



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 224 OF 2010

EMANGA NE-SEMATA INVESTMENTS LIMITED APPLICANT

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT

THE MINISTER FOR LANDS 2ND RESPONDENT

THE COMMISSIONER OF LANDS 3RD RESPONDENT

THE DISTRICT LAND REGISTRAR, NAIROBI 4TH RESPONDENT

BOARD OF GOVERNORS LANGATA HIGH SCHOOL 5TH RESPONDENT

RULING

1. In its application dated 27th November 2012 and supported by the affidavit of Harun Osoro Nyamboki of the same date, the applicant asks this court to set aside the decision of the Taxing Master made in this matter on 13th November 2012. It also seeks orders that its party and party Bill of Costs be referred to another Taxing Master for re-taxing, and for the costs of this application.

2. The basis of the application is that the Taxing Master erred in law with regard to two items of the Bill of Cost, namely items 1 and 144, by applying the provisions of Schedule V1 (1)(j) while addressing the instruction fees on the matter instead of applying Schedule V1(1)(b).

3. The applicant argues that the Taxing Master erred in law by not determining the value of the subject matter from the pleadings as Kshs 68 million and in failing to take into account the amount of time expended, having regard to the care and labour required in the protection of the petitioner's interests in accordance with the Advocates Remuneration Order 2009. The applicant states that its costs were taxed at Kshs 413,812 after the Taxing Master taxed off Ksh 2,706,308.

4. In its written submissions dated 10th April 2013, the applicant has relied on among others the decision of the court in **Republic -vs Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W. Njuguna & 6 Others (2006) EKLR** and **In First American Bank of Kenya Ltd -Vs- Gulab P. Shah -vs- Others** with regard to the factors that the court should take into account in taxing a Bill of Costs. It contends that the fact that the value of the subject matter is Kshs 68 million cannot be ignored, and it should earn the litigation fees for that value.

5. The applicant submits that the Remuneration Order of 2009 does not provide separate

provisions for taxing private law claims and public law matters and that the same principles apply. It asks the court, should it find that the Taxing Master erred in assessing the instructions fees, also adjusts the fee for getting up and preparing for trial accordingly.

6. On their part, the respondents contend that this court did not make a finding that the petitioner was entitled to the land; that the subject matter of the petition was whether or not there had been a violation of the petitioner's rights under the Constitution by the revocation of the petitioner's title by way of a Gazette Notice, and the Taxing Master properly assessed the instructions fees. In opposing the application, they rely on their written submissions dated 13th August 2013 filed in opposition to the Bill of Costs before the Taxing Master. They submit that the basis of instructions fees in public law claims such as constitutional petitions cannot and should not be the value of the subject matter. They also rely on the decision of Ojwang, J (as he then was) in **Republic -vs- Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W. Njuguna & 6 Others (supra)** on the applicable principles in public law claims.

Determination

7. In considering the application before me, I believe I need to address myself to two issues. The first relates to the proper provisions of the Advocates (Remuneration) Order applicable to matters such as this. The second issue relates to the principles applicable in a taxation of a Bill of Costs, and whether the Taxing Master in this matter properly addressed her mind to these principles.

8. The applicant seeks to review the award of the Taxing Master on the ground that she erred in principle as she taxed the Bill of Costs under the wrong schedule. It contends that the 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.”

9. The applicant's contention is that its costs should have been assessed on the basis of the value of the subject matter, which it asserts is Kshs 68 million, the value of the land, title No Nairobi/Block 72/3174, based on the sale and loan agreement annexed to the affidavit in support of the application.

10. In my judgment in this matter dated 22nd June 2012, I stated as follows at paragraph 41 thereof:

I must emphasise for the avoidance of doubt that my findings in this matter are confined to the procedural aspects with regard to the revocation of the petitioner's title by Gazette Notice No. 5563 of 21st May 2010. I make no findings with regard to the legality or otherwise of the petitioner's title. The respondents are aware of the proper legal process for the revocation of the petitioner's title should it, as they allege, have been illegally obtained, bearing in mind, in particular, the provisions of Article 68(c)(v) of the Constitution. It is incumbent upon them to initiate the process so that the status of both the suit property and its parent title, L.R. No Nairobi Block 72/2881 can be determined expeditiously.

11. The effect and intent of this finding was to leave the question of the legality of the petitioner's entitlement to the land still unresolved, and the respondents are at liberty to follow the right legal procedure should they believe that the land in question was illegally acquired.

12. The applicant is unhappy that instead of basing the taxation on the value of the land as required under Schedule VI(1)(b), 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.”

13. This court has had occasion to consider the provisions of the Advocates (Remuneration) Order with regard to costs arising from petitions seeking orders of judicial review under Article 23 of the Constitution and alleging violation of Article 47 of the Constitution, 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 v 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**.”*

14. Similarly, in the case of **Orion East Africa Limited –vs- Permanent Secretary, Ministry of Agriculture and Another Nairobi Petition No. 100 of 2012 (Unreported)**, Majanja J, in considering the same issue raised in this reference, observed that:

*“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.”*

15. I agree wholly with the reasoning of Majanja, J in the above matters. What the applicant was seeking before me were orders and declarations for alleged violation of Articles 40, 47 and 48 of the Constitution, and for orders directed at the 4th respondent to cancel a title issued to the Permanent Secretary, Treasury, as a trustee for the 5th respondent.

16. The applicant alleged that by the notice of revocation of their title to the subject property carried in the Kenya Gazette, the respondents were in violation of their rights under Article 47(1) of the Constitution. While it had filed a constitutional petition, it was in effect seeking prerogative orders of judicial review, which it could also have sought under Order 53 of the Civil Procedure Act. The Advocates (Remuneration) Order is clear that costs in respect of applications for prerogative orders are to be taxed under Schedule VI(1)(j). I can therefore find no basis for faulting the decision of the Taxing Master in assessing the instructions fees, and consequent thereon, the fees for getting up and preparing for trial under Schedule Vi (1) (j).

17. The next issue to address my mind to is whether the Taxing Master properly addressed her mind to the principles applicable in taxation of Bills of Costs. Again, this court has had occasion to deliberate on this matter in several decisions. 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.

18. In her ruling dated 13th November 2012, the Taxing Master expressed herself as follows on the matters before her:

Para 18. I have perused the pleadings and judgment in the current case. The Petitioner's cause of action in the Petition were declaratory orders that the petitioner is the bona fide and lawful owner of all that parcel of land known as Title No NAIROBI/BLOCK/72/3174 and a declaration that the 4th Respondent's revocation of title No NAIROBI/BLOCK/72/3174 vide Gazette Notice No 5563 of 21st May 2010 was unlawful and unconstitutional.

19. She then set out the principles applicable in taxations as set out in the case of **Republic -vs Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W. Njuguna & 6 Others** (supra) then continues at paragraph 29 as follows:

29. I have carefully considered the submissions by both parties in the bill of costs dated 13th August 2012. On item one, I find that the value of the subject matter cannot be used as a basis for awarding the instruction fees. Replying on the authorities of PREMCHAND RAICHAND LTD (Supra) and REPUBLIC VS. THE MINISTER FOR AGRICULTURE (Supra) I find that the current case does not involve any element of complexity or any novelty in the proceedings.

30. There is no indication that the Petitioner's counsel deployed special skills and neither is there any indication of the time spent in research.

31. In my opinion a sum of Ksh200,000/- is reasonable as instruction fees in the circumstances.'

20. In my view, the Taxing Master has properly addressed her mind to the principles enunciated in the cases cited above, with respect to taxation of party and party costs in a matter such as the one now before me and properly assessed the costs due to the applicant in this matter. The issue before the court was whether or not the respondents had violated the petitioner's rights by their revocation of its title without following due process, and this was the basis of determination of the court. This 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** (supra) where the learned Judge 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.'

21. Consequently, I find no merits in this reference and it is hereby dismissed with costs to the respondent.

Dated Delivered and Signed at Nairobi this 23rd day of May 2013

MUMBI NGUGI

JUDGE

Mr. Onyancha instructed by the firm of Migos-Ogamba & Co. Advocates for the Applicant

Mr. Wamotsa instructed by the State Law Office for the Respondents