



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
THE ELECTIONS ACT 2011
PETITION NO. 1 OF 2013

AND

ELECTIONS FOR THE SENATOR FOR BOMET COUNTY

NICHOLAS KIPTOO ARAP KORIR SALAT.....PETITIONER.

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

WILFRED ROTTICH LESAN.....2ND RESPONDENT

ROBERT SIOLEI

COUNTY RETURNING OFFICER, BOMET COUNTY.....3RD RESPONDENT

KENNEDY ONCHAYO.....4TH RESPONDENT

WILFRED WAINAINA.....5TH RESPONDENT

PATRICK WANYAMA.....6TH RESPONDENT

MARK MANKO.....7TH RESPONDENT

ABDIKADIR SHEIKH.....8TH RESPONDENT

RULING

1. The applicant was the 2nd respondent in this matter. He filed a bill of costs dated 20th September, 2013. In his ruling dated 16th February 2016, the taxing master taxed the bills of costs before him including that of the 3rd – 8th respondents which was also before him, at Kshs.3,000,000.00, to be shared equally between the 1st, 3rd – 8th respondents on the one hand, and the 2nd respondent, the present applicant, on the other hand, the implication being that the 2nd respondent’s bill of costs was taxed at **Kshs. 1,500,000.00.**

2. Dissatisfied with this decision, the 2nd respondent filed the application dated 29th February 2016,

brought under the provisions of Rule 11(2) of the Advocates Remuneration Order 1962, in which he seeks the following orders:

1. That this Honourable Court be pleased to set aside the decision of the taxing officer delivered on the 16th day of February, 2016 as far as the same relates to taxation on the objector's Bill of Costs dated 20th September, 2013, the quantum awarded thereon and the reasoning with respect to the said award.

2. That this Honourable Court be pleased to re-tax the said Bill of costs.

3. That in the alternative to prayer 2 above, this Honourable Court be pleased to remit the bill of costs dated the 20th September, 2013 for re-taxation before a different taxing officer with appropriate directions therefore

4. That the costs of the application be provided for.

3. The application is expressed to be based on the following grounds:

1. The learned taxing officer erred in law and principle by making to tax every item in the bill of costs.

2. The learned taxing officer erred in law and principle to take into account the proviso under schedule VI of the Advocates (Remuneration)(amendment) Order, 2009 which requires the taxing officer to take into consideration the nature and importance of the matter, the amount involved, the interests of the parties as well as the general conduct of the proceedings.

3. The learned taxing officer erred in principle by failing to consider the objector's submissions particularly on item no.1.

4. The fee awarded by the taxing officer is manifestly low that it was based on an error of principle.

5. The learned taxing officer erred in principle by taking into account irrelevant factors and failing to take into account relevant factors in taxing the objector's bill of costs.

6. The learned taxing officer erred in principle by failing to consider that every case must be decided on its own merit and in every variable degree.

4. The application is supported by an affidavit sworn by the applicant's Advocate, Mr. Brian K. Langat, sworn on 29th February 2016.

5. In his affidavit, Mr. Langat avers that his firm was in conduct of the matter on behalf of the applicant, and that he was fully conversant with the matter. He further avers that the applicant is dissatisfied with the decision of the taxing officer dated 16th February, 2016 as it defies the basic principles of taxation. In particular, it is his averment that the taxing officer erred in law and principle by failing to tax every item in the bill of costs, by failing to take into account the proviso under Schedule VI of the Advocates (Remuneration) (Amendment) Order, 2009 which requires the taxing officer to take into consideration the nature and importance of the matter, the amount involved, the interests of the parties as well as the general conduct of the proceedings.

6. It is also his averment that the taxing officer erred in principle by failing to consider the objector's submissions, particularly on item no.1 of the bill of costs. He avers that the fee awarded to the applicant is so manifestly low that it was based on an error or principle. Finally, he contends that the taxing officer erred in principle by taking into account irrelevant factors and failing to take into account relevant factors in taxing the objector's bill of costs.

7. In submissions filed on behalf of the applicant dated 17th May 2016, it is submitted that this court should address itself to the following issues:

1. Whether the taxing officer erred in law and principle by failing to tax every item in the bill of costs.

2. Whether the taxing officer took into account irrelevant factors and/or failed take into account relevant factors while taxing the bill of costs.

3. Whether the sum awarded is inordinately low in the circumstances.

4. Whether the decision of the taxing officer should be set aside and the bill of costs re-taxed.

8. With respect to the first issue, the applicant submits that a glance at the decision of the taxing officer reveals that he addressed himself only to the first item on the bill of costs, leaving 130 item untaxed. The submission is therefore that this is an error by the taxing officer that is sufficient to render the entire taxation process flawed as it goes against the basic tenets of taxation where the taxing officer is obligated to consider every item in the bill of costs.

9. The applicant submits with respect to the second issue, namely that the taxing officer took into account irrelevant matters, that the Election Court did not limit the amount of costs to be awarded to the respondents, but the taxing officer took it upon himself to limit the costs. His submission is therefore that this was an irrelevant factor that the taxing officer took into account.

10. According to the applicant, the bill of costs emanated from an election petition, and there is no specific scale under the Advocates (Remuneration) (Amendment) Order, 2009 for taxation of bill of costs emanating from election petitions. It is his contention therefore that the taxation of bills of costs emanating from election petitions should be based on Schedule V of the Advocates Remuneration Order.

11. The applicant argued further that election petitions are special proceedings that must be heard and determined within six (6) months of filing; that they also required a huge amount of time for research and preparation involving collating and analyzing election material in an entire county; and that this required the employment of four (4) Advocates in order to effectively deal with all the issues involved in the petition within the shortest time possible.

12. The applicant further took the view that his bill of costs was of a special and distinct nature, and that Schedule VI of the Advocates Remuneration Order does not apply to the instructions fees as the judgment is not pegged on a pecuniary sum of money. In his view, the instructions fee should be assessed on the basis of Schedule V, and should be guided by the judicial trends in election petitions.

13. According to the applicant, the principles upon which instructions fees is taxed are well settled and they include the care and labour required, number and length of paperwork involved, nature and importance of the matter, interest of the parties, difficulty or complexity of the matter and the general conduct of the proceedings. He relied for this submission on ***Kuloba J*** (as he then was) in his book ***Judicial Hints on Civil Procedure*** at pages 132- 137.

14. On the last issue, that the amount awarded is inordinately low, the applicant submitted that election petitions are matters of immense public importance, and that section 75 (2) of the Elections Act, No. 24 of 2011 has set a timeline of six (6) months within which they are to be heard and determined. His submission was therefore that it will require a lot of skill and labour to effectively undertake the task within the set timeline. In his view, an award of Kshs 1,500,000.00 all-inclusive is a drop in the ocean for such a daunting task. According to the applicant, one of the tenets of taxation of costs is that awards should be such as to encourage new entrants into the profession, and the award in this case was highly discouraging and should be reviewed upwards. He urged the court to set aside the decision of the taxing officer dated 16th February, 2016 and have the bill of costs re-taxed.

15. In response, the petitioner filed submissions dated 21st June 2016. In his view, the following were the issues that arose for determination:

a) Did the taxing officer err in law and principle in his ruling dated 26th February, 2016 when taxing the objector's bill of costs?

b) Should the honourable Court interfere with the taxing officer's decision on taxation?

16. With respect to the first issue, the respondent's submission was that in taxing the objector's bill of costs, the taxing officer was to be guided by the Advocates' Remuneration Order. He also had discretion on the award of costs.

17. The respondent relies on section 34 (1) of the **Election (Parliamentary and County Assemblies) Act** (though I believe the reference is to the rules) to submit that the court determining the petition out of which this reference arose did not provide the costs payable to the applicants but left such costs to the discretion of the taxing officer.

18. It is his contention, further, that under section 35 (1) of the same Act, (sic) it is provided that the Registrar shall tax costs of an election petition in the same manner as costs are taxed in civil proceedings and in accordance with the Civil Procedure Act. His submission therefore is that the decision of the taxing officer should not be interfered with.

19. On the question whether the court should interfere with the decision of the taxing officer, the respondent relied on the decision of the court in **Paul Semogerere & Another vs Attorney General SCCA No.5 of 2001** in which the Court stated as follows:

"... In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which, sometimes, are against one another, in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that the advocates' remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for the intricate balancing exercise that the taxing officer's opinion on what is reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference".

20. He also referred the Court to the words of the Court in the Case of **Premchand Raichand Limited and Another vs Quarry**

Services of East Africa Limited and Another (1972) EA 162 in which it was stated:

"The taxation 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, and particularly where he is an officer of great experience, merely because it thinks the award is 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."

21. It was his submission that the applicant had not laid a sufficient basis for the court to interfere with the decision of the taxing officer, which the respondent views as legally sound. According to the respondent, the taxing officer properly directed himself in assessing item 1 of the applicant's bill of costs at Kshs. 3,000,000.00 given that the minimum provided for is Kshs. 42,000.00.

22. The respondent further submitted that the applicant had not shown that the matter was complex, and

the mere fact that time was spent in research cannot be a yardstick for determining the complexity of the matter.

23. Finally, the respondent urged the court to be guided by the principles set out in **First American Bank of Kenya vs Shah and Others (2002) EALR 64 at 69** and, **Premchand Raichand Limited and Another vs Quarry Services of East Africa Limited and Another (supra)** with respect to the legal parameters within which a court can interfere with a taxing officer's decision. He urged the court to dismiss the application with costs.

Analysis and Determination

24. I have read and considered the application before me, the affidavit in support and the respective submissions of the parties. I have also considered the authorities relied on by the parties.

25. The parties have proposed different issues as falling for determination in this matter, which I have set out earlier in this judgment. However, having considered the two sets of issues, I believe that the matter can be dealt with under four heads:

- a. Whether the taxing officer erred in law and principle in taxing the applicant's bill of costs.*
- b. Whether the taxing officer took into account irrelevant factors and/or failed take into account relevant factors while taxing the bill of costs.*
- c. Whether the sum awarded is inordinately low in the circumstances.*
- d. Whether the taxing officer erred in law and principle by failing to tax every item in the bill of costs.*

Whether the taxing officer erred in law and principle in taxing the applicant's bill of costs

26. The first question that this Court should address itself to is the issue of the applicable principles with respect to the taxation of costs. The decision in the case of **Premchand Raichand Ltd v Quarry Services of East Africa Ltd** cited above sets out the principles to be considered in the assessment of costs. These principles are :

- (a) That costs should not be allowed to rise to a level as to confine access to justice to the wealthy,*
- (b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur,*
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession,*
- (d) so far as practicable there should be consistency in the award made and,*
- (e) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.*

27. In the case of **Joreth Limited v Kigano & Another [2002] E.A. 92** the court set out the factors to be taken into consideration in determining the instruction fees. These are the importance of the matter, the general conduct of the case, the nature of the case, the time taken for its dispatch and the impact of the case on the parties.

28. In his decision in **First American Bank of Kenya vs Shah and others [2002] E.A.L.R 64 at 69**, Ringera J (as he then was) expressed the following view:

“First, I find that on the authorities, 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”.

29. I have considered the decision of Hon. Soita which was delivered by the Deputy Registrar of this Court on 16th February, 2016. In considering the instructions fees, which he notes had been charged at Kshs.57,638,970.00 by the 2nd respondent and Kshs.10,422,511.00 by the 1st, 3rd – 8th respondents, the taxing officer stated as follows:

“In taxing costs one must be guided by the principles of assessing costs developed over time which in summary require that costs awarded must be reasonable and must not confine access to courts of law to only the wealthy. In a nutshell, costs should be fair and not prohibitive. They should also be consistent and predictable.”

30. As is evident from the decisions of the court set out above, these are the principles that the taxing officer is required to consider in assessing instructions fees. He did not therefore, in my view, fail to consider the principles that have been established and generally accepted as the applicable principles in assessment of costs. Consequently, I would determine the first issue in favour of the petitioner /respondent.

Whether the taxing officer took into account irrelevant factors and/or failed take into account relevant factors while taxing the bill of costs.

31. The applicant alleges that the taxing officer failed to take into account relevant matters, and took into account irrelevant matters. His submissions are that the Election Court did not limit the amount of costs to be awarded to the respondents, but the taxing officer took it upon himself to limit the costs, and in his view, this was an irrelevant matter that the taxing officer took into account.

32. I have considered the ruling of the taxing officer with regard to the costs. In his ruling, he considers the costs awarded in various decisions in election petitions arising out of the 2013 elections as compared to past elections and concludes that the trend was for costs in elections petitions to go down. He expressed himself in this regard as follows:

“The 2nd Respondent relied on the Case of Ayumba Juma Mwakesi vs Makwere Chirau Ali High Court Election Petition No.1 of 2008 where the taxing officer awarded Kshs.9,000,000.00 as instructions fees on 23rd March, 2011 and William Kabogo Gitau vs George Thuo & 2 Others High Court Election Petition No.10 of 2008 where the taxing officer awarded Kshs.18,000,000.00 as instructions fees on 4th November, 2010.

The 1st, 3rd – 8th Respondents relied on the authority of Rashid Hamid Ahmed Amana vs IEBC & 2 Others Malindi High Court Petition No.6 of 2013 where Kshs.2,500,000,00 was awarded as instructions fees.

Clearly from the authorities cited, the trend on instructions fees for election petitions of late has changed. All the recent authorities cited, the fees awarded did not go above Kshs.3,000,000,00.”

33. In my view, the taxing master did not take into account irrelevant matters, having considered the very high costs awarded in past elections which the applicant in this case had cited, and noting that recent decisions were in the region of Kshs 3,000,000 which he properly, in my view, awarded the applicants.

Whether the sum awarded is inordinately low in the circumstances.

34. I have already set out above the reasoning of the taxing officer in making its assessment of the costs due to the applicant in this matter. As I have observed above, the amount of costs awarded in respect of

the instructions fees was in keeping with the awards made in other similar matters. Consequently, this issue must also be determined in favour of the petitioner.

Whether the taxing officer erred in law and principle by failing to tax every item in the bill of costs

35. The final issue for consideration is whether the taxing officer erred in failing to tax every item in the bill of costs. I have noted that though lengthy submissions were filed before him which addressed, among other things, the specific items charged in the applicant's bill of costs, the taxing officer confined himself to the fees payable as instructions fees. Under the Advocates Remuneration Order, the taxing officer is required to tax each item. To this extent therefore, the taxing officer erred by failing to tax each of the items in the 2nd respondent's bill of costs,

36. The upshot of my findings above is that this application partially succeeds. It is hereby referred to the taxing officer of this court to tax the remaining items in the 2nd respondent's bill of costs dated 20th September 2013.

37. Each party shall bear his own costs of this application.

Dated, Delivered and Signed at Kericho this 28th day of October 2016.

MUMBI NGUGI

JUDGE