



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 243 OF 2012

ANDERS BRUEL T/A QUEENSCROSS AVIATION.....PETITIONER

VERUS

KENYA CIVIL AVIATION AUTHORITY1ST RESPONDENT

THE HONUORABLE ATTORNEY GENERAL2ND RESPONDENT

RULING

Introduction

1. In his Chamber Summons application dated 16th October 2013, the applicant seeks to set aside the decision of the taxing master dated 9th October 2013 with regard to the 1st respondent's fees. The application is based on the grounds that the taxing master erred in law and fact in failing to find that the 1st respondent, Kenya Civil Aviation Authority, was not entitled to a sum higher than Kshs28,000/- provided under schedule VI(1) (J) of the Advocates Remuneration Order.
2. The applicant contends further that the taxing officer erred in ascribing a value to the subject matter when the suit was a constitutional petition and not a commercial dispute; in failing to consider and evaluate the applicant's evidence and submissions; in awarding the 1st respondent an amount that was manifestly excessive and contrary to principle and public policy that costs must be maintained at levels that would not restrict access to courts of law to the wealthy; and in reaching a decision that is wholly against the weight of the evidence.
3. The applicant had filed a petition dated 7th June 2012 in which he alleged violation by the 1st respondent of his constitutional rights under various articles of the Constitution. The violations were alleged to have arisen as a result of the cancellation of the registration of two aircrafts alleged to belong to the applicant. After hearing the parties in the matter, the court dismissed the petition with costs to the respondent. It is with regard to the taxation of those costs that the present application arises.
4. The 1st respondent has filed grounds of opposition to the application in which it contends that the application as drawn and taken out is misconceived, bad in law, devoid of merit and amounts to an abuse of the court process; and that the applicant had not received the taxing master's reasons for his decision, contrary to the provisions of Rule 11 of the Advocates Remuneration Order.
5. Both parties filed written submissions dated 21st May 2014 and 5th June 2014 respectively which they asked the court to rely on in rendering its decision on the application.

6. I have considered the application, the submissions of the parties, and the decision of the taxing master dated 9th October 2013. Contrary to the contention by the respondent, the reasons for the taxation are set out in the said decision.
7. In her decision titled “Ruling and Reasons for Taxation”, Hon. A. Ongeru applied Schedule vi(1)(j) of the Advocates Remuneration Order and assessed the respondent’s costs at Kshs331,831, with instructions fees assessed at Kshs 300,000.
8. The parties are in agreement with regard to the principles to be applied in the taxation of Bills of Cost, and the circumstances under which the Court can interfere with the decision of the taxing master on a taxation. These principles are enunciated in several decisions of the Court. In **Premchand Raichand Ltd -vs- Quarry Services of East Africa Ltd (No. 3) [1972] EA 162** the Court outlined the principles of taxation as follows:

(a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,

(b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur,

(c) That the general level of remuneration of Advocates must be such as to attract recruits to the profession and

(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.”

9. In **First American Bank of Kenya –vs- Shah and Others [2002] EALR 64** at 69, Ringera J (as he then was) observed as follows:

“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”.

10. The parties have also relied on the decision of the court in the case of **Thomas James Arthur -vs- Nyeri Electricity Undertaking (1961) E.A 492** in which it was held that:

“where there has been an error in principle, the court will interfere, but questions of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will only intervene in exceptional cases.”

11. With regard to taxation of costs in matters arising out of public law claims, Ojwang J (as he then was) stated as follows in **Republic vs- Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W’ Njuguna & 6 Others (2006) eKLR**:

“It is noteworthy that Counsel for the Respondents herein invoked many authorities from private-law claims sounding in damages and entailing pecuniary awards. Such claims do not, in my opinion, fall in the same class as public-law claims such as those in judicial review, in constitutional applications, in public electoral matters, etc. Such matters are in a class of their own, and the instructions fees allowable in respect of them should not, in principle, be extrapolated from the practices obtaining in the private law domain which may involve business claims and profit calculations.”

12. Taking the above judicial precedents and principles into consideration, the question is whether the circumstances of this case justify intervention by the court. I have read the decision and reasons of the taxing master dated 9th October 2013. In the said decision, the taxing master expressed herself as follows in arriving at her decision to tax the instructions fees at Kshs 300,000:

“The 1st respondent is seeking Ksh3,056,717.30 in respect of instruction fees.

The petitioner was seeking orders of certiorari to quash the respondent’s letters dated 2nd March 2012 and 19th March 2012 which revoked the registration of the petitioner’s aircraft.

The instruction fees is charged under schedule V1(1)(j) where the remuneration order provides for a minimum of Kshs28,000/-.

The taxing officer has a discretion to increase this figure taking into account a number of factors including the following:

- 1. The nature and importance of the cause or matter*
- 2. The amount or value of the subject matter*
- 3. The interest of the parties*
- 4. The general conduct of the parties*
- 5. The complexity of the issues raised and novel points of law*
- 6. The time. Research and skill expended in the brief.*
- 7. The volume of documents involved.”*

13. The taxing master relied on the principles set out in the **Premchand** case and **Republic -vs- Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W’ Njuguna & 6 Others** (supra) and then stated as follows:

“In the current case, the petitioner was seeking orders of certiorari to quash the Respondent’s letters. Taking into account the value of the subject matter and the importance of the case to the parties, instruction fees of Kshs300,000/- is reasonable in the circumstances of this case. Kshs2,756,717.30/- is taxed off from item one.”

14. I am unable, from the above reasoning by the taxing officer, to find that there was an error of principle, or that the costs as taxed are so manifestly excessive as to amount to an injustice to the petitioner. As the Court observed in Premchand’s case (supra):

“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 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”.

15. Given the principles set out in the **Republic -vs- Muchiri W’Njuguna** case set out above with regard to the manner of taxation of Bills of Costs arising from public law matters, it would have been erroneous for the taxing master to consider the value of the subject matter in arriving at the costs payable to the respondent. While there is reference in her decision to the value of the subject

matter, however, it does not appear that she based her decision on such value, which is unstated, as the amount of costs arrived at compares well with the costs awarded in similar cases-see the decisions of the High Court on taxation references in **High Court Petition No.143 of 2011 Nguruman Limited -vs- Kenya Civil Aviation Authority & Another** and **High Court Petition No. 224 of 2010 Emange Ne-Semata Investments Limited -vs- The Attorney General & Others.**

16.For the above reasons, the application dated 16th October 2013 is hereby dismissed with costs to the respondent.

Dated Delivered and Signed at Nairobi this 31st day of July 2014

MUMBI NGUGI

JUDGE

Mr. Kahonge instructed by the firm of Macharia Kahonge & Co. Advocates for the Applicant

Mr Ogutu instructed by the firm of Mwaura & Wachira & Co. Advocates for the Respondent