



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 228 of 2011

BRAMPTON INVESTMENT LIMITED PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

REGISTRAR OF TITLES 2ND RESPONDENT

COMMISSIONER OF LANDS 3RD RESPONDENT

RULING

1. Before me is a reference under **Rule 11** of the *Advocates (Remuneration) Order* from the decision of the learned Deputy Registrar acting as the taxing master. The decision concerns the taxation of the party and party bill of cost pursuant to a bill of costs dated 6th July 2012 filed on behalf of the petitioner. The petitioner is dissatisfied with the decision of the taxing master, contained in a ruling dated 30th October 2012, reducing the instruction fees from Kshs 8,862,000.00 claimed to Kshs 500,000.00.

2. The petitioner challenged the action by the Registrar of Titles of revoking its title to its property being **Land Reference No. 209/12071/3** situated in Nairobi through the **Gazette Notice No. 9230**. The petitioner prayed for various orders including an order of *certiorari* to quash the gazette notice and an order of injunction restraining the respondents from interfering with the petitioner's possession by forceful entry, cancellation or revocation of the petitioner's grant or maintaining any entries on the certificate of title. The matter was duly heard and by a judgment delivered on 19th June 2012, the Gazette Notice was duly quashed and the petitioner awarded costs of the petition.

3. The petitioner contends that instruction fee awarded by the Deputy Registrar is too low as to constitute an error in principle. It contends that this is an ideal case in which a court should intervene to ensure that a successful litigant be fairly reimbursed else it would amount to an injustice. The applicant has also taken issue with the provision of the *Advocates (Remuneration) Order, 2009* that the taxing officer applied in assessing the costs. According to the applicant, the applicable provision was **Schedule VI 1(b)** of the *Advocates (Remuneration) Order* which reads; "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," and not **Schedule VI 1(j)** that provides as follows; "Prerogative orders- To present or oppose an application for a Prerogative order; such sum as may be reasonable but not less than 28,000."

4. The applicant also faults the taxing master's ruling of categorizing the matter as one of public interest and one whose costs could not be based on the value of the subject matter of the property in the petition

terming this as an erroneous finding.

5. The respondents have opposed the application. Their case is that the application is defective and an afterthought as the proceedings had already been defended in court under **schedule VI (b)** and that the applicant is seeking to amend their application through their submission before the court. The respondents submit that the Deputy Registrar correctly assessed and reduced the instruction fee by taking into consideration all the relevant matters in the case in arriving at the decision.

6. Both parties cited several well known cases which elucidate the principles governing the assessment of costs. In the case of ***Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972]EA 162*** the Court outlined these principles 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.

In the case of ***Joreth Limited v Kigano & Another [2002] E.A. 92*** the court set out various factors that are to be considered in determining the instruction fee namely; 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.

7. The cases I have cited also emphasise the principle that the taxing master is vested with discretion to increase or decrease instruction fees and that in exercising such discretion, the taxing officer must act judicially by taking into account relevant factors stipulated in the ***Advocates (Remuneration) Order*** including importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances. The court will only interfere with the discretion of the taxing master in certain circumstances, such as where the amount is either too low or too high as to occasion an injustice or where the taxing master errs in principle (see also ***First American Bank of Kenya Ltd v Gulab P Shah & Others [2002]1 E.A. 61*** per Ringera J.).

8. The question then is whether the taxing officer erred in principle as to justify this court's interference with the discretionary power of the taxation officer. The learned Deputy Registrar's decision is clear that various factors were taken into consideration. She expressed herself as follows;

“The applicant asks the court to consider the preparation of hearing, nature of the matter and the value of property. I have perused the proceedings and the matter cannot be deemed to have been overly complex the main issue which was not novel was whether the 2nd respondent had power to invoke a certificate of title under the RTA or any other law. This (sic) are matters that arise often.

However I have considered the nature of matter which I believe the issue raised are of public interest. However the value of property cannot be a determinant in this case as this (sic) proceedings are public law in nature. The matter may have proceeded as a petition but the prayer (sic) sought are prerogative orders and they fall under Schedule 6(VI) J Advocate Remuneration Order which provides a reasonable but not less than Kshs. 28,000/=.

The court has a discretion to enhance this amount but must consider the complexity of the matter, responsibility by counsel, time spent, reason done and skill deployed by counsel. The court must ensure that the advocates instruction fees is to seek and has more and no less than reasonable compensation

for professional work done.

I have considered all the above and I award Instruction fees of Kshs 500,000...”

9. I have taken trouble to set out part of the decision of the learned Deputy Registrar to satisfy myself that she did not err in principle. She considered relevant factors and in my view the fact that the matter concerns the exercise of the authority of the Registrar of Titles and that the petition was founded on the provisions of the Constitution is a matter of public interest. I also agree with her that the matter was an ordinary one and not one that was overly complex as the main issue was revocation of land titles by Gazette Notice which was not novel as to attract such high amount sought by the petitioner.

10. 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)**. I think this issue is 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**. 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.

11. I dismiss the application dated 13th November 2012 with no order as to costs.

DATED and DELIVERED at NAIROBI this 26th day April 2013

D.S. MAJANJA
JUDGE

Ms Kashindi instructed by Hamilton Harrison & Mathews advocate for the petitioner.

Mr Motari, Litigation Counsel instructed by the State Law Office for the respondents.