



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT GARISSA**  
**ELECTION PETITION NO. 1 OF 2013**

**MOHAMED ALI MURSAL.....PETITIONER**

**VERSUS**

**SAADIA MOHAMED.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**AHMED ABDULLAHI MOHAMAD.....3<sup>RD</sup> RESPONDENT**

**RULING**

Before me is an application by way of Chamber Summons dated 18<sup>th</sup> July 2014 filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The application was brought under Article 159 of the Constitution of Kenya 2010 and Section 1A, 1B, 3B of the Civil Procedure Act (Cap 21), as well as Order 50 rule 6 of the Civil Procedure Rules 2010 and Order 11(2) of the Advocates Remuneration Order. It seeks the following orders

- 1. THAT this Honourable court be pleased to enlarge the time within which to lodge this application.**
- 2. THAT this Honourable (Court) do grant the 1<sup>st</sup> and 2<sup>nd</sup> respondent costs of at least Kshs. 600,000/- each.**
- 3. THAT this Honourable court be pleased to review the orders of the Deputy Registrar made on 7<sup>th</sup> April, 2014.**
- 4. THAT this Honourable court do grant any other relief as it deems fit.**
- 5. THAT the costs of this application be in the cause.**

The application has grounds on the face of the Chamber Summons. The grounds are that the Deputy Registrar misdirected himself when taxing the 1<sup>st</sup> and 2<sup>nd</sup> respondents bill of cost by assessing the value of the subject matter (while it was an election petition) to be two million Kenya shillings (Kshs. 2,000,000). Secondly that the Deputy Registrar failed to take into account the nature, importance and complexity of an election petition. Thirdly, that the Deputy Registrar failed to take into consideration that

the High Court had ordered that the 2<sup>nd</sup> respondents costs be capped at one million Kenya Shillings (Kshs. 1,000,000/-) each. Fourthly, that the Deputy Registrar's decision was not just and proper in the circumstances. Lastly, that the respondents were only able to get a copy of the Deputy Registrar's reasons on 2<sup>nd</sup> July, 2014.

The application was filed with an affidavit sworn on 18/07/2014 by Joseph Mwangi advocate for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It was deponed therein inter alia that in the Wajir gubernatorial election petition filed by the petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had to go through numerous documents to ascertain the veracity of allegation put forth. That their advocates were forced to interview all the Returning Officers in Wajir County to prepare a response to the petition. That they filed a response constituting 342 pages.

That the hearing of the petition, excluding interlocutory applications, took at least two weeks. That the court ultimately dismissed the petition with costs and ordered that the 1<sup>st</sup> and 2<sup>nd</sup> respondents be paid costs capped at Kshs. 1,000,000 each. It was also deponed that the Deputy Registrar erred in taxing the 1<sup>st</sup> and 2<sup>nd</sup> respondents bill of costs at Kshs. 604,287/-. That the Deputy Registrar did not take into account the complexity of the case and erroneously failed to take into account that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were separate parties. That it was clear from the reasoning in the taxation that the Deputy Registrar erred in determining the value of the subject matter at Kshs. 2,000,000/-. That the Deputy Registrar did not demonstrate how he arrived at Kshs. 400,000/- for item 1 of the Bill of costs. That the taxed amount fell far below the amount spent by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in defending the petition.

The application is opposed. The petitioners counsel filed grounds of opposition on 8<sup>th</sup> October, 2014. The said grounds of opposition are as follows:

- 1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents application is fatally defective and invalid for failure to comply with the provisions for Rule 11 of the Advocates Remuneration Order**
- 2. The prayers sought cannot issue and are without any basis in law as the power to tax bills of costs is vested only in the taxing officer of the court and not the judge.**
- 3. No good grounds have been set out to warrant a grant of the orders sought.**
- 4. The application as drawn, filed and taken out is otherwise wholly misconceived vexatious and entirely an abuse of the process of the court.**

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and counsel for the petitioner filed written submissions to the application. Mr. Mwangi who appeared in court for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Mr. Mumbo for the petitioner relied on the written submissions filed.

In the written submissions M/S Garane & Associates Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, gave a background of the matter. Counsel submitted that the petitioner had made very serious accusations concerning the way elections were conducted in all Constituencies within Wajir county. That the advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents had to interview all six Returning Officers and many of the Presiding Officers Counsel submitted that the petition was quite complex and that it took over two weeks to go through documentation and respond comprehensively. Counsel emphasized that the advocates had to go through all the forms 35 and prepare a response constituting close to 500 pages. Further affidavits had also to be filed. There were also three preliminary applications heard. Counsel submitted that the 2<sup>nd</sup> respondent IEBC transported ballot boxes by road and their witnesses to Garissa. Counsel then made their way to Garissa for the trial which lasted over three weeks. Counsel, submitted that when the petition was finally dismissed, the court capped the costs of each of the two respondents at Kshs. 1,000,000/- (one million) each.

Counsel submitted further that the application was not fatally defective. Counsel contended that after

they became aware of the taxation, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an objection on 28/04/2014 to which the Deputy Registrar in writing gave the reasons to justify his findings. That was why they now filed the present application on 21/07/2014. There was thus no inordinate delay. Counsel urged this court to invoke the provisions of Rule 11(4) of the Advocates Remuneration Order which gives the court discretion to enlarge time for taking any step under sub paragraph (1) and (2) of the said rule.

Counsel also submitted that this court had the power to review taxed costs. Counsel relied on the provisions of Rule 11(1) and (2) of the Advocates Remuneration Order 2009.

On whether the application had merits, counsel submitted that in the reasons for the taxation dated 26/05/2014, the Deputy Registrar stated that the value of the subject matter was Kshs. 2,000,000 and as such the minimum fees was kshs. 92,000/-. The Deputy Registrar thereafter totally contradicted himself by stating that the value of the subject matter could not be ascertained and went ahead to tax Kshs. 400,000/- as the costs for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Counsel contended that the Deputy Registrar should have applied Rule 1(G) of Schedule VI of the Advocates Act, which provided for a minimum amount of Kshs. 42,000/- to oppose or present an election petition. In counsels view the Deputy Registrar erred in applying Rule (B) of schedule VI.

Counsel urged this court to be guided by the nature and complexity of the matter in reviewing the taxed costs herein, especially item (1). Counsel relied on a number of cases especially **First American Bank of Kenya vs. Shah & Others (2002) EA 64.**

Counsel also relied on the case of **Suleiman Said Shabhal vs. IEBC & 3 Others Mombasa HC Election Petition 8 of 2013 eKLR** where costs awarded were Kshs. 3,000,000, and Nairobi Election **Petition No. 1 of 2013 Ferdinand Ndungu vs. IEBC & 8 Others (2013) eKLR** where costs awarded were Kshs. 2,500,000/=.

The petitioners counsel M/S Waruhiu, Kowade & Nganga submitted that this court in exercise of powers conferred upon it by Rule 36(1) of the Election (Parliamentary and County Elections) Petition Rules 2013, capped the costs for each of the 1<sup>st</sup> and 2<sup>nd</sup> respondent on the one hand, and the 3<sup>rd</sup> respondent on the other hand at Kshs. 1,000,000/- subject to taxation. Counsel highlighted the exact words used by the court in capping the costs.

Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to comply with the law in bringing the present application. Counsel submitted that from the record, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not comply with the requirement to give notice of objection within 14 days under Rule 11(2) of the Advocates Remuneration Order. According to counsel, all the documents in the application did not state the date when objection was made to the Deputy Registrar. It was only in the written submissions that counsel made an unsupported allegation that the objection was made on 28/04/2014. Thus both the objection and this application were fatally defective and should be dismissed.

Counsel also submitted that the Taxing Officer under rule 37(1) & (2) of the Election Petition Rules had sole discretion to conduct taxation subject to confirmation of the trial court. Counsel emphasized that the Taxing Officer herein was guided by the provisions of rule 16 of the Advocates Remuneration Order. According to counsel, nothing had been shown by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to demonstrate that the taxing officer erred in exercising the discretion to tax the bill of costs.

With regard to this courts powers of review of taxed costs, counsel relied on the case of **Kipkorir, Titoo & Kiara Advocates, vs. Deposit Protection Fund Board (2005) eKLR** where the Court of Appeal stated that a judge would not interfere unless the taxing officer erred in principle in assessing the costs. Counsel submitted that there was no basis for the request that each of 1<sup>st</sup> and 2<sup>nd</sup> respondents be awarded costs of Kshs. 600,000/=.

Counsel lastly, submitted that the determination of costs was properly within the domain of the Taxing Officer and relied on the case of **Thomas James Arthur – Vs – Nyeri Electricity Undertaking [1961]**

EA 492.

I have considered the application, documents filed, the submissions on both sides and the authorities cited to me.

The first issue is whether the application is finally defective. Both sides have put arguments on this issue. From the record and submissions of the parties counsel, I find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not lodge their objection to the taxation within the 14 days allowed by the rules. However, in my view that default does not render the application fatally defective in the circumstances of this matter, as the delay has not prejudiced any of the parties herein. In my view the tenets of administering substantive justice in this matter, demands that I exercise this court's discretion in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. I dismiss that objection.

Did the Taxing Officer err in the way he awarded to costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents? It has been agreed that the High Court capped the costs of the petition. No complaint or challenge to the capping has been filed in this court or any other court. In my view therefore the taxing officer had to be guided by that capping by the High Court.

A taxation was indeed done with regard to the Bill of Costs for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. A ruling by the Taxing officer was delivered on 12<sup>th</sup> March 2014. This is the ruling that is being challenged.

Though counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, submitted that the Taxing Officer determined the value of the election petition to be Kshs. 2,000,000/=, in my view that was not what the Taxing Officer did. The Taxing Officer merely relied on the amount that the High Court directed to be deposited by the petitioner as security for costs, to guide him in assessing costs. It was Kshs. 2,000,000/=. The counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent has not provided any other or better way of assessing the value. I thus dismiss that complaint.

The counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents has argued that the amount of Kshs. 400,000/= as instruction fees was not based on any tangible considerations. Again counsel has not provided this court with any alternative or better way of arriving at a justifiable figure for instruction fees. I again dismiss that complaint.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents has also argued that the Taxing Officer erred in treating the two respondents as one. I find no fault on the part of the Taxing Officer - because such, in my view was in line with what was directed by the petition court when it capped the costs in the petition by stating in the judgment as follows :-

**“Rule 36 gives this court powers to cap the costs. I have taken into account that this matter proceeded and was concluded expeditiously. There were not many interlocutory applications other than the various objections raised in the course of these proceedings but the court was able to quickly give a ruling within hours in the same day. This cut down on costs of transport and accommodation for parties. This court therefore caps the costs payable to the respondents to a maximum of 2 million Kenya Shillings to be shared equally between the 1<sup>st</sup> and 2<sup>nd</sup> respondents, a maximum of 1 million and the 3<sup>rd</sup> respondent a maximum of 1 million shillings.”**

The underlining is mine. My understanding of the above directive by the petition court is that the court in its wisdom capped the cost for all the three respondents at 2 Million Shillings. The court also stated that the said maximum of 2 Million Shillings would be shared equally on the one hand between the 1<sup>st</sup> and 2<sup>nd</sup> respondent together a maximum of Kshs. 1 million, and for the 3<sup>rd</sup> respondent on the other hand, a maximum of 1 million shillings. Unless the petition court's orders above are varied, the Taxing Officer cannot be blamed for putting the 1<sup>st</sup> and 2<sup>nd</sup> respondents together and appropriately taxing their costs as such, within the maximum ceiling of Kshs. 1 Million Shillings determined by the petition court.

What the 1<sup>st</sup> and 2<sup>nd</sup> respondents are trying to do in this application is to vary the substantive orders of the petition court through this application. That is not possible. The application therefore has to fail.

To conclude, this application has no merits. I dismiss the same with costs to the petitioner.

**Dated and delivered at Garissa this 26<sup>th</sup> February, 2015.**

**GEORGE DULU**

**JUDGE**

In the presence of:

Mr. Bashir for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Mr. Nyaga h/b for Mr. Nthiga for the petitioner

Abdi Mohamed court clerk.