IN THE MATTER OF: AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW BY MIDDLE EAST BANK KENYA LIMITED

AND

IN THE MATTER OF: EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004

BETWEEN

REPUBLIC…….....……
APPLICANT

VERSUS

KENYA REVENUE AUTHORITY…….....……
RESPONDENT

EXPARTE

MIDDLE EAST BANK KENYA LIMITED

R U L I N G

The Chamber Summons application dated 15th June 2010 filed under Regulations 11 (1) and (2) of the Advocates (Remuneration) Order refers.

The Applicant herein Middle East Bank Kenya Limited (MEBK) is objecting to the ruling on taxation delivered by the taxing officer S.M. Wahome on 4th June 2010 in respect of ***Items 1, 19*** and ***79*** of the Bill of Costs filed on behalf of the Applicant who was also the Exparte Applicant in the Judicial Review proceedings, the subject matter of the taxation which gave rise to the ruling now being objected to by the Respondent.

The Applicant objects to the said ruling on the following grounds:

(1) The learned taxing master erred in holding that no separate instructions fees were payable in respect of Item Number 1 of the said bill of costs;

(2) The learned taxing master erred in failing to appreciate that Item Number 1 was completely different and apart from Item Number 19 of the said bill of costs;

(3) The learned taxing master in assessing instructions fees at Shs.1,000,000 exercised his discretion on

wrong principles and injudiciously;

(4) The learned taxing master in assessing instruction fees under Item Number 19 also took into account matters which he ought not to have taken into consideration;

(5) The learned taxing master failed to appreciate that this Honourable Court had held that "nothing" was due or payable by MEBK to the Respondent and MEBK had not paid any sum to the Respondent; and

(6) The learned taxing master failed to appreciate and hold that fair and reasonable instructions fees payable was the amount claimed namely Shs.3,500,000.00.

From the bill of costs dated 16th December 2009, the taxed items objected to by the Applicant starting with ***Item 1*** related to instruction fees to institute on behalf of the Applicant an application seeking to commence Judicial Review proceedings against the Respondent for orders of Certiorari, Prohibition and Mandamus. For this item, the Applicant had claimed a sum of Kshs.10,000/- which was taxed off by the taxing master.

In ***Item 19***, the Applicant had claimed instruction fees for filing the substantive Notice of Motion seeking the aforesaid Judicial Review remedies pursuant to leave granted on 20th March 2007. For this item, the Applicant had claimed Kshs.3,500,000 and the taxing master allowed a sum of Kshs.1,000,000 taxing off Kshs.2,500,000.

Item No.79 related to getting up fees for which the Applicant claimed Kshs.875,000. The taxing officer allowed a sum of Kshs.333,000 which was $^1/_3$ of the sum allowed as instruction fees.

Having read the written submissions filed by both the Applicant and the Respondent which were highlighted before me on 15th November 2011 by Mr. Esmail for the Applicant and Mr. Matuku for the Respondent, it is clear to me that the main gist of the Applicant's objection to the taxation on the aforesaid items is that the taxing master wrongly exercised his discretion in taxing the Applicant's bill of costs by applying the wrong principles and taking into consideration irrelevant matters and thereby taxed off Kshs.10,000 in ***Item 1*** and awarded an unreasonable amount of Kshs.1,000,000 as instruction fees in ***Item 19***.

Mr. Esmail in his submissions contended that the taxing master erred when he made a finding that instruction fees cannot be awarded for application seeking leave to commence Judicial Review proceedings as the application for leave is merely a preliminary step which opens the door to the filing of the substantive motion. Mr. Esmail submitted that the Applicant was entitled to costs for both applications seeking leave to institute Judicial Review proceedings and for Notice of Motion seeking prerogative orders since the applications were different and in any event there was an order of the court specifically granting the Applicant costs of the Notice of Motion as well as costs for application to obtain leave. For this submission he relied on the court order issued on 21st October 2008. The Respondent in its submissions supported the decision of the taxing master in respect of ***Item 1*** and all the other items objected to by the Applicant.

I propose to deal with the issues raised in each of the contested items separately. In respect of ***Item I,*** I am in agreement with the Respondent's submission that the taxing master was right in holding that there were no separate instruction fees payable in respect of ***Item 1*** and ***Item 19*** of the Bill of Costs. I make this finding because Judicial Review is a challenge on the exercise of administrative power or authority by either statutory or public bodies or by inferior tribunals where it is alleged that they have acted either illegally or beyond their jurisdiction or have committed procedural improprieties or failed to perform their public duty to the detriment of the Applicant.

In the circumstances, the instructions to an advocate by a litigant seeking to challenge administrative action would be to institute Judicial Review proceedings to remedy the illegality or procedural

impropriety or inaction complained against bodies amenable to Judicial Review.

However, the law under Order 53 Rule I of the Civil Procedure Rules requires that before such proceedings are instituted, leave must first be obtained from the Court and this can only be done vide an application seeking leave for that purpose. This is why the application to obtain leave is a necessary prerequisite to the filing of the Notice of Motion seeking the desired prerogative orders. This legal requirement must be what the learned taxing master was referring to when he described the application to obtain leave as *"merely a preliminary step to unlock the process for JudicialReview"*. The learned taxing master also described it as a *"procedural and a bridge to land the Applicant to the real prerogative orders"*.

Given this legal position, it is impossible to commence Judicial Review proceedings before first seeking and obtaining leave to do so. The application for leave is made pursuant to instructions to institute Judicial Review proceedings and in the circumstances, I find that the taxing master applied the correct legal principles in finding that it is not possible to separate the application for leave with the substantive motion for prerogative orders for purposes of payment of instruction fees. I find that the taxing master was correct in taxing off Kshs.10,000 from ***Item 1***.

The claim that the Applicant is in any event entitled to costs under ***Item 1*** since there was a specific order granting it costs for the application seeking leave cannot stand since a perusal of the court proceedings before Nyamu, J on 9th October 2008 from which the order issued on 21st October 2008 was extracted from gave a blanket order for costs to the Applicant without specifying that even costs for the application for leave were included in that order. It is important to note when the order for costs was issued J. Nyamu was dealing with the substantive motion for Judicial Review and not application for leave. In my view, paragraph 3 of the Order issued on 21st October 2008 is not a true reflection of the Orders on costs granted to the applicant by J. Nyamu on 9th October 2008 since the order was not specific to both applications for leave and the substantive motion.

It is worth noting that the Applicant had prayed in Prayer 10 of the chamber summons dated 19th March 2008 seeking leave to be allowed to commence Judicial Review proceedings that costs of the application be provided for but the Court that granted leave pursuant to that application did not make any order as to costs. In the premises, it is my finding that there was no court order that specifically granted the Applicant costs for the application dated 19th March 2007.

On ***Item 19***, both Counsels were in agreement that instruction fees for the Notice of Motion for prerogative orders were to be assessed under Schedule VI I (j) of the Advocates remuneration order which provides for an award of a ***"reasonable sum"*** but not less than Kshs.28,000. It is also conceded that in determining the amount of instruction fees payable on applications for prerogative orders, the taxing master has unfettered discretion to either increase or decrease the sums claimed in the bill of costs provided that the said discretion is exercised judiciously taking into account the principles set out in the proviso I to schedule VI Part A (I) of the Advocates Remuneration Order which provides as follows:

"The taxing officer, in the exercise of this discretion, shall take into account consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances".

I have read through the ruling delivered by the learned taxing master on 4th June 2010 and I did not come across anywhere in the ruling that would suggest that he applied the wrong principles or considered irrelevant and extraneous matters in determining the award on instruction fees on ***Item 19***. It is clear from the said ruling that the taxing master correctly addressed his mind to the complexity and novelty of the matter. He also considered the amount of research the advocates for the Applicant had to do given the relatively new area of law under the East African Community Customs Management Act on which the main application was grounded. The submission that the taxing master erred in principle by failing to take into account that the claim by Kenya Revenue Authority was in the sum of Kshs.139,556,540.96 and it is

this claim that the Applicant managed to set aside and that had it not been for the success of the Applicant in the Judicial Review proceedings, this is money that the Applicant would have paid to Kenya Revenue Authority. It was also the Applicant's contention that the taxing master erred in holding that the amount claimed by the Applicant was excessively high as a sum of over Kshs.20,000,000 was eventually paid to Kenya Revenue Authority and that this indicated that the Respondent may have had a ***bona fide*** through misguided claim.

In my considered view, though this later holding by the taxing master appears to have been misplaced, it does not appear to have influenced the taxing master's assessment of the instruction fees payable to the Applicant since the taxing master clearly weighed the sums claimed against the Respondent's proposal after taking into account the complexity of the case, the novelty of the case and the amount of work and skills employed to file, prepare and prosecute the application. It is also clear that the taxing master was alive to the fact that he was dealing with taxation in a Judicial Review proceedings where the value of the subject matter is immaterial but is a good pointer to the weight and complexity of the matter which the taxing master considered in arriving at the sum of Kshs.1,000,000 as adequate instruction fees. It is evident from the ruling that the taxing master also gave due consideration to the importance of the matter to the Applicant since he took into account the submission by counsel for the Applicant that he had filed the Judicial Review Proceedings to save the applicant from collapse.

I entirely agree with the holding of J Ringera *(as he then was)* in First American Bank of Kenya –Vs- Shah & Others [2002] IE.A 64 at page 69 when he stated:

"First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle…..of course, [it] would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors".

In this case, I am satisfied that the learned taxing master properly and correctly exercised his discretion by applying the correct legal principles in determining the instruction fees awarded under Item 19. I find that he did not take into account any irrelevant or extraneous matters.

It is because of that judicious exercise of his discretion that the taxing master increased the instruction fees payable from the minimum provided by the law of Kshs.28,000 to the sum of Kshs.1,000,000 which is in my view reasonable given the circumstances of this case.

I make this finding because looking at the court record and the proceedings in the Judicial Review application, it would appear that the amount claimed by the Applicant of Kshs.3,500,000 was infact excessive considering that the hearing in this matter was not protracted and the time spent by the advocate in adjudicating this matter was relatively short. It is worth noting that the matter was concluded on the first day that hearing commenced because the Respondent conceded to the lifting of the Agency notice. I did not come across any voluminous or numerous documents that the advocate had to synthesis and prepare for hearing. In my opinion, the sum of Kshs.1,000,000 awarded to the Applicant under Item 19 was not in the circumstances of this case unreasonable as claimed by the Applicant.

Having found that the taxing master exercised his discretion judiciously according to the law, there is no basis for me to disturb the award of the instruction fees awarded to the Applicant under Item 19. With due respect to Mr. Esmail for the Applicant, I find that the amount was fair and reasonable compensation for the responsibility placed on his shoulders by his client and for the professional skills employed and work done by Counsel in the prosecution of the Judicial Review proceedings. I therefore find no merit to the objection raised by the Applicant to the taxation on Item 19.

As for ***Item 79***, it is common ground that the amount to be awarded for getting up fees according to the remuneration Order should be one-third of the instruction fees. The taxing master had awarded the Applicant Kshs.1,000,000 as instruction fees and $^{1}/_{3}$ of Kshs.1,000,000 is Kshs.333,333.00. The amount taxed under Item 79 was therefore correct and as this court has upheld the award of Kshs.1,000,000 as

instruction fees under Item 19, the amount of Kshs.333,333 under Item 79 will remain undisturbed.

In view of the foregoing, I find no merit in the Applicant's reference in this matter and I hereby dismiss it with no orders as to costs.

DATED, **SIGNED** and **DELIVERED** by me at Nairobi this 29TH day of FEBRUARY 2012

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

Mr. Karanja for Applicant

M/s Ngugi holding brief for Mr. Matuku for Respondent