



IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 107 OF 2011

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF
PROHIBITION**

AND

**IN THE MATTER NAKURU CHIEF MAGISTRATE COURT CRIMINAL CASE NO.7160 OF
2009**

between REPUBLIC VS.ISAAC KIPTARBEI AND CYRUS CHEBOI ROTICH

AND ALSO

**IN THE MATTER OF NAKURU CHIEF MAGISTRATE COURT CRIMINAL CASE NO.2173
OF 2011**

between REPUBLIC V..ISAAC KIPTARBEI AND CYRUS CHEBOI ROTICH

IN THE MATTER OF AN APPLICATION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

CHIEF MAGISTRATE COURT NAKURU.....2ND RESPONDENT

EX PARTE

CYRUS CHEBOI ROTICH.....SUBJECT

AND

SAMUEL NGIGE THIGA.....APPLICANT/INTERESTED PARTY

RULING

The applicant herein is the interested party in the Judicial Review application herein. The applicant's bill of costs herein was taxed by the Deputy Registrar (DR) of this court, Hon J.M Njoroge at

Kshs.124,150/=. Aggrieved by that award, the applicant filed a reference to this court praying that the award be set aside and the court be pleased to re-tax the entire bill or order for retaxation of the bill by another DR of this court.

The application is premised on the grounds that the award by the taxing master was manifestly low; that the taxing master did not give any reasons for the award and that he completely ignored the submissions tendered in favour of the bill. Further, that the taxing master overlooked the fact that the issue raised in the judicial review application and which the applicant's advocate successfully opposed involved important aspects and had a great impact upon the applicant. The applicant complains that even after he wrote two letters requesting for reasons for the award, the taxing master did not provide him with any reasons as required by law.

The application is supported by the affidavit of the applicant, Samuel Ngigi Thiga, in which the grounds thereon are reiterated.

In opposition to the application, the *ex parte* applicant, Cyrus Cheboi, filed the notice of preliminary objection dated 2nd June, 2014 in which he contends that the reference is in violation of Rule 11(1) and (2) of the Advocates (Remuneration) Order and that it is inept or grossly incompetent.

Counsel for the applicant, Mr. Maragia, reiterated the applicant's contention that the award of Kshs.124,150/= against the proposed sum of Kshs.1,047,095/= was inordinately low. Consequently, vide a letter dated 31/3/2014, the applicant objected to taxation of all items in the bill.

Contending that the amount awarded by the taxing master is less than the instruction fees, Mr. Maragia urged the court to exercise the discretion vested in it to tax the bill afresh or remit it to another DR to be taxed afresh or to issue such directions as the justice of the case may require.

Mr. Kipkoech, for the applicant, submitted that a reference from the decision of a taxing master presupposes that there is a request for reasons on specific items of the bill. The request for the reasons, according to Mr. Kipkoech, is supposed to be made within 14 days of the making of the impugned decision.

Contending that the applicant did not request for reasons within the time stipulated in law, Mr. Kipkoech, submitted that the court cannot exercise its discretion in favour of the applicant. In this regard, he argued that the court exercises the discretion vested in it based on the reasons given by the DR yet none exists in this reference. Without the reasons, Mr. Kipkoech maintained that there is no valid reference before the court.

As concerns the applicant's letter to the DR, Mr. Kipkoech submitted that it was a general one and that it was not addressed to the taxing officer as required under Rule 11(1) of the Advocates (Remuneration) Order. In view of the fact that there are 5 Deputy Registrars in Nakuru, Mr. Kipkoech submitted that it would have been prudent to address the letter to the DR who taxed the bill.

Concerning the discretion of the court to grant the orders sought, counsel submitted that the discretion can only be exercised in favour of the applicant if the award is inordinately low or high or unreasonable, which is not the case.

In reply, Mr. Maragia, submitted that Rule 11(2) of the Advocates Remuneration Rules, 2009 does not state that the request for reasons be addressed to the DR who taxed the bill; that it suffices if the letter is addressed to the Deputy Registrar of the Court.

Pointing out that the ruling of the DR did not address the issue of itemising of the bill, Mr. Maragia, submitted that the applicant's alleged general letter did not stop the DR from responding to the letter and that this court has discretion to interfere with the award of the DR. According to Mr. Maragia, the only rider to the exercise of the discretion is that it should be exercised judiciously.

I have read and considered the rival arguments herein, the sole issues for consideration are:-

1. Whether the reference offends the provisions of Rule 11(1) and (2) of the Advocates (Remuneration) Order? If yes,
2. Whether that defect renders the application fatally defective?
3. What order(s) should the court make?

As pointed out above, the reference herein is said to be in violation of Rule 11(1) and (2) of the Advocates (Remuneration) Order. The reasons given for that contention are that the letter giving notice to the DR did not itemise the items for taxation to which the applicant objected to and that, in any event, the letter was written outside the time provided for by law.

Rule 11 Subrule (1) and (2) of the Advocates (Remuneration) Order, under which the subjects objection is premised, provides:-

“11.(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation which he objects.

2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

The ruling which is the subject matter of the current application was delivered on 13.3.2014. On the same day, the applicant wrote to the DR Nakuru High Court requesting for reasons for the award. In that letter, the applicant indicated that he required the reasons in order to lodge an intended reference. Although the applicant had requested the DR to reply to the letter within seven days, the DR did not reply to the letter within the time stipulated therein or at all. By way of follow up, the applicant wrote the letter dated 31/3/2014 but yet again received no response.

On 10/4/2014, the applicant wrote to the DR High Court Nakuru intimating his intention to file the reference without the reasons. In that letter, he intimated that he would presume the reasons are those contained in the ruling. With that presumption the applicant filed the reference herein in objection to the entire ruling.

In view of the foregoing, the question that arises is whether the applicant fulfilled his obligation under rule 11(1) above.

By dint of the provisions of rule 11 (1), the duty of the party objecting to the decision of the taxing officer is to give notice in writing to the taxing officer of the items of taxation to which he objects. That notice is to be given within fourteen days of the making of the impugned decision.

Although the applicant's first letter did not specify the items which he objected to, given the fact that the DR did not specifically tax off any of the items in the bill but proceeded to give a global award, I hold the view that it was reasonable for the applicant's notice to take the form it took.

After the applicant issued the notice, the duty shifted to the taxing officer to record and forward to the objector the reasons for his decision on those items (in this case all the items in the applicant's bill). See Rule 2 (*supra*) if the DR received the notices.

Since the taxing officer did not respond to the applicant's notice within the time stipulated therein or within a reasonable time, I find and hold that the applicant was justified in lodging the instant application even without those reasons.

As concerns the contention that the notice ought to have been addressed to the specific officer who taxed the bill, while acknowledging that Rule 11(1) requires the notice of objection to be given to the taxing officer, which ordinarily would mean the individual who taxed the bill. There are several DRs at Nakuru Court and it was only prudent that the notice be sent to the specific officer who taxed the bill in order to avoid delay, considering that the applicant had only 14 days. The court does not know who received the notices, but the DR that received the notices should have handed over to the specific DR who dealt with the matter since both are at this court. However, failure to address the correct DR does not render the application incompetent. For the foregoing reasons, my answer to question one is in the negative.

Having found the application to be competent, I turn to the question:

What order(s) should the court make?

Whilst agreeing that this court has jurisdiction to interfere with the decision of the taxing master, Mr. Kipkoech submitted that this court can only do so if the award is inordinately low or high or unreasonable or if no reasons are given for the figures.

As pointed above, the taxing officer of the bill herein only gave a global award to the applicant's bill. He gave no reasons for that award. That was so even after the applicant requested for reasons as to why he arrived at such a low figure against the proposed figure of Kshs.1,047, 095/=.

There being no evidence that the DR considered the submissions by the applicant and there being no reasons for the award, I am satisfied that the applicant has made up a case for setting aside of the award.

Although the applicant has urged the court to re-tax the bill, since no reasons have been given for the award, it is prudent to remit the bill before a different DR for re-taxation. This action will give the applicant an opportunity to move to this court by way of another reference should he not be satisfied by the decision that the DR may make following this referral.

The upshot of the foregoing is that the ruling of the taxing master hereto is set aside and an order issued directing that the applicant's bill of costs dated 30/10/2012 be placed before a different DR for taxation.

Because of the omission by the applicant/interested party in failing to serve the specific DR, the court orders each party to bear its own costs.

Dated, Signed and Delivered at Nakuru this 18th day of July, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Maragia for the applicant

N/A for the respondents

Ms Kilach holding brief for Mr. Kipkoech for the subject

N/A for the interested party

Kennedy – Court Assistant