



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

HCC MISC. APPLICATION NO.73 OF 2014

IN THE MATTER OF ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF PARTY AND PARTY BILL OF COSTS

SWARN SINGH (K) LIMITED.....APPLICANT

VERSUS

COMMUNICATIONS AUTHORITY OF KENYA.....RESPONDENT

RULING

The Applicant herein filed a reference by way of chamber summons dated 2nd may 2017. The reference/application is challenging ruling on party and party bill of costs dated 25th may 2016 delivered by the Deputy Registrar Honorable Elizabeth Tonui on 6th March 2017. The application is brought under paragraph 11(2) of the Advocates Remuneration order 2009, section 1A, 1B and 3A of the Civil Procedure Act application. The reference is in respect to items 1, 2 and 4 of the party and party bill of costs. The Respondent filed grounds of opposition dated 12th June 2017. Both parties filed written submissions. The Respondent's Advocate while highlighting submissions indicated that they are in agreement with the Applicants that there is error on item 4. Applicants Counsel submitted that the taxing master correctly found that cost for perusal of bundle of documents adding up to 896 folios was erroneously calculated as Kshs. 735 instead of Kshs. 37,632. This was not challenged.

What remains for Courts determination is item 1 and 2. Counsel for the Applicant submitted that 2 applications were filed in Court; one was to set aside arbitral award and the second application to adopt arbitral award as the judgment of the Court. He submitted that the subject of this reference is instruction fee in respect of the two applications. He added that that the taxing master awarded instruction fee of Kshs. 50,000 on each application whereas the Applicant had drawn a bill of Kshs. 909,273.20 for the first application and Kshs. 400,000 for the second application. He submitted that the taxing master was right in taxing the instructions fee under schedule 6 paragraph j; he however added that the minimum fee provided is Kshs. 50,000 and that in any matter where parties have come to Court to challenge the arbitral award the minimum is Kshs. 50,000 irrespective of the subject but the problem with the drafters is that there is no scale of weighing the weight of the subject matter. He submitted that Kshs. 50,000 is not a weighing scale in a matter where the subject matter is well defined. He argued that in such a case the scale fee provide a proper guide. He submitted that Court has to give weight to the subject matter bearing in mind the minimum of Kshs. 50,000. He cited the case of *Joreth Limited vs Kigano & Associates Civil*

Appeal No.66 of 1999 where the Court held as follows;

“taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”.

The guiding principles to be applied by the taxing officer while assessing costs are set out in **Ramesh Naran Patel vs Attorney General and Another, constitutional Appl.1 of 2009** where the Court held as follows;

“The guidelines or principles to be applied by a taxing officer to be applied by a taxing officer in exercise of his discretion to increase instruction fee are clear. He must demonstrate in his ruling the reasons for increase of fees-

- 1. care and labor required by the Advocate**
- 2. specify the number and length of papers to be perused**
- 3. the nature and importance of the matter**
- 4. the value(where ascertainable) of subject matter**
- 5. interest of the parties**
- 6. complexity of the matter**
- 7. Novelty of the matter.**

Counsel for the Applicant submitted that volume of papers dealt with was enormous. He also submitted that the matter had remained unresolved for 8 years and that the arbitral award was of 45million but together with interest it added up to 65million;that the Applicant would have lost 65million if the arbitral award was set aside. He cited the case of **Kenyariri & Associates vs Salama Beach Hotel Limited and 3 others, Misc. Appl. No. 770 of 2013** where the Court held that **taxation is entirely a matter of opinion[h1] based on experience and not a mathematical exercise and that a Court will only interfere with the taxation if the taxation is so high or so low to amount to injustice to one party or the other.** He submitted that Kshs. 50,000 was too low as to occasion injustice to the Applicant. He submitted that the figures of Kshs. 909,273.20 and 400,000 for item 1 and 2 respectively were fair charges for work involved in this matter.

Counsel for the Respondent submitted that Courts will interfere with taxation only where the taxing master misdirected himself on principle and will not interfere or quash quantum. She argued that the Applicants Counsel has not indicated where the taxing master misdirected herself. She said the schedule states the minimum and what Counsel is asking is that a scale be put in the minimum. On complexity of the matter she said Counsel for Applicant had conduct of arbitral proceedings and he therefore had the documents and was familiar with the matter. On 8 year period the Applicant would have lost in arbitration if the application to set aside was allowed, she submitted that what was before Court was not arbitral proceedings. She submitted that the Applicant was awarded costs of arbitral proceedings by the arbitrator. She quoted the 9.2 of the arbitral award which state as follows;

“9.2 The total of Kenya shillings two million seven hundred eighty three thousand two hundred seventy five (Kshs. 2, 783,275) being costs of this reference shall be borne by the Respondent. Any sum paid by claimant shall be reimbursed by the Respondent.”

She submitted that the taxing master correctly found that the applicable schedule was schedule VI paragraph 1(k) of the Advocates Remuneration order 2009 as opposed to paragraph 1 (a) or (b) as argued

by the Applicant. Counsel for the Respondent argued that instruction fee is charged once and it is inappropriate for the Applicant to use enforcement proceedings to seek additional instruction fee. She cited the case of *Kanyotu vs Abuodha & Omino Advocates (2013) eKLR* where the Court held that while assessing Advocate –client bill of costs, the taxing officer committed an error in principle when she assessed the instruction fees on the basis of the value of the entire estate as opposed to provision of Remuneration order with respect to other applications or proceedings under the law of succession.

Counsel for the Respondent submitted that basing the instruction fee on the arbitral award would amount to being excessive and run counter to principles of affordable and accessible justice; that allowing the Applicant to claim Kshs. 1,309,273.20 in addition to the amount the Respondent has already expended in arbitration fee would amount to unjust enrichment in the eyes of a reasonable man. She urged Court to follow the decision in *Republic vs Public procurement and Administration Review Board & 2 others Ex-Parte Sanitam Services(E.A)Limited(2015) where Odunga J found that the decision of the taxing officer was not based on an error of principle and neither was the fee awarded manifestly low to justify interference.*

Counsel for plaintiff reiterated that there is error on principle when the deputy registrar failed to weigh the matter according to the issues he submitted.

What I consider to be in issue is whether the taxing officer erred in principle when she assessed instruction fee without basing her assessment on the arbitral award. It is not disputed that what before the High Court for consideration were 2 applications; one to set aside arbitral award, and the other to adopt the award as judgment of this Court. There is no dispute that the Applicant was awarded Kshs. 47,284,879.45. The arbitrator further awarded costs of Kshs. 2,783,370. That covers proceedings before the arbitrator.

The bill before the taxing master relate to the two processes before Court enumerated above. Parties herein are agreeable that the 2009 remuneration order is applicable in this case. Schedule V1 paragraph 1 (k) provide for minimum fee of Kshs. 8,400 to set aside arbitral award. It calls for taxing master to exercise discretion while computing costs while considering complexity of the matter. Assessment of instruction fee cannot be based on value of subject matter as rightfully found by the taxing master. I do not see any error in principle committed by the taxing master as it relate to the two items. She exercised her discretion and awarded Kshs. 50,000 on each application an amount which is far beyond the minimum provided for such applications. In arriving at that amount I believe the taxing master considered the nature and complexity of the matter. I find that the decision made by the taxing master was not made in error. I do not find the amount awarded manifestly low. Considering that the Applicant has already been awarded costs for the arbitral proceeding awarding again on the basis of the subject matter will amount to double enrichment resulting in injustice on part of the Respondent. I decline to interfere with taxation in respect of item 1 & 2. As concern item 4 the same to go back to the taxing master for correction the error.

Dated and Delivered at Nairobi this 13th day of October 2017

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT

.....COUNSEL RESPONDENT

[h1]