



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. 31 OF 2016

KEROSI ONDIEKI & COMPANY ADVOCATES.....APPLICANT

VERSUS

NAROK COUNTY GOVERNMENT.....RESPONDENTS

RULING

1. Through Chamber Summons dated 18th November 2016, the applicant herein sought orders to set aside/vary the decision of the taxing-master made on 27th October 2016. The applicant also sought orders for the re-taxation of items number 1, 18, 26, 29, 31, 34 and 35 of the Advocates/Client Bill of Costs dated 15th May, 2016 together with the costs of the application.

2. The application is supported by the grounds enumerated on the body of the Chamber Summons application and on the affidavit of the applicant's advocates, Mr. Kennedy Bosire Gichana, sworn on 17th November 2017 wherein he deposes that the taxing master did not record the reasons for her decision on taxation contrary to the provisions of **Rule 11 (2) of The Advocates (Remuneration) Order** which requires that the taxing master furnishes the applicant with her reasons upon receipt of the applicant's notice of objection to the decision.

3. He also faults the taxing master for failing to have regard to the provisions of **Schedule VIA (1) of the Advocates (Remuneration) Order** which deals with advocates costs/scale allowed in proceedings before the High Court.

4. On 9th March 2017, the respondent filed grounds of opposition to the application in which he listed the following grounds:

1. The Taxing Officer did not commit any error of principle in the taxation of the Advocate-Client Bill of Costs so as to warrant the setting aside of her decision. The Taxing Officer had abided by the provisions of the Advocates act and the Advocates (Remuneration) Order.

2. The role of the Applicant/Advocates was merely advisory and, as such, the amount awarded by the taxing Officer was fair and reasonable taking into consideration the amount of the legal work undertaken by the Applicant/Advocates.

3. The said application is frivolous, vexatious and an abuse of the process of this Honourable Court.

5. When the application came up for hearing, both parties agreed to canvass it by way of written submissions which I have carefully perused and noted that the main issue for determination is whether

this court is entitled to interfere with the decision of the taxing master.

6. The main gist of the applicant's application, as can be seen from his written submissions is that the taxing master wrongly applied the provision of **Schedule V1 (1) (K) of the Advocates (Remuneration) Order (hereinafter "ARO")** in awarding instructions fees of Kshs. 8,400/= instead of Kshs. 434,667/= that was sought by the applicant.

7. According to the applicant, **Schedule VI (1) (K) of the ARO** only deals with proceedings upon an award being made by the arbitrator and does not deal with instruction fees in respect to an application for entry or adoption of the award as judgment of the court. The applicant maintained that the taxing master applied the wrong principles during taxation hence arrived at a wrong assessment. The applicant's case was that he represented his client in an arbitration case in which an award of Kshs. 143,432,960 was made to the client together with other assets valued at more than 1 billion shillings and therefore, under the provisions of **Rule 10 (2) of the Arbitration Rules**, he was entitled to calculate his fees in accordance with the scale of fees applicable in the High Court.

8. The applicant maintained that because the total value of the award in the proceeding before the Arbitration was in the tune of Kshs. 1,420,049,460/=: the instructions fees due to him was Kshs 17,862,618.25 even though he had erroneously sought for a lower figure of Kshs. 14,434,667 and therefore, the award due to him ought to have been Kshs. 14,434,667 increased by $\frac{1}{2}$ to make a total of Kshs. 21, 652,000.50 as the amount due for instruction fees.

9. The respondent, on its part, maintained that the applicant's claim for a colossal sum of Kshs. 21,652,000 as costs on instructions fees was unjust and not based on any facts. He contended that Schedule VI of ARO was clear on the instructions fees chargeable to present and/or oppose an award made by an arbitrator and argued that the taxing master correctly made her calculations on instructions fees based on the clear provisions of the ARO.

10. The respondent further argued that the award of costs are intended to compensate the successful party with reasonable costs incurred in defending himself. The respondent's arguments on this point were fortified by the decisions in **Mayers & Another vs Hamilton & Others (1975) E.A. 13** and **Republic vs Minister for Agriculture & 2 Others [2006] eKLR** wherein courts observed that costs were intended to be reasonable and not to unjustly enrich a litigant.

11. It was the respondent's case that the taxing master properly exercised her discretion in awarding the applicant the sum of Kshs. 8,400/= as instruction fees considering that the respondent herein is a County Government and thus a public body which should not be burdened with heavy costs as such costs would be transmitted to the tax payers thereby leading to loss of public funds.

12. It was the respondent's position that the amount of instruction fees sought by the applicant was manifestly excessive, erroneous and contrary to the spirit of the ARO.

13. The genesis of the application before the court is the taxation of the advocates client bill of costs that followed the applicant's application dated 5th August 2011 made under Section 36 of the Arbitration Act 1995 and Rule 6 of the Arbitration Rules 1997 and Section 256 of the Local Government Act (Cap 265 Laws of Kenya) wherein the applicant sought orders for the adoption of the award of the Minister of Local Government dated 9th May 2004 as the award of the court. The said award sought to be adopted, which award was reduced into a decree of the court upon adoption, was as follows:

a. The County Council of Narok do and is hereby directed to pay a sum of Kshs. 12 Million to Transmara County Council, within a period of Six (6) years from the date of the report at the rate of Kshs. 2 Million per year.

b. The County Council of Narok do and is hereby directed to pay Transmara County Council a further sum of Kshs. 2,982, 867/= being the share of revenue collected during the transition period, within a period of two (2) years effective from the date of the Report.

2. THAT the applicant be and is hereby granted leave to enforce the award made on 9th February, 2004 by the Arbitrator herein, namely the Minister for Local Government as a decree of this Court.

3. THAT the costs of this application shall be in the cause.

14. What this court finds baffling is how the applicant herein arrived at the figure of over 1 billion shillings to be the value of the award made by the Arbitration Tribunal. From the applicant's submissions before the taxing master, it would appear that the applicant decided to unilaterally attach certain values to properties that were not even named or listed in the arbitration award thereby arriving at the colossal sum of Kshs. 1,420,049,460/= as the amount awarded by the arbitration presided over by the Minister for Local Government.

15. It is however abundantly clear from the said award that the actual amount awarded in Kenya shillings was 2,982,667/= only while the value of the land was Kshs. 12 million which the minister directed ought to be paid to the applicant at Kshs. 2 million per year spread over a period of 6 years. In sum therefore the actual total monetary award made to the applicant by the arbitration tribunal was Kshs. 14,982,867/= and not Kshs. 1,420,049, 460/= as claimed by the applicant.

16. It is therefore my finding that the applicant's claim that the award in question was in respect to an amount exceeding 1 billion is erroneous misleading and not a true reflection of the arbitral award.

17. **Rule 11 (1) and (2) of the ARO** stipulates as follows:

Objection to decision on taxation and appeal to Court of Appeal

(1)Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2)The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

18. The Procedure to be adopted by an aggrieved party to taxation is specific that the said party must write to the Taxing Master, within 14 days of the ruling on taxation, a Notice of Objection specifying the items in the Bill of Taxation in respect of which he is aggrieved and requesting the Taxing master to give reasons for his decision. I find that the applicant adhered to the above procedure in objecting to the taxation as he filed his objection within the stipulated period. I similarly find that the taxing master complied with the rules in responding to the objection and directing the applicant to note that the reasons for her decision were contained within the ruling itself. However even assuming that the taxing officer can be deemed not to have given reasons for her decision as is envisaged by the rules, the Courts' power under paragraph 11 of the Advocates (Remuneration Order) is meant to be exercised to meet the ends of justice so that the objector is not barred from filing a reference in such circumstances. See the Court of Appeal's decision in **Kipkorir, Titoo & Kiara Advocates v. Deposit Protection Fund Board [2005] 1KLR 528** where the implication of a Taxing Officer's failure to record and/or furnish reason for his/ her decision was discussed as follows:-

“If a taxing officer totally fails to record any reasons and to forward them to the objector as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”

As I have already stated in this ruling, the applicant's main argument was that the taxing master did not

comply with the provisions of **Schedule VI A (1) of the ARO** thereby awarding a lower figure of Kshs. 8,400/= for instructions fees instead of Kshs. 434,667/= that was sought by the applicant. It is thus apparent to me that the applicant seeks orders that this court interferes with the taxing master's order on taxation by reversing the same in respect to the items that he has listed in the application. It is however trite law that an appellate tribunal, which the Judge in chambers in respect of a taxation ruling, will not ordinarily interfere with the exercise of discretion by the Taxing Master unless the latter's decision:

i. Was in error of principle or

ii. The sum allowed is so high or excessive or so low that it clearly is unreasonable and will have been contrary to the existing principle. See generally First American Bank of Kenya Vs Shah and others [2002] E.A.L.R 64, Steel Construction Petroleum Engineering E A Ltd Vs Uganda Sugar Factory [1970] E A 141, Kamunyi & Company advocates Vs Mully Children Trust and another (Ruling No 1) High Court Misc. App 936 of 2010 [2012] e KLR.

19. The costs that are the subject of these proceedings were in respect to an application for adoption of an arbitral award.

20. I note that the Taxing Master relied on the **ARO of 2009** and in particular **Schedule VI (I) (K)** which deals with the costs to be awarded in respect to the presentation of an award by an arbitrator. My finding is that the Taxing Master did not err in principle, in relying on the provisions of **Schedule VI I (K) of the ARO** when assessing the instruction fees so as to warrant the intervention of this court as the said schedule is very clear on the amount to be awarded for presentation of arbitrator's award.

21. Taking into account all the facts and circumstances discussed hereinabove, I do not find merit in this application which I hereby dismiss with no orders as to costs.

Dated, signed and delivered in open court this 24th day of October, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Bosire for the Applicant

Miss Amojong for the Respondent

Omwoyo court clerk