



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**ELECTION PETITION CAUSE NO. 1 OF 2008**

**ESPOSITO FRANCO .....PETITIONER**

**VERSUS**

**AMASON KINGI JEFFAH.....1<sup>ST</sup> RESPONDENT**

**AMINA KALE ..... 2<sup>ND</sup> RESPONDENT**

**ELECTORAL COMMISSION OF KENYA.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This reference was brought by the 1<sup>st</sup> respondent in Election Petition No. 1 of 2008 as a challenge to the decision of the taxing master (TM) delivered on 30<sup>th</sup> November, 2011 in respect of the 1<sup>st</sup> respondent's Bill of Costs dated 26<sup>th</sup> August, 2008. The particular items in contention are numbers 1, 2, 15, 35, 38 and 39. The following sums were awarded on the said items: Shs. 700,000/-; shs. 233,333.30; Shs. 5,040/- and Shs. 2,100/- respectively. Parties to the reference agreed to dispose of it by way of written submissions, however during the mention on 6<sup>th</sup> December, 2012 for that purpose, only the 1<sup>st</sup> respondent had filed submissions.

2. Judgment was initially set for 1<sup>st</sup> March, 2013 but was subsequently adjourned to 8<sup>th</sup> July, 2013, 19<sup>th</sup> February, 2014, 26<sup>th</sup> March, 2014 and finally, 23<sup>rd</sup> June, 2014. The main reasons for the postponement are as follows. The bulk of the early part of the year 2013 was taken up with the vetting exercise to which the judge submitted herself, while the bulk of the middle of the year was taken up by Election Petitions. This court handled three election petitions. In the final part of the year the court was engaged in a national judiciary initiative aimed at clearing old criminal appeals. Early this year the judge was called upon to sit on a five-judge bench in Nairobi Constitutional Petition No. 594 of 2013 Judicial Service Commission and others vs. Speaker, National Assembly and others. The delay in delivering this judgment is regretted.

3. I note from the record that only the 1<sup>st</sup> respondent filed submissions in support of the reference. I propose to deal with the disputed items seriatim.

**Item 1**

The 1<sup>st</sup> respondent has argued that the taxing master's reasoning disclosed a misdirection through which she arrived at the sum awarded. The 1<sup>st</sup> respondent argued inter alia:

**“The upshot is that the Taxing master failed to appreciate the weight of responsibility**

**on the advocates and the inherently strenuous nature of the matter. In R V Minister of Agriculture exparte W’Njuguna & Others – HCCC 621 of 2000 NAIROBI; Ojwang J when referring the bill for fresh taxation enumerated on the guiding principles for taxation as inter alias;**

- i. Nature and importance of the cause or matters**
- ii. Complexity of proceedings**
- iii. Responsibility borne by advocates, and**
- iv. Time spent, research done, skill deployed by counsel...”**

4. The 1<sup>st</sup> respondent argued that by failing to exercise her discretion in a reasonable manner through applications of settled principles, the trial magistrate erroneously denied the 1<sup>st</sup> respondent instruction fees of Kshs. 15,000,000/- as claimed in the Bill of Costs.

5. In considering this appeal the court is alive to the fact that the instruction fees awarded to the advocate ought to be reasonable compensation for professional work done and that courts must guard against unjust enrichment on the part of any party. In the case of **Premchand Raichand Ltd and Anor. V Quarry Services of East Africa Limited and another [1972] EA 162** Spry VP stated as follows:

**“The taxation of costs is not a mathematical exercise, it is entirely a matter of opinion based on experience. Of court will not, therefore, interfere with the award of the taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low. It will only interfere with if it thinks the award so high or so low as to amount to an injustice to one party of the other”**

6. The principle of reasonableness runs through the authorities tendered in this appeal and even before the taxing master. I have perused the reasoning of the taxing master in arriving at the figure of Shs. 700,000/- as instruction fees. I cannot find any misdirections in the said reasoning. The taxing master was clearly alive to the applicable taxing principles and considered carefully the nature of proceedings in the election petition and the purpose of taxation.

7. The complaint by the 1<sup>st</sup> respondent that the taxing master’s decision was primarily based on their alleged failure to tender authorities in support of item 1 is in my opinion inaccurate. In her ruling the taxing master considered a number of authorities in Election Petitions cited in the course of taxation before concluding as follows:

**“The counsel for the 1<sup>st</sup> respondent cited other authorities which I have considered. I find that these authorities are relevant as the bill of costs were in matter of election petition (but) counsel has not submitted any authority with instruction fees like the ones they are claiming” (sic).**

8. In my understanding all that the taxing master was saying is that in none of the authorities cited, albeit election petitions was an award of instruction fees in the sum claimed by the 1<sup>st</sup> respondent allowed. It was not in any way a suggestion that instruction fees were reduced because the 1<sup>st</sup> respondent failed to proffer authorities. In observing as she did, the taxing master in my view was speaking to principles of comparability and consistency, a key consideration in taxation (see **Premchand Raichand Ltd case**).

9. The taxing master’s observation with regard to awards in election petitions determined at preliminary stages must be seen in the same light. The taxing master stated:

**“Looking at the above cited authorities it is clear for election petitions which were determined at preliminary stages, costs awarded do not exceed Kshs. 1000,000/-“ (sic).**

Nowhere did the taxing master state that instruction fees for such election petitions were limited to that sum, as the 1<sup>st</sup> respondent suggests in his submissions.

10. Reading the decision of the taxing master as a whole, it is amply clear that she was alive to and considered the nature and importance of the election petition, complexity of the proceedings, the responsibility borne by and time, research and skill of counsel. In short, I cannot find any reason to fault the decision of the taxing master. It was arrived at upon proper application of the taxing principles to the matter at hand. It cannot be said that the sum of shs. 700,000/- was “so low as to amount to an injustice to one party or the other”.

11. Although this observation is obiter, the new electoral dispute regime has introduced a mechanism for capping of costs in election petitions. This was certainly intended to keep costs at a manageable level so as not to limit access to justice by litigants of moderate incomes. In many petitions filed after the 2013 General Elections that went into full hearing, costs were capped by courts at between shs. 1.5 to shs. 2m. (see for example **Malindi Election Petition No. 1 of 2013 consolidated with Election Petition No. 3 of 2013 Francis Baya and another vs Amason Kingi and others**) where costs were capped at a total of Kshs. 3 Million to be shared equally by the Respondents.

12. The rationale behind these developments is valid today as it was in the pre-2010 Constitution and the Election Act (2012), namely, the fair, consistent compensation of costs incurred by the successful litigants and to deter unjust enrichment through inflated bills of costs.

## **Item 2**

13. With regard to this item, the court correctly took into account the fact that the petition did not go to full trial and awarded the minimum 1/3 of instruction fees. In considering the nature of proceedings relating to the bill of costs the taxing master had stated:

**“The petition did not see the light of day as it was dismissed at preliminary stages. I have perused the proceedings and in particular the ruling dated 10<sup>th</sup> July, 2008 by Hon. N. R. O. Ombija, Judge. The ruling shows that the petition was dismissed mainly on two grounds. That is failure to effect personal service on the 1<sup>st</sup> respondent in time and secondly failure to deposit security. I find that these issues were not complex ....election petitions are a matter of public interest. .... I find that for the petitioner the matter was complex trying to gather evidence and present it before court to sustain the petitions. This may not be said of the 1<sup>st</sup> respondent.”**

My own perusal of the proceedings leading up to the ruling of Ombija J. dismissing the petition with costs confirms the assessment made by the taxing master. In my considered view she exercised her discretion properly in awarding 1/3 of instruction fees under Item No. 2, and I can find no reason to disturb her award.

## **Items 15, 21, 35, 38 and 39**

14. With regard to the above items, the taxing master did not fully justify the awards, save for item 21 in respect of which, she observed that the mention for direction could not have taken the entire day. The 1<sup>st</sup> respondent has pointed out that the taxing master did not take account of the fact that the advocate was based in Mombasa and that travelling to and from Mombasa for attendances would ordinarily take more than half the day. I note from the proceedings before the taxing master that these items were not seriously challenged by the petitioner. However, under paragraph 7(iv) of the Schedule a sum of shs. 10,080/- is payable for a full day attendance on the higher scale.

15. Obviously, there were travelling and other allied expenses involved. Such expenses however must be properly incurred in getting to and from the court. It is not clear whether all these expenses were laid before the taxing master for her consideration. In the circumstances, the 1<sup>st</sup> respondent ought in my view

to be entitled to payments for attendances that take into account travel time, and proper expenses regarding items 15, 21, 35, 38 and 39. Whether these items are to be charged on the higher scale also requires determination.

16. **Paragraph 77 of the Advocates (Remuneration) (Amendment) Order 2006**

The 1<sup>st</sup> respondent is aggrieved by the decision of the taxing master that denied him the taxed costs. Paragraph 77 (1) of the Order provides as follows:

**“If more than 1/6 of the total amount of a bill of costs, exclusive of court fees be disallowed on taxation, the party presenting the bill on taxation may in the discretion of the taxing master be disallowed the costs of such taxation”.**

17. The 1<sup>st</sup> respondent contends that the decision of the taxing master was ultra vires and an abuse of discretion by the taxing master. This they argue amounts to the taxing master sitting on appeal to reverse the decision of the High Court awarding costs upon dismissal of the petition. They contend that the discretion of the taxing master with regard to paragraph 77 is either to award or disallow costs of the taxation of the bill of costs but not the costs of the main suit.

18. The 1<sup>st</sup> respondent invoked decision of Ringera J (as he then was) in **First American Bank of Kenya vs Shah & Others [2002]1 EA 64** to the effect that:

**“I find that on the authorities, this court cannot interfere with the taxing officer’s decision on taxation unless it can be shown that either the decision was based on an error of principle...of course it would be an error of principle to take into account relevant (sic) factors for to omit to consider relevant factors. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment.**

19. On the correct reading of paragraph 77(1) and (2) of the Order, I do agree with the 1<sup>st</sup> respondent’s submissions. The discretion given to the taxing master under the paragraph relates to taxation costs and not to the costs of the main suit. Denying taxed costs to the 1<sup>st</sup> respondent on the basis of paragraph 77 amounts to a misdirection as to the true purport of the paragraph. Costs of the petition having been awarded by the High Court could not be taken away by the taxing master. Her role was merely to tax the same. The taxing master’s interpretation was erroneous and it would be unjust for that decision to be allowed to stand as it effectively denies a successful litigant his rightful costs.

20. For the foregoing reasons the decision disallowing the 1<sup>st</sup> respondent the taxed costs is set aside. Objections relating to items 15, 21, 35, 38 and 39 have merit and are upheld. The Bill of costs is remitted back to the Deputy Registrar (Mrs. Gicheha –SPM) for purposes for taxation of the items 15, 21, 35, 38 and 39 only, as well as a consideration of whether or not the 1<sup>st</sup> respondent is entitled to costs of the taxation under paragraph 77 of the Order. Objections with regard to items 1 and 2 are without merit and are dismissed accordingly. The 1<sup>st</sup> respondent is awarded half the costs of the reference. The reference has succeeded to the extent outlined above.

Delivered and dated at Malindi this 23<sup>rd</sup> day of **June, 2014** in the presence of Mr. Kimani holding brief for Miss Ngugi for the 1<sup>st</sup> respondent, Mr. Otara for petitioner absent.

Court clerk - George

**C. W. Meoli**

**JUDGE**