



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 100 of 2012

BETWEEN

ORION EAST AFRICA LIMITED PETITIONER/APPLICANT

AND

PERMANENT SECRETARY MINISTRY OF AGRICULTURE1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

Introduction

1. Before me is the petitioner's chamber summons application dated 31st January 2013. It is a reference under **Rule 11** of the *Advocates (Remuneration) Order, 2009* from the decision of the learned Deputy Registrar acting as the taxing master. The petitioner is dissatisfied with the decision of the taxing master concerning the taxation of the party and party bill of costs dated 18th October 2012. The petitioner challenges the decision of the Deputy Registrar reducing the instruction fee from Kshs 5,000,000/00 claimed to Kshs 200,000/00.

The arguments

2. The applicant seeks to review the award of the learned Deputy Registrar on the ground that she erred in principle as she proceeded to tax the bill of costs under the wrong schedule. According to the applicant, she ought to have applied **Schedule VI 1(b)** which provides that taxation shall be based on the value of the subject matter which provides as follows; "*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.*" Instead she applied **Schedule VI 1(j)** which provides a basis for taxation of costs for application for prerogative orders. It stipulates thus; "*Prerogative orders-To present or oppose an application for a Prerogative order; such sum as may be reasonable but not less than 28,000.*"

3. The applicant also contended that the instruction fee awarded by the Deputy Registrar was too low as to constitute an error in principle and that she did not act judiciously as she failed to take into account various principles in arriving at her decision. The applicant further contended that the learned Deputy Registrar failed to take into account the value of the subject matter in assessing the sum due as the instruction fee.

4. The petitioner challenged the action by the respondents to ban the use of certain pesticide products which contained an ingredient known as *dimethoate*. It claimed that the purported ban was in

breach of its right to fair administrative action secured by **Article 47** of the Constitution amongst other violations. It had also prayed for an award of Kshs 100,000,000/00 as compensation for lost revenue. By a judgment delivered on 28th September 2012, I allowed the petitioner's claim and held that the purported ban was in violation of the petitioner's right to fair administrative action protected under **Article 47(1)**. I also issued an order restraining the respondents from interfering with the petitioner's licensed products and also awarded the petitioner costs of the suit as against the 1st respondent ("the respondent"). I declined to award the compensation claimed as it had not been proved.

5. The respondent opposed the application on the basis of grounds of opposition filed on 22nd February 2013. The respondent denied that there was any error in the decision which would entitle the court to set it aside. It submitted that the Deputy Registrar properly taxed the Bill of costs in adherence to the applicable principles of the law and the **Advocates (Remuneration) Order, 2009**. The respondent relied on the case of **Steel Construction Petroleum Engineering (EA) Ltd v Uganda Sugar Factory (1970) EA 141** where the court held that it can only interfere with the decision of a taxing officer if there was an error in principle, or the sum arrived at was either so high or so low as to imply that the taxing officer applied the wrong principles.

6. The respondent discounted the applicant's contention that the taxing master erred by failing to use the subject matter discernible from the proceedings adding that the value of the subject matter of the suit could not be determined from the pleadings, judgment or settlement. The case of **Joreth Limited v Kigano and Associates [2002] E.A. 92** was cited to support the proposition that the taxing master was entitled to use her discretion in assessing the instruction fee.

7. In rejecting the petitioner's assertion that matters raised in the petition were complex as evidenced by the petition alone together with supporting documents running to 211 pages and authorities cited running to 143 pages, the respondent stated that volume of papers was not indicative of the complexity of a matter. To back up this point, it relied on the case of **Trans-National Bank Limited v Elite Communication Limited and Another (2005) eKLR**.

Determination

8. The first issue for consideration is whether the learned Deputy Registrar erred in taxing the bill of costs under the wrong provision of the **Advocates (Remuneration) Order**. The petitioner has argued that the taxation ought to have proceeded on the basis of **Schedule VI 1(b)** of the **Advocates (Remuneration) Order** rather than **Schedule VI 1(j)**. As I stated in a similar reference in **Brampton Investment Limited v Attorney General & 2 others, Nairobi Petition No. 228 of 2011 (Unreported)**, "*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.*"

9. 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. The substance of the judgment as well as the main declaration was on the basis of breach of **Article 47(1)**. The other reliefs sought, were in my view, consequential. In the circumstances, I do not detect an error on the part of the learned Deputy Registrar to approach the matter as one seeking prerogative orders under **paragraph (j)** as opposed to **paragraph 1(b)** of **Schedule VI** of the **Advocates (Remuneration) Order, 2009**.

10. I now turn to the second issue that is whether the taxing master erred in principle in awarding the

sum of Kshs. 200,000/00 as the instruction fee. In the case of **Premchand Raichand Ltd v 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.

11. In the case of **Joreth Limited v Kigano and Associates [2002] E.A. 92** the court set out various factors that are to be considered in determining the instruction fee. These factors include the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties.

12. In my view, the applicant's argument that the amount awarded was too low was based on the basis that the bill of costs ought to have been taxed under the provisions of **Schedule VI 1(b)** of the **Advocates (Remuneration) Order**. If the taxation had proceeded under that provision, the value of the subject matter would have been a basic factor for consideration in order to determine the basic instruction fee as provided in the said provision. However, as I have found the learned Deputy Registrar was correct to apply **Schedule VI 1(j)** and it is on this basis that the amount awarded must be considered. Under this particular provision, the learned Deputy Registrar is entitled to consider other factors as well as the value of the subject matter in increasing the instruction fee from a basic fee of Kshs. 28,000/00. It is well settled principle that the taxing master is vested with discretion to increase or decrease instruction fees (see **Thomas James Arthur v Nyeri Electricity Undertaking [1961] EA 497**).

13. Counsel for the applicant referred to the case of **Ochieng, Onyango, Kibet & Ohaga Advocates v Adopt a Light Limited, Milimani HC Misc. Cause No. 729 of 2006 (Unreported)**, as authority for the proposition that the value of the subject matter was fundamental and the taxing officer ought to have carried out an inquiry into the value which was stated in the pleadings and deposition to come up with a proper assessment. Warsame J., stated as follows: *"The law gives the taxing master some leeway but like all discretions it must be exercised judicially and in reliance to the material presented before court. The taxing master must consider the case and labour required in the matter, the nature or importance of the matter. More so the amount or value of the subject matter involved, the interest of the client in sustaining or losing the benefit and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject. And when the subject matter is unknown, the court is empowered to make what is available as a point of reference. In my view the point of reference is the figures proposed to and accepted by Mombasa Municipal Council. The law is that matters of quantum are regarded as matters with which the taxing master is particularly fitted to deal and the court sitting on appeal will intervene only in exceptional circumstances."* (See also **First American Bank of Kenya Ltd v Gulab P Shah & Others [2002]1 E.A. 61** per Ringera J.).

14. The question then is whether the taxing officer erred in principle as to justify interference with the decision. The learned Deputy Registrar's her ruling and reasons for the decision dated 16th January 2013 stated, in part, as follows;

"...the petitioner was seeking prerogative orders against the Respondents and instruction fees is taxed under schedule VI(1)(j) Advocates Remuneration Order 2009 where a minimum of Ksh 28,000 is provided for.

The Taxing Officer has a discretion to increase this figure taking into account factors such as the nature and importance of the cause or matter, the amount or the value of the subject matter, the interest of the parties, the general conduct of the parties, the complexity of the issues raised in the case and any novel points of law canvassed and also the time, research and skill expended on the brief.

In awarding the figure of Kshs. 200,000 the factors stated above were taken into consideration and also the principles stipulated in the following cases

In the current case, the Petitioner did not show what novel points of law were raised or what complexity was involved in the brief.

However, the value of the subject matter was taken into account and the taxing officer agreed that the case was very important to the petitioner and had serious ramifications on its revenue.

The figure of Kshs. 5,000,000 was found to be grossly exaggerated. The amount of Kshs 200,000 was awarded as reasonable instruction fee and Kshs 4,800,000 was taxed off.”

15. I have considered the nature of the petition based on the pleadings and submissions filed before the court and the reasons advanced by the learned Deputy Registrar and I find that she failed to explain how she took into account the value of the subject matter of the petition as a factor in determining the instruction fee. In giving her reasons she stated that she took into account the value of the subject matter but did not however go further to identify the particular value of the subject matter employed in arriving at the decision but noted that the matter was “*very important to the petitioner.*” I think the learned Deputy Registrar ought to have taken set out the basis for determination as a point of reference discernible from the pleadings and explained how she determined the value of the subject matter in order to exercise her discretion to arrive at the final instruction fee. (See *Onyango, Kibet & Ohaga Advocates v Adopt a Light Limited (supra)* and *Republic v Minister of Agriculture and Other ex-parte Samuel Muchiri W’Njuguna [2006] eKLR*).

16. The petitioner, in its petition, stated that it suffered a loss of Kshs. 100,000,000/00 while the respondent stated that the use of the product which was subject of the petition would affect exports to the tune of Kshs.131,586,781/00. It is fair to suggest that these amounts, which we set out in the petition and deposition, would set out the parameters for any such determination and influence the decision of the taxing officer but would not necessarily be the decisive factor. Had the learned Deputy Registrar examined the value of the subject matter and considered it, she probably would have come to a different conclusion. It is for this reason that I conclude as Justice Ringera did in *First American Bank of Kenya Case (supra)* that, “*It would be an error of principle to take into account irrelevant factors or omit to consider relevant factors.*”

17. Should I remit the matter to the Deputy Registrar for taxation? Both parties have cited authorities to support the position that the judge in finding an error ought to refer back the matter to the taxing master. In this regard and in the circumstances of this case, I prefer to adopt the position taken by Hon. Justice Ringera in *First American Bank (supra)* where the court stated as follows, “*I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.*” I adopt these sentiments.

18. Although both parties cited the respective figures which are indicative of the value of the subject matter and which I have cited elsewhere in this decision, what is clear is that neither party made a serious attempt in the depositions to furnish evidence to support these figures. The petitioner, on its part did not prove, by evidence, the nature or extent of the loss hence its claim was dismissed. On the other hand, I think that the amount proffered by the respondents was intended to show that gravity of the decision leading to the ban of the subject chemical. Although the taxing officer is entitled to enter in inquiry to ascertain the value of the subject matter based on the pleadings, depositions and judgment, such an

inquiry is not necessarily an opportunity for the parties to make a case they did not prove in the main cause otherwise parties would be permitted plead figures which they had no intention of proving at the hearing but take such an opportunity to lay a basis for an award of higher costs based on a random figure set out in the pleadings. I think the figures pleaded must have material bearing on the matters in issue. Furthermore, I think it is proper that where a party seeks to have a further inquiry into the value of the subject matter beyond what is in the pleadings, depositions and judgment, an application to that effect should be made before the taxing officer.

19. For the reasons I have set out above, I think the value of the subject matter, while not decisive in this case, is sufficiently substantial to be reflected in the amount awarded for instruction fees. I am of the view that a sum of Kshs 500,000/00 as instruction fees would properly reflect the value of the subject matter and all the other factors which the Deputy Registrar took into account.

20. I hereby vary the amount awarded by the Deputy Registrar on account of the instruction from the **Kshs. 200,000/00 to Kshs. 500,000/00.**

21. As the petitioner has partly succeeded, it shall have half the costs of the reference.

DATED and **DELIVERED** at **NAIROBI** this 29th day April 2013.

D.S. MAJANJA
JUDGE

Mr Ng'ang'a instructed by Mbugua Ng'ang'a and Company Advocates for the petitioner.

Ms Lukoba, Litigation Counsel, instructed by the State Law Office for the respondents.