



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW 372 OF 2007

REPUBLIC.....
APPLICANT

VERSUS

THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD.....1ST
RESPONDENT

AND

KENYA POWER & LIGHTING COMPANY LTD.....2ND
RESPONDENT

EXPARTE

EAST AFRICAN CABLES LTD.

RULING

This is a ruling on the Notice of Motion dated 1st September 2011 and filed by the Exparte Applicant herein East African Cables Ltd objecting to the ruling on taxation of the 2nd Respondent's bill of costs dated 22nd August 2007.

The objection is limited to taxation of item 1 on the bill of costs concerning the instruction fees

The Notice of motion seeks the following orders;

- (1) THAT the decision of the Taxing Master on item 1 to the bill of cost dated 22nd August 2007 be reviewed.**
- (2) THAT the instruction fee in Item 1 assessed at Kshs.750,000/- be reduced.**
- (3) THAT in the alternative to Order (2) above, appropriate directions be given to the Taxing Master upon an order to have Item 1 assessed afresh by the Taxing Master.**
- (4) THAT costs of this reference be provided for.**

The application is based on grounds that the taxing master in taxing the bill of costs on instruction fees considered irrelevant factors and applied the wrong legal principles with the result that he did not

exercise his discretion judiciously .The Applicant also contends that the instruction fees allowed under Item 1 was in any event excessive.

The application is opposed through grounds of opposition filed by the 2nd Respondent.

It is the 2nd Respondent's case that the taxing master in allowing the item on instruction fees at Kshs.750,000/- applied the correct legal principles and exercised his discretion judiciously. The 2nd Respondent further claimed that the Applicant has not disclosed any error of principle on the part of the taxing master in his ruling on taxation which would warrant the court to review the amount allowed as instruction fees.

I have looked at the bill of costs dated 22nd August 2007 and the entire court record. I have also carefully considered both the written and oral submissions made by Mr. Gachuhi, learned counsel for the Applicant and M/s Kashindi, learned counsel for the 2nd Respondent.

Mr. Gachuhi submitted that the taxing master erred in principle when he considered the value of the subject matter as a basis for awarding instruction fees. He relied on the case of **R -Vs- Ministry of Agriculture Exparte W' Njuguna and 6 Others (2006) KLR 359** for the proposition that in judicial review proceedings, the value of the subject matter should not be considered when awarding costs on instruction fees. It was also argued on behalf of the Applicant that the increment from Kshs.28,000 basic instruction fees allowed by the law to Kshs.750,000 was so excessive as to lead to an inference that the taxing master took into account the wrong principles in allowing instruction fees at Kshs.750,000/-

M/s Kashindi on her part submitted that the taxing master did not base his award on instruction fees on the value of the subject matter but only made reference to it when appreciating the importance of the project in question to both parties and the responsibility placed on the advocates in handling the judicial review proceedings. M/s Kashindi further submitted that though Schedule 6 of the Advocates Remuneration Order of 1997 allows Kshs.28,000 as basic instruction fees, the taxing officer had discretion to increase it depending on the circumstances of the case.

After considering the submissions by counsel on record for the parties, I find that it is not disputed that though Schedule 6 Part A (J) allows a basic instruction fee of Kshs.28,000 for presenting or opposing an application for a prerogative order, the taxing master has unfettered discretion to increase the amount to any amount that he considers reasonable depending on the circumstances of the case.

That discretion however must be exercised fairly and judiciously taking into account the legal principles applicable to the matter in question.

The legal principles that should have guided the taxing master in the taxation of the 2nd Respondent's bill of costs are those prescribed by proviso (i) to Schedule VI Part A which provides as follows:

“the taxing officer, in the exercise of this discretion, shall take into 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”.

It is now settled law that the High Court cannot interfere with the taxing officer's decision on taxation unless it is shown that the decision was based on an error of principle or that the award was manifestly excessive as to justify an inference that it was based on an error of principle – see the cases of **Joreth Ltd -Vs- Kigano and Associates (2002) IEA 92** and **First American Bank of Kenya -Vs- Shah & Others (2002) IEA 64**.

The East African Court of Appeal put it more clearly in **Premchard Raichard Ltd & Another - Vs- Quarry Services E. Africa Ltd (1972) E.A. 162** where Spry VP stated:

“the taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks that the award is too high or too low as to amount to an injustice to one party or the other”

What amounts to an error of principle was defined by the Court of Appeal in Kipkorir, Titoo & Kiara Advocates -Vs- Deposit Protection Fund Board (2005) IKLR 529 where the court after reiterating that a judge should not interfere with a taxing officer’s discretion unless the taxing officer had erred in principle held inter alia that a taxing officer would commit an error in principle if he fails to apply the formula for assessing instruction fees or costs specified in Schedule VI Part A or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in Proviso (1) of Schedule VI A .

I have gone through the ruling on taxation delivered by the taxing master Hon. M. Muya on 28th May 2008. I have not found any evidence to show or suggest that he based the award on instruction fees on the value of the subject matter of the judicial review proceedings in which costs were awarded to the Respondents. At page 3 of the ruling the taxing master stated:

“It is not in dispute that the matter revolved around the public tendering process.

Also not in dispute is the fact that substantial amounts of money were involved in the tenders. This matter was fairly complex. It involved a lot of documentation and perusals as well as research on the relevant laws. The matter was also of much importance to the parties due to the amounts involved of the Kshs.576,232,160/-. The charge of charge of 1.5 million however, is exorbitant and allow Kshs.750,000/”.

These remarks by the taxing master taken as a whole clearly show that in making reference to the value of the subject matter, the taxing officer was considering the nature of the dispute that was before the court in the judicial review proceedings , the complexity of the matter that was before the court and the tasks that the advocates on record were expected to undertake in order to prepare for the hearing of the application.

In my view, the taxing master did not consider the value of the subject matter as a basis for awarding costs on instruction fees but used it as a measure of the interest and importance of the matter to the parties.

Taking everything into account, I am persuaded to find that the taxing master exercised his discretion correctly and judiciously and that in arriving at the award of Kshs.750,000 he did not commit an error of principle. There is no doubt that he properly addressed his mind to the circumstances of the case in relation to the relevant principles in proviso (1) of schedule V1 Part A. It is noted that the amount charged in the bill of costs on instruction fees was Kshs.1,500,000 but the taxing officer reduced the amount in his discretion to Kshs.750,000. I am of the view that the amount of Kshs.750,000 was reasonable in the circumstances of this case considering the volume of documents filed by the parties and the authorities relied upon by counsel on record which are evident from the judgment delivered on 14th may 2007. This is an indicator of the responsibility which had been placed on the shoulders of the advocates on record and the work done by 2nd Respondent’s counsel in preparing and defending the Exparte Applicant’s application for Judicial Review. I am therefore satisfied that the amount awarded as instruction fees was neither too high nor too low as to cause injustice to any of the parties.

For the foregoing reasons, I find that the reference filed by the Exparte Applicant in the Notice of Motion dated 1st September 2011 lacks merit and it is hereby dismissed with no orders as to costs.

DATED, DELIVERED and SIGNED by me this 17th day of **October** 2012

C.W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

M/s Kashindi for the Applicant

N/A for the 1st Respondent

Mrs. Kimani holdin brief for Mr. Gichohi for the 2nd Respondent