



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 2 OF 2013

JOB KIPKEMEI KILACH.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE ETHICS & ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The main petition was dismissed on 18th June 2014. The respondents were awarded costs. The 2nd respondent filed a party and party bill of costs on 4th February 2015. On 27th October 2015, the taxing master of this court assessed the bill at Kshs 205, 598 to be paid by the petitioner.
2. The petitioner is aggrieved by the award of instruction fees to the 2nd respondent in the sum of Kshs 100,000. The petitioner has filed a notice of motion dated 10th November 2015. He prays that the 2nd respondent's bill of costs be "*quashed or re-taxed*".
3. The point taken is that learned counsel for the 2nd petitioner is under full time employment of the commission. As in-house counsel of a State corporation, she is not entitled to instruction fees. The petitioner submitted that it would amount to sharing legal fees with an unqualified person contrary to the Advocates Act. Those matters are buttressed by a deposition of the petitioner sworn on 10th November 2015.
4. The application is contested. The 2nd respondent has lodged grounds of opposition dated 24th November 2015. In a nutshell, the respondent contends that it was awarded costs by the superior court; that the application is misconceived and incompetent; that the taxing master exercised her discretion judiciously; and, that the motion is a ploy to sit on appeal against the decision of the High Court of 18th June 2014.
5. On 4th February 2016, the learned counsels for both parties made brief oral submissions. I have considered the notice of motion, deposition, grounds of opposition and the rival submissions.
6. The petitioner requested for reasons of the taxation on 2nd November 2015. The motion was presented on 10th November 2016. Rule 11 of the Advocates (Remuneration) Order requires that a reference be made within 14 days of the decision or 14 days of receipt of the reasons for taxation. I am satisfied that the motion for review was presented within the prescribed time.
7. The narrow and *key* question for determination is whether the taxing master erred by awarding *instruction fees* to *in-house counsel*. All the other items in the bill of costs are *not* challenged. Learned counsel for the petitioner Mr. Chebii confirmed as much. It is not contested that Mr. Olola and Mrs. Christine Natome are *in-house counsel* for the 2nd respondent. They represented

- the commission in the petition. The High Court awarded costs to the 2nd respondent. The 2nd respondent was entitled to be represented by counsel. And, there was no bar to Mr. Olola or Mrs. Natome from doing so.
8. However, *instruction fees* are meant to *compensate* a party for *expenses* paid to his advocate. In this case, the commission did not instruct external lawyers: it utilized the services of its salaried employees. The documents filed by the lawyers were *not* drawn in the names of a professional firm *but* in the name of the commission. See section 39 of the Advocates Act. The commission thus fell in the genre of a party acting in *person*. The other danger is that the instruction fees may end up in the pocket of the 2nd respondent; and, raise the specter of *sharing* fees with an *unqualified* person in violation of sections 41 and 43 of the Advocates Act. I thus readily find that it was not entitled to the item of instruction fees of Kshs 100,000. See Commissioner of Lands v Odinga [1972] E.A 125.
 9. In a synopsis, the 2nd respondent was only entitled to the disbursements and other costs *other than* instruction fees. I accordingly review the decision of the taxing master dated 27th October 2015. I *set aside* the award of Kshs 100,000 being instruction fees. All the other items in the certificate of costs were *not* challenged and are accordingly *upheld*. The upshot is that the petitioner shall only pay costs in the sum of Kshs 105,598 to the 2nd respondent. In the interests of justice, each party shall bear its own costs of this motion.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 25th day of February 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

No appearance for the petitioner/applicant.

Mrs. Natome for the 2nd respondent instructed by the Ethics & Anti-Corruption Commission.

Mr J. Kemboi, Court clerk.