



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISC APPL. NO 630 OF 2012
MAINA NJUGUNAAPPLICANT
VERSUS
WESTBUILD GENERAL CONTRACTORSLIMITED...RESPONDENT

RULING

1. The applicant, dissatisfied with the decision of the Taxing Master made on 17th September 2013, has filed the application brought by way of Notice of Motion dated 9th October 2013 expressed in the following terms:
 1. *That the applicant objects to the order of taxation dated 17th September 2013 and prays that the same should be set aside and re-taxed before a different Taxing Master.*
 2. *That the cost of this application be provided for.*

The Applicant's Case

2. The application is based on the grounds that The Taxing Master erred in not taking into consideration the subject matter of the suit; failed to consider the time taken, the complexity of the matter, and the benefit that accrued to the respondent and the interest that the respondent had in the matter. He contends that there is no basis on which the Taxing Master arrived at Ksh500,000/- as reasonable fees and that she failed to exercise her discretion properly and judiciously.
3. The application is supported by an affidavit sworn by the applicant on 9th October 2013. In the said affidavit, Mr. Njuguna states that the present matter arose from a Client – Advocate representation in **Judicial Review No 64 of 2011** in which Kenya Revenue Authority were demanding a total sum of Kshs249,503,907.00 from the respondent. The applicant represented the respondent in the matter, which was eventually compromised and a consent judgment recorded in which the claim against the respondent was agreed at Kshs14,331,134.00.
4. The applicant avers that the Taxing Master failed to consider all the factors in arriving at her decision; that the matter was not an ordinary judicial review as it was quantifiable; and that the amount of the total claim should be the basis of computation of the legal fees payable to the applicant.

The Response

5. The application is opposed. The respondents have filed an affidavit sworn by Mr. John Mburu Mwaura, the Managing Director of the respondent, on 28th October 2013. The respondent contends in the said affidavit that the application as framed and filed is premature, misconceived, incompetent, incurably defective and offends the mandatory provisions of rule 11(1) and (2) of the Advocates (Remuneration) Order; that the Court lacks jurisdiction to entertain the application and that the said application is a blatant abuse of the Court process; and that the orders sought are not merited as the applicant has no arguable reference before the Court.
6. The respondent also contends that the Deputy Registrar proceeded reasonably and acted on the correct principles in taxing the applicant's Bill of Costs under Schedule (vi)(1)(j) of the Advocates Remuneration Order at Kshs753,351.

Determination

7. Having considered the parties' pleadings and submissions, both oral and written, in support of their respective positions on this matter, I believe that three issues arise for determination in the matter. The first is whether the reference is properly before the court; secondly, whether the Taxing Master used the correct scale in determining the instructions fees in the matter; and thirdly, whether there was any error of principle made by the Taxing Master in arriving at the instructions fees that she did.

Whether this Reference is Properly before the Court

8. I will deal first with the respondent's challenge to the present reference. This challenge is premised on the fact that no objection was lodged to the taxation by the applicant in accordance with Rule 11(1) and (2) of the Advocates (Remuneration) Order.
9. The respondent argues that the applicant did not give notice to the Taxing Master as required by Rule 11(1) of the Advocates Remuneration Order within the 14 days given by the rule. It therefore contends that the reference is incompetent as failure to comply with the rule renders the proceedings incompetent. The respondent relies on the decision in **Rosafric Ltd & 3 Others vs Central Bank of Kenya Ltd & Another Civil Case No. 1389 of 2001**.
10. In the course of the hearing of the application, the applicant's Counsel drew the Court's attention to a letter dated 18th September 2013. While there was no copy of this letter in the Court file, the letter in the possession of the applicant bears a court stamp and date of 20th September 2013. The letter is expressed to be pursuant to the provisions of Rule 11(1) of the Advocates Remuneration Order. It states that the applicant objects to the taxation on items 1 and 27 of the Bill of Costs, and requests for reasons with a view to filing a reference. The applicant alleges that he received reasons on 27th September 2013, and filed this reference on 9th October 2013. Consequently, his application is properly before the Court.
11. The respondent suggests that this notice of objection was never lodged, and that it was probably lodged after the respondent filed its submissions on 5th May 2014. Apart from Counsel's submissions from the Bar along these lines, however, there is nothing before the Court that would suggest that the applicant engaged in such nefarious conduct as to lodge a notice more than eight months after the taxation in order to mislead the Court and answer the allegations made in the respondent's submissions. On the face of it, and in the absence of any evidence to the contrary, the letter dated 18th September 2013 was duly filed in Court and received. To that extent, there was compliance with the requirements of Rule 11(1), the only omission appearing to be failure to serve the respondent with the notice of objection. I therefore find and hold that this reference is properly before the Court.

Whether the Taxing Master Applied the Correct Scale in arriving at the Instructions Fees

12. The applicant is dissatisfied that the Taxing Master, in assessing item 1 of his Bill of Costs, the instructions fees, applied Schedule V1(i)(j) of the Advocates Remuneration Order instead of Schedule V1(1)(b). According to the applicant, Schedule V1(1)(j) provides for a minimum of 28,000 for any application for prerogative orders. The applicant takes the view that the taxation should have been on the basis of the value of the subject matter, being Kshs 249, 503, 907; that the value of the subject matter was ascertainable and the applicable provision should have been Schedule V1(1)(b) of the Order. According to the applicant, had the Deputy Registrar used this Schedule, she would have arrived at a much higher figure than the amount of Kshs 500,000 at which she taxed the instructions fees.
13. The respondent counters that the Taxing Master properly exercised her discretion in arriving at the amount in respect of item 1 in the Bill of Costs. It is its case that the only grounds on which the Court should interfere with a Taxing Master's decision is where there is an error of principle, relying in this regard on the decision in **First American Bank of Kenya -vs- Shah (2002)1 EA 64**, but that there was no error of principle committed by the Taxing Master. As the applicant was seeking judicial review orders in the nature of prerogative writs, the Taxing Master properly taxed the fees on the basis of Schedule V1(1)(j); that she increased the instructions fees from 28,000 to 500,000 and took into account various matters in doing so.
14. I have considered the submissions of the parties with regard to this issue, and the ruling of the Taxing Master dated 17th September 2013. I have also considered the various authorities relied on by the parties. The applicant claims that his Bill of Costs should have been taxed under **Schedule VI 1(b)** of the **Advocates (Remuneration) Order** which provides that taxation shall be based on the value of the subject matter:

“to sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defence or other denial of liability is filed; where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties.”

15. Instead, the Taxing Master applied **schedule VI (1)(j)** which provides a basis for determination of fees for applications for prerogative orders by providing that:

‘Prerogative Orders’ to present or oppose an application for a Prerogative Order; such sum as may be reasonable but not less than 28,000.’

16. The respondent, the applicant in Judicial Review No. 64 of 2011, was seeking prerogative orders in that matter against the respondent. In **Famy Care Limited -vs- Public Procurement Administrative Review Board & Another High Court Petition No. 43 of 2012**, Majanja J, while dealing with a reference from the decision of the Taxing Master on the party and party Bill of Costs, stated as follows:

*‘Whether the instruction fee ought to have been assessed under **Schedule VI(1)(b)** or **VI(1)(j)** of the **Advocates (Remuneration) Order** is a matter I had the opportunity to consider in the case of **Brampton Investment Limited -vs- Attorney General & 2 others, Nairobi Petition No. 228 of 2011 (Unreported)**. In that case I observed that, “this issue ought to be approached on the basis of substance rather than form. In my view, prerogative orders can now be sought in the form of a petition as provided in **Article 23** of the Constitution. A respondent should not be disadvantaged by costs merely because the petitioner chose to commence proceedings in a different form, in this case a constitutional petition when the orders sought could also have been granted through proceedings of judicial review under **Order 53** of the **Civil Procedure Rules**.”*

17. The argument in that case was that since the petitioner had approached the Court by way of a constitutional petition, the instructions fees should have been assessed differently, and higher, than provided in respect of prerogative orders sought by way of judicial review under Order 53 of the

18. Again, in **Orion East Africa Limited -vs- Permanent Secretary, Ministry of Agriculture and Another Nairobi Petition No. 100 of 2012 (Unreported)**, the Court, in considering the same issue raised in this reference, stated as follows:

“My reasoning is fortified by the fact that the petitioner in this matter invoked the provisions of Article 47(1) of the Constitution which deals with the right to fair administrative action. It states that, “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” The effect of Article 47(1) is that judicial review of administrative action contemplated under Order 53 of the Civil Procedure Rules is now placed on a constitutional footing and whether one invokes the Order 53 procedure or the Article 22 procedure, the same result is achieved. Indeed prerogative orders are expressly recognised as one of the reliefs the court is entitled to grant in an application to enforce fundamental rights and freedoms.”

19. The issue before the Court from which the applicant’s Bill of Costs arose was a purely public law issue, the instructions fees in respect of which fall for determination on the basis of the principles enunciated by Ojwang J(as he then was) in **Republic vs- Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W’ Njuguna & 6 Others(2006) eKLR** in which he observed as follows:

‘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.’

20. Thus, where, as in the present case, a party approaches the Court for issuance of prerogative orders, whether under Order 53 or by way of a constitutional petition, the taxation of such costs must be on the basis of **schedule VI (1) (j)** of the **Advocates (Remuneration) Order** which provides a basis for determination of fees for applications for prerogative orders. It cannot be on the basis of **Schedule VI (1)(b)** which requires that costs be taxed on the basis of the subject matter.

Whether the Taxing Master Made an Error of Principle in Assessing the Instructions Fees

21. The final issue to consider is whether there was an error in principle in the Taxing Master assessing the instructions fees at Kshs753,351.00. In her ruling in the matter, the Taxing Master expressed herself as follows with respect to item 1 of the applicant’s Bill of Costs, the instructions fees:

“The Advocate is seeking Kshs.3,107,298.80/- in respect of instruction fess. This figure is based on the amount of Ksh249,503,907/- which was the claim in Judicial Review No 64/2011.

A perusal of the original file (JR 64/2011) shows that the Respondent herein had instructed the Advocate to seek the following orders:

1. *An order for prohibition prohibiting the commissioner general from, enforcing the Agency notice issued on the 4th day of March 2011.*
2. *An order for certiorari to quash the Agency Notice issued by the commissioner general which*

arbitrarily demanded the sum of Kshs249,503,907/=.

3. *An order of mandamus compelling the commissioner general to refund the sum due to the applicant the amount that it was withholding.*
4. *Costs of the application, the advocate was therefore seeking prerogative orders of mandamus, certiorari and prohibition against Kenya Revenue Authority.*

The instruction fees is therefore charged under schedule (VI)(1)(J) of the Advocates Remuneration order where a minimum of Ksh28,000/- is provided for.

22.The Taxing Officer then went on to observe that she has a discretion to increase the amount of Kshs 28,000 provided in the schedule, taking into account certain factors which she enumerated as follows:

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.*

23.She further observed the need for the taxing officer to exercise her discretion judiciously and reasonably, and placed reliance on the well known principles enunciated in **Premchand Raichand Ltd And Another –vs- Quarry Services of East Africa Ltd and Others (1972)EA 162and Republic -vs- Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W’ Njuguna & 6 Others**(supra) in which Ojwang J (as he then was) observed as follows:

“The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion must be specified cogently and with conviction. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode if the conduct of the proceedings necessitated the deployment of a considerable amount of industry, and was inordinately time consuming, the detail of such a situation must be set out in a clear manner.

If large volumes of documentation had to be clarified, assessed and simplified, the details of such initiative by counsel must be specifically indicated apart of course from the need to show if such works have not already been provided for under a different head of costs”

24.The Taxing Master, after setting out the consent on the basis of which JR 64/2011 was compromised, expressed herself as follows:

Instruction fees of Kshs500,000 is reasonable taking into account amount of money the Respondent in JR 64/2011 was seeking from the Respondent herein before the parties entered into a consent. 16% VAT (Kshs80,000/=) is added to the instruction fees making a total of Kshs 580,000/- less Kshs100,000/- paid on account – 480,000/-.

25.Save for the fact that she took into account the amount of money that the respondent in JR 64 of 2011 was seeking from the respondent, it is my finding that the Taxing Master took into account the factors that she was supposed to take into account in arriving at the instructions fees that she did. There was therefore no error of principle that would justify interference by this Court with her decision.

26. Having so found, and also having found that the Taxing Master applied the correct scale in taxing the fees payable to the applicant in this matter, which was the crux of the applicant's claim, I find no merit in this reference and it is hereby dismissed with no order as to costs.

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

MUMBI NGUGI

JUDGE

Ms Gweno instructed by the firm of Maina Njuguna & Associates Advocates for the applicant

Mr Kipngeno instructed by the firm of Kiplangat & Associates Advocates for the respondent