined as the 2nd respondent. The applicant then filed a replying affidavit to the petition on 30th July 2012. The affidavit was sworn on 27th July 2012. However, on 28th September, 2012, the petition was withdrawn with costs to the respondents. It was pursuant to that order for costs, that the applicant filed its party and party Bill of costs which was taxed and allowed at **Kshs.425,705**. Instruction fee was allowed at **Kshs.400,000**. **Kshs.49,611,106/=** was taxed off, leading to this reference challenging the taxing officer's decision on item 1.

17. Taxation of Bill of costs is at the discretion of the taxing officer. The principles that guide taxation of Bill of costs were well stated in the case of **Premchand Ranchand Ltd & another v Quarry Services of East Africa** [1972]EA 162 where the court stated.

1. "The court must consider the following principles:-

i. That costs be not allowed to rise to such a level as to confine access to the courts to the wealthy,

ii. That a successful litigant ought to be fairly reimbursed for the costs he has had to incur.

iii. That the general level of remuneration of advocates must be such as to attract recruits to the profession; and

iv. That so far as practicable there should be consistency in the awards made." (emphasis)

18. It is also a principle of law that Courts should not normally 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 ones which led to injustice. This position was stated in the case of **First American Bank Ltd v Shah & Another** [2002] 1 EA 64. **Ringera J**, (as he then was), stated thus;

1. "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 relevant 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)

19. As both the applicant and respondent have correctly stated, the value of the subject matter plays an important role in determining instruction fee to be allowed in a bill of costs. In the case of **Joreth Limited v Kigano & Associates** (supra), the Court went on to state that the value of the subject matter is important in determining instruction fee. The court then state;

1. "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."

20. In the case of **D. Njogu & Co-Advocates v Panatcop Engineering Limited** [2006] eKLR, the Court observed that complexity of the matter was also important in determining instruction fee. On his part, **Warsame J** (as he then was) had the following say on the discretion of the taxing officer and the factors to take into account in the case of **Ochieng, Onyango, Kibet and Ohaga Advocates v Adopt Light Ltd.** HC Misc 729 of 2006.

1. ***“The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in line to the material presented before court. The taxing master must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject. And when the subject matter is unknown, the court is empowered to make what is available as a point of inference. In my view, the point of reference is the figure proposed and accepted....”*** (emphasis)

21. There is no doubt, therefore, that the value of the subject matter plays an important role in determining instruction fee. The respondent never filed submissions before the taxing officer hence the taxing officer’s decision largely depended on the submissions by the applicant and his own assessment of the matter. The pleadings filed in court form the source of determining the value of the subject matter, complexity, or importance of the cause or matter to the parties. The pleadings have therefore to be considered in determining instruction fee allowable in any Bill of taxation before a taxing officer.

22. In this case, the main pleadings were; the petition filed by the petitioner which initiated the cause or matter, and the response by the respondents. The applicant’s counsel has submitted that the interested party filed pleadings which had averments containing an amount of **US Dollars 90,000,000** equivalent to **Kshs. 7,650,000/=**, which should have formed the basis for determining instruction fee. As stated earlier, **Paul Kobia M’buri** filed an affidavit sworn on 30th March, 2012, and from the paragraphs reproduced elsewhere in this ruling, joined hands with the petitioner in supporting the petition. He stated that the warrant issued had affected his businesses especially the contracts his companies had entered into in Sudan amounting in aggregate to **US Dollars 90,000,000**. He also averred that the warrants were null and void having been issued by a Court without jurisdiction.

23. As correctly stated in the case of ***Orion East Africa Limited v Permanent Secretary Ministry of Agriculture & another*** (supra), and which both parties have relied on, the value of the subject matter may not be decisive but is nonetheless important when determining what amount to allow on instruction fee. While the applicant has maintained that the affidavit filed by the interested party contained the value of subject matter, the respondent’s argument was that only the petition filed by the petitioner and the responses by respondents should be considered when determining the value of the subject matter for purposes of determining instruction fee.

24. I have perused the record herein, and what is clear is that **Paul Kobia M’buri** filed an affidavit which supported the petitioner’s position advanced in the petition. Although that affidavit is on record, I have not been able to trace a formal order joining **Paul Kobia M’buri** as an interested party in these proceedings, even though counsel appeared and was recorded as representing the “interested party”.

25. In that regard, therefore, the affidavit by **Paul M’buri** did not form part of the pleadings and could not have been taken into account while determining the amount to allow on instruction fee. This view is informed by the fact that the affidavit was filed by a person who was merely interested in the matter, but was not the main party in the petition. The petition was between the petitioner and the respondents. The court could on its own motion join a necessary party into the proceedings, but that would not make the added party bear costs of the petition or his/ her responses form the basis of awarding costs against petitioner(s) or respondent(s) as the case may be. He is added in the case as a necessary party to enable the Court make a just determination. The Court can and may order a Party to bear costs when necessary. In the present case it is the petition that was withdrawn with costs hence the petitioner would have to bear costs.

26. In this case, I am unable to hold that the said “interested party’s” affidavit was a pleading for purposes of taxation of the applicant’s party and party Bill of costs. For those reasons, I cannot fault the taxing officer for not taking into account the amount mentioned in the affidavit by **Paul Kobia M’buri** as forming the value of the subject matter for purposes of determining instruction fee in the applicant’s bill of costs.

27. The other issue that I find necessary to address here, is when instruction fee becomes payable. Learned counsel complained that the taxing officer stated that the petition was withdrawn, and in a way, that wrongly influenced his determination on instruction fee which, according to Mr. Nderitu, was an error of principle in law.

The taxing officer in justifying the amount to award as instruction fee, stated in his decision;

i. “In arriving at what is to be considered reasonable figure, one has to look at the record and the time expended by the parties on the matter. As already stated herein, the applicant came into the matter on 18th April, 2012. This matter was withdrawn on the 28th September, 2012, barely five months after the applicant came on record. The court record shows that the applicant merely filed a four page replying affidavit in the matter. Not even submissions did he file as the petition was subsequently withdrawn. This is a matter that did not go to full hearing. Having taken all these factors into consideration and especially considering the nature of the case and the fact that the same was withdrawn before trial, I find an award of kshs 400,000 (four hundred thousand) is reasonable as instruction fee...”

29. In principle, taxation is at the discretion of the taxing officer and courts should not readily interfere with exercise of this discretion unless there are good grounds to do so. In the words of ***Spry V. P*** in the case of ***Premchand Ranchand Ltd & another v Quarry Services of East Africa*** (supra) at page 104;

i. “The taxing of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.” (Emphasis)

30. The question raised here seems to be whether instruction fee becomes payable when the case proceeds to full hearing, or upon counsel being instructed. In all case, instruction fee is payable once a defence or some form of denial has been filed. This is clear from the Advocates Remuneration Order. In the case of liquidated claims there would be no difficulty in determining instruction fee which is easily ascertainable. But where the claim is an un liquidated one, there is a minimum fee provided for and as to the amount the taxing officer should allow on instruction fee, this is left at the discretion taxing officer, who has to take into account such factors as, complexity and importance of the case, matter or suit in arriving at the instruction fee. That was the position advanced in ***Joreth Limited v Kigano & Associates*** (supra) where the Court of Appeal stated;

1. “...we would at this stage point out that the value of the subject matter of a suit for the 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 ascertainable, the taxing officer is entitled to use his discretion to asses 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 the trial judge and all other relevant circumstances...”

31. In my view, the taxing officer addressed his mind on these factors in arriving at the instruction fee in this matter. It is not that the taxing officer allowed part instruction fee because the petition had been withdrawn. Rather by stating that the matter had been withdrawn, the taxing was considering the general conduct of the matter for purposes of determining amount of instruction fee to award which was within his discretion. In the circumstances I find no error on the part of the taxing officer in this regard.

32. That then leaves one question; was the amount allowed on instruction fee inordinately low, as to amount to an injustice to warrant this court’s interference? To answer this question, it is important to consider one other issue which has been raised by the respondent, that is, which is the applicable **Advocates Remuneration Order**.

33. According to the respondent, the applicable Order is the **Advocates Remuneration Order, 2014**,

which provides for instruction fee of kshs 100,000 where the application was for constitutional or prerogative orders and was complex.

34. In this reference, counsel for the applicant only referred to **Schedule VI (i)(b) of the Remuneration Order**, without specifying the year of the order. According to the record, the taxing officer also never referred to the applicable Advocates Remuneration Order. However going by the record, the petition was filed on 1st March, 2012, while the order for costs was made on 28th September, 2012 when the petition was withdrawn. In that case, therefore, the applicable order is the **Advocates Remuneration (Amendment) Order, 2009** which was in force when the petition was filed and concluded.

35. The Remuneration Order does not however provide the amount of instruction fee payable in the case of constitutional petitions. Schedule VI (j) provides for applications for prerogative orders, where the minimum amount provided for is Kshs.28,000/-. Taking this into account and considering all the circumstances of the petition, I am unable to hold that instruction fee of Kshs.400,000/- awarded to the applicant as instruction fee was inordinately law to warrant this Court's interference. Instruction fee in this case was at the discretion of the taxing officer, and taking into account the conduct of the matter. The amount of Kshs400,000/= was in my view sufficient, it must also be remembered, as stated in Premchand Ranchand Ltd & Another v Quarry Services of East Africa (supra), that costs should not be allowed to raise high levels as to continue litigation to the wealthy, and costs ought to fairly compensate the successful litigant but not to enrich them.

36. The respondent on his part submitted that the amount allowed as instruction fee was inordinately high and should be set aside, and the Bill remitted for taxation afresh. I must point out that the respondent never filed a cross reference against the taxation. There would be no basis, therefore, for setting aside the taxing officer's decision. In any case I do not think the respondent has laid a basis for finding that the amount awarded as instruction fee was inordinately. I too find no basis to differ with the taxing officer's exercise of discretion.

37. In the end, I find that the reference has no merit. The chamber summons dated 14th April 2014 is hereby dismissed. Each party do bear their own costs.

Dated, Signed and Delivered at Nairobi this 2nd Day of August, 2017

E C MWITA

JUDGE