



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 768 OF 2008

**IN THE MATTER OF: THE TEA ACT, CHAPTER 343 OF THE
LAWS OF KENYA**

**IN THE MATTER OF: THE AGRICULTURE ACT, CHAPTER 318
OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE TEA (LICENSING, REGISTRATION
AND TRADE)**

IN THE MATTER OF: REGULATION, 2008 (LEGAL NOTICE NO. 122 OF 2008)

**IN THE MATTER OF: THE TEA (FORMS) REGULATIONS, 2000 (LEGAL NOTICE NO. 107
OF 2000)**

**IN THE MATTER OF: THE COMPANIES ACT, CHAPTER 486 OF THE LAWS OF KENYA
WITH SPECIAL REFERENCE TO SECTIONS 178**

**IN THE MATTER OF: THE INTERPRETATION AND GENERAL PROVISIONS ACT,
CHAPTER 2 OF THE LAWS OF KENYA WITH SPECIAL REFERENCE TO SECTION 23 IN
PARTICULAR**

THE REPUBLIC

VERSUS

THE MINISTER FOR AGRICULTURE.....1ST RESPONDENT

THE KENYA TEA BOARD OF KENYA.....2ND RESPONDENT

EXPARTE

KAMBAA TEA FACTORY CO. LTD & 63 OTHERS....APPLICANTS

RULING

1. By a Chamber Summons dated 19th December 2011 expressed to be brought under the provisions of Rule 11 of the *Advocates (Remuneration) Order* (hereinafter referred to as the Order) the applicants herein seek the following orders:

1. **That the quantum of instruction fees in respect of the suit, that is, item number 1 of the bill of costs dated 7th September 2010 be reviewed and be substituted by such amount as is reasonable in all the circumstances of the case upon taxation afresh of the 2nd Respondent's Party and Party Bill of Costs.**
2. **That the sum of Kshs. 3,120,816 as taxed by the Taxing master be reviewed and be substituted by a lower, reasonable amount as the circumstances of the case determine.**
3. **The costs of the application be provided for.**
2. The Chamber Summons is supported by an affidavit sworn by **S. Musalia Mwenesi**, the applicant's advocate on 19th December 2011.

The application is based on the following grounds:

1. **The award of Kshs. 3,000,000/= as basic instruction fees under item 1 of the 2nd respondent's bill of costs dated 7th September 2010 is manifestly high in the circumstances and is without any basis in law.**
2. **That notwithstanding the submissions made by counsel on matters that were in dispute between the parties, the Taxing Master ignored or failed to appreciate the 2nd Respondent's submissions. Consequently, the Taxing Master exercised her discretion incorrectly to the prejudice of the Applicant.**
3. **That notwithstanding the finding by the taxing officer that under Schedule VI (i) J a reasonable fees but less than Kshs. 28,000/- was awardable, the Taxing master made an error of principle in awarding Kshs. 3,000,000/= as instruction fees.**
4. **Despite the finding by the taxing Master that the issue raised in the matter did not raise any novel issue of law, the Taxing Master that the issue raised in the matter did not raise any novel issue of law, the Taxing master made an error of principle to find that the Counsel for the 2nd respondent had to carry a lot of responsibility in reviewing notices and research on the relevant case law and so entitled the Counsel to the instruction fees of Kshs. 3,000,000/=.**
5. **The Taxing Maser erred in principle in finding that since the orders sought affected all the growers in the country, the 2nd Respondent's advocate was then laden with a lot of responsibility and so entitled to instruction fees of Kshs. 3,000,000/=**
6. **The taxing maser refused to be guided by the authorities and the guideline on taxation of the bills by Justice Ojwang (Republic Vs Minister for Agriculture & 2 others ex parte Samuel Muchiri W'njuguna & 6 others (2006) eKLR) in arriving at a reasonable amount as instruction fees.**
7. **The Taxing Master failed or neglected to provide sufficient reasons or grounds to justify the quantum of fees awarded.**
8. **The Taxing Master erred in awarding the sum of Kshs. 3,120,816/= without considering objections to items 9, 12, 14, 15, 20, 22, 23, 24 and 25 of the bill of costs.**
9. **The Taxing Master erred in principle in finding that Kshs. 3,000,000/= was reasonable instruction fees.**
3. According to the said deponent, the 2nd respondent's bill of costs dated 7th September for the sum

of Kshs. 25,120,816 was taxed by the Taxing Master and ruling delivered on 21/9/2011 by which ruling the Taxing Master taxed the said bill in the sum of Kshs 3,120,816/=. According to the deponent, the aforesaid amount of Kshs. 3,120,816 was exorbitant and excessive in view of the authorities relied on by both parties and upon instructions from his clients, the firm of **S. Musalia Mwenesi Advocates** applied for reasons for the decision of the taxing master vide letter dated 22nd September 2011 as provided for under Rule 11 of the Advocates Remuneration Order which letter was received by the Court on 22nd September 2011. The Taxing Master thereafter, vide letter dated 1st November 2011 addressed to the Ex Parte applicants Advocates, provided reasons for her decision which are contained in her ruling dated 21/9/2011. Relying on the reasons and grounds provided in the Chamber Summons application, the deponent urged this court to review and substitute the taxed amount of Kshs. 3,120,816/- with a reasonable amount as provided under Schedule V1 (i) J. In the deponent's view, the Taxing Master having found that there was no novel issue of law, the Taxing Master should have awarded the minimum amount of money as provided for Schedule VI (i) J or the Advocates Remuneration Order 1996 hence in awarding the sum of Kshs. 3,120,816/ the Taxing Master went against the guidelines as provided for in the case of **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna & 6 others (2006) eKLR**, where **Justice Ojwang** opined that "The taxation of instruction fees should avoid any aspect of unjust enrichment".

4. In opposition to the application the respondents on 15th March 2013 filed a replying affidavit sworn by **Patrick Anam**, their advocate on 9th March 2013. According to the deponent, the application lacks merit and the same should be dismissed with Costs to the 2nd Respondent. He explained that on 7th September, 2010 the 2nd Respondent filed a Party and Party Bill of Costs dated 7th September, 2012 for Kshs. 25,120,816.00 which bill was drawn to scale considering the nature of the Proceedings in JR miscellaneous Application No 768 of 2008 which were judicial review proceedings and having regard to the nature and the complexity of the proceedings which required a lot to research and court attendance. He stated that the taxation hearing of the bill of Costs was canvassed by way of written submissions and the Respondent duly filed its written submissions supporting the said bill of costs and that that Taxing Master having considered all the issues in the Bill of Costs as canvassed in the Parties' Written Submissions, and further having exercised her discretion as provided under Schedule VI of the Advocates Remuneration Order did tax the Bill at Kshs. 3,120,816.00. To the deponent, at arriving at the said amount the Taxing Master considered several factors among them the research that was involved in the matter, the pleadings filed in Court, the responsibilities of council for the 2nd Respondent as well as the time spent in court during the proceedings and that he did consider and was guided by the principles laid down by the High Court regarding taxation of bills in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** and therefore arrived at a reasonable amount on item 1 which is the instruction fees and provided cogent reasons for her decision. In the deponent's view, the decision of the taxing Master was therefore well reasoned and the applicants have not demonstrated any basis to warrant review of the taxing master ruling as there is no valid basis to reviewing the same hence the Application herein should therefore be dismissed with costs.
5. In the submissions in support of the reference, the applicant contended that there was no much legal issues involved in this matter and the Taxing Master appreciated the same in her ruling. It was further contended that it was wrong for the Taxing Master to find that there were a number of exhibits filed in court when in total there were 7 exhibits filed in court and further that it was wrong for the Taxing Master to have held that the matter required a lot of research when the replying affidavit contained only 3 exhibits. In the applicant's view, the case law cited by the 2nd respondent deal on the principle of when the judicial review orders can be granted by any court most of which are judgements from Kenyan Courts. While conceding that the Taxing Master has discretion to enhance the instructions fees, it was submitted that such discretion should be exercised in a prudent manner so that the Advocate gets an amount of money commensurate to the work done. In the applicant's view the pleading filed by the parties were not bulky and only one principle was involved in the case law cited by the 2nd respondent. It was therefore submitted that the Taxing Master was not guided by the principles set out in the case of **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra) and that though the Taxing Master stated that the matter required a lot of research and that the amount of work and

responsibility bestowed upon 2nd respondent's advocates was huge, she failed to set out in summary form what issues were to be researched on and how the research was involving as well as the nature of the responsibility and work done. In the applicant's view, the fact that the 2nd respondent had several advocates from the same firm to present arguments on the case cannot be the reason for enhancement of fees since no certificate was given that the industry of such advocates was necessary to warrant fees on any higher scale. To the applicant, there was no greater responsibility to defend a motion for judicial review and that no novel points can be pointed to in the record showing that it resulted from the 2nd respondent's Counsel's industry and labour. To the applicant, the amount of work by the 2nd Respondent does not attract a sum of Kshs 3,000,000.00 where the minimum amount is supposed to be Kshs 28,000 since not much time would be needed to compile a 29 paragraph replying affidavit with 3 exhibits. It was therefore submitted that the Taxing Master did not provide cogent reasons to support such an award hence the reference ought to be allowed.

6. On behalf of the respondents, it was submitted that the reference was filed out of time. According to the respondents whereas the applicant sought reasons for the taxation after the ruling was delivered on 22nd September 2011, the reasons thereof were forwarded by the Deputy Registrar on 28th November, 2011 and the reference filed on 19th December, 2011 which was 22 days after the receipt of the reasons hence outside the time stipulated by the Advocates Remuneration Order rule 11 which requires that the reference be filed within 14 days after receipt of the said reasons. As the applicant did not invoke the court's jurisdiction under paragraph 11(4) of the Order to extend time, it was submitted that the application is incompetent and reliance was placed on **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Ltd Milimani HCC No. 751 of 2004.** In the respondents' view the bill of costs was drawn having regard to the nature and the complexity of the proceedings which required a lot of research and court attendance and upon exercising her discretion and considering the issues the Taxing Master taxed the bill at Kshs. 3,120, 816.00. To arrive thereat, it was submitted that the Taxing Master considered several factors and was guided by the principle laid down in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra). To the respondent the Taxing Master provided cogent reasons for her decision which was well reasoned and the applicant has not demonstrated any basis to warrant review of the Taxing Master's ruling as there is no legal basis for reviewing the same hence the application should be dismissed as the Court cannot interfere with the discretion of the Taxing Master unless it is manifestly extravagant and the case of **Steel Construction & Petroleum Engineering (EA) Ltd vs. Uganda Sugar Factory Ltd [1970] EA 1421.** It was submitted that the Taxing Master did exercise her discretion properly by following the principles set out in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra) hence his discretion ought not to be interfered with as there was no error of principle. Relying on **Thomas James Arthur vs. Nyeri Electricity Undertaking [1961] 492,** it was submitted that whereas where there has been an error in principle the court will interfere, questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene in exceptional cases. To the respondents where the taxing master considers all factors in the assessment as happened in this taxation, then such a taxation cannot be challenged in the High Court and based on **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64,** it was submitted that the Court cannot upset the taxation merely because in its opinion the amount awarded was high and it would not interfere with the Taxing Officer's decision unless the decision was based on an error of principle or the fees awarded is excessive.
7. I have considered the foregoing and this is the view I form of the matter.
8. The first issue that falls for determination is whether this application was filed within time. According to the affidavit sworn in support of the Chamber Summons, the Taxing Master vide a letter dated 1st November 2011 addressed to the ex parte applicant's advocates provided reasons for her decision. According to the copy of the letter from the Principal Deputy Registrar dated 1st November 2011, the said letter was received by the applicant's advocates on 28th November 2011. Under the provisions of Paragraph 11(2) of the Order:

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. (Emphasis mine).

9. Therefore if the reasons were received on 28th November 2011, the applicant had until 12th December 2011 to make the application. This application was however not filed until 19th December 2011 which was clearly outside the period stipulated under the aforesaid provisions. Nevertheless the applicant could have invoked the provisions of Paragraph 11(4) of the said Order to have the said period extended. No such step was taken.
10. The overriding purpose of all limitation statutes, and by extension limitation provisions, as was held in **Dhanesvar V Mehta vs. Manilal M Shah Civil Appeal No. 3 of 1964 [1965] EA 321**, is based on the maxim *interest reipublicae ut sit finis litium*, and it has been the policy of the courts to lean against stale claims.
11. As the present application was filed outside the time stipulated the application is thereby rendered incompetent and is struck out with costs to the respondents.

Dated at Nairobi this 18th day of October 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Liko for the 2nd respondent