REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Application 295 of 2008

REPUBLIC……APPLICANT

-VERSUS-

NATIONAL ENVIRONMENTAL TRIBUNAL

ex parte

SILVERCREST ENTERPRISES LIMITED……..….RESPONDENT

JOEL LESALE……. 1ST INTERESTED PARTY

DONATCO FONSECA…….. 2ND INTERESTED PARTY

HON. MRS. BETH MUGO…….. 3RD INTERESTED PARTY

JOHN MBUVI……..... 4TH INTERESTED PARTY

MANGA MUGWE…….....5TH INTERESTED PARTY

EUGENE CHERNEL…….. 6TH INTERESTED PARTY

AMB. NICK MUGO……. 7TH INTERESTED PARTY

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY……. 8TH INTERESTED PARTY

-VERSUS-

DIRECTOR-GENERAL, NEMA……..1ST RESPONDENT

SILVERCREST ENTERPRISES LIMITED…… …….2ND RESPONDENT

RULING

By Chamber Summons dated

9th March, 2010 the applicant sets out three prayers:

(i) ***that, the ruling on the taxation of the applicant's Bill of Costs dated*** *1st July, 2009****, delivered on*** *29th January, 2010* ***by the Taxing Master,*** *Mr. T. Gesora****, be set aside;***

(ii) ***that, this Court be pleased to tax the Bill of costs dated*** *1st July,2009;*

(iii) ***that, the costs of this application be borne by the respondent.***

The following are the grounds set out as the basis of the application:

(a) ***that, the Taxing Master erred in disallowing items 1,41, 42, 43, 44, 45, 46 and 47 of the Bill of Costs;***

(b) ***that, the Taxing Master erred in law and principle in failing to appreciate the nature and importance of the matter;***

(c) ***that, the Taxing Master misdirected himself as to the relevant schedule to be applied in taxing item 1;***

(d) ***that, the Taxing Master erred in disallowing the travelling costs as provided for in paragraph 7 (d) (iv) of the Advocates' (Remuneration) Order, yet counsel's practice is in Nairobi;***

(e) ***that, the Taxing Master did not consult the record of the High Court, in arriving at his decision on the applicant's Bill of Costs;***

(f) ***that, the determination of the Taxing Master is manifestly low, in the circumstances.***

The taxation ruling complained about is brief, and may be set out here:

"I have considered the bill of costs dated 1st July, 2009. The claim herein was for prerogative reliefs. Under clause 1(j) of Schedule 6, the minimum provided is Kshs. 28,000/00. By any sketch [sic] Kshs. 1.5 million is excessive. Kshs. 200,000/= will suffice. Therefore Kshs. 1.3 million [is] taxed off that item. Kshs. 24,500/= is taxed off 1/M No. 10 and Kshs. 5,040/= is taxed off items 25, 26 & 40.

"I do not find any provision for travelling expenses that have been included in the disbursement. Those items are therefore taxed off.

"Ultimately, Kshs. 1,575,135/= is taxed off the bill leaving a balance of Kshs. 338,219/40. Though the item was not included in the bill, fees for getting up is allowed at Kshs. 60,667 being one-third of the transaction fees.

"The bill is therefore allowed in the sum of Kshs. 404,886/=."

Learned counsel for the applicants submitted that the grievance in this matter centres on (i) Item No. 1 – ***instruction fees***; and (ii) Items 41,42,43,44,45,46 and 47 – travelling costs.

It was contended that the Taxing Master had erred in principle, in reducing the instruction fee as drawn by the applicants; on the basis that under Schedule **VI** A, para. 1 of the Advocates (Remuneration) Order the Taxing Master has the discretion to increase or reduce the instruction fees, but with the condition that –

"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."

Counsel gave the background to the proceedings in question. It was an application for judicial review orders by the ***ex parte*** applicant: and leave was granted for an application for orders of ***certiorari*** to remove into the Court and quash the proceedings taken before the National Environmental Tribunal (in Cause No. 23 of 2007); and for an application for orders of ***prohibition*** staying any further proceedings in the said cause. After leave was granted for the judicial review motion to be filed, the applicants herein filed a motion to have such leave set aside, and to have the

motion for judicial review orders dismissed. Counsel submitted that the hearings were protracted, and the ***ex parte*** applicant retained two counsel to conduct its case. The Court gave its ruling on 19th May, 2009, setting aside the leave granted, and dismissing the ***ex parte*** applicant's motion with costs to the applicant herein. The applicant thereafter lodged a bill of costs before the Taxing Master.

Counsel urged that the Taxing Master had failed to consider the nature of the pleadings, and of the oral submissions made before the Court – elements which showed the matter to be of the utmost importance to the parties.

Counsel invoked past decisions to support the applicant's case. In ***First American Bank of Kenya v. Shah and Others*** [2002] 1E.A. 64, ***Ringera, J*** (as he then was) considered the guiding principles in a taxation matter such as this one; and the following passage appears in the report (p.69):

> ***"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. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject-matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. [Not] all of the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment…..However, the Judge does have jurisdiction and it is within his discretion to reassess the bill himself…The Court is not entitled to upset a taxation because in its opinion, the amount awarded was high".***

Counsel also relied on the High Court's decision (***Azangalala, J***) in ***Vijay Kumar Mandal v. Rajinder Kumar Mandal*** Nairobi MCC HCCC No. 337 of 2002 [2005]eKLR.

Counsel gave as an indication of misdirection on the part of the Taxing Officer, the fact that he had provided for getting-up fees which had not been claimed; and he submitted that such fees were only payable in a case where a denial of liability was filed and the advocate making the claim for fees has had, consequently, to get up and prepare the case for trial; so this would be in addition to the instruction fees. But in the instant case the cause was concerned with ***prerogative orders***, and so it was not a proper case for getting-up fees. Counsel urged that Item 1 of the bill of costs (instruction fees) be allowed as drawn.

Counsel submitted that Items 41, 42, 43, 44, 45, 46 and 47 were transport costs involved in counsel's travels from Nairobi to Mombasa where the matter was filed, heard and determined. It was urged that the Court should take judicial notice that for a firm of advocates practising in Nairobi, attendance in Court at Mombasa entailed essential travel – and that in this regard, the advocate having the conduct of the matter for the applicants herein, "never once…..[failed] to attend". Counsel invoked Schedule V, para. 7 of the Advocates (Remuneration) Order which provided for charges of Kshs. 10,500/= for "journeys home", for every day of not less than seven hours used in travelling; in which case only proof of travel (and not actual disbursement) was required. Counsel submitted that the Taxing Master had the discretion to increase or decrease, but not to disallow, the travel-cost element.

The identified errors in the taxation ruling of 29th January, 2010 are the following:

(i) ***allowing for getting-up fees in respect of the judicial review matter amounted to a misdirection in principle, on the part of the Taxing Officer;***

(ii) ***allowing for getting-up fees, an element that was not claimed, after reducing the claim in respect of instruction fees, indicates that this element was intended to make up for the reduction in the***

instruction fees;

(iii) ***there was no basis for disallowing the travel-cost element in the applicant's advocate's bill of costs.***

Upon considering the main factors which the Taxing Officer should have taken into account – in particular, (a) the nature and importance of the cause or matter; (b) the interest of the parties; (c) the general conduct of the proceedings – I have been unable to determine from the Taxing Officer's ruling of 29th January, 2010 that he consciously brought such factors, in so far as they were relevant, on to the scales of assessment. An omission to take into account such factors, in the conduct of taxation, would deprive the ruling of the statutory basis of validity; and in this regard, I find the applicant's position to be justified.

The only question left is whether I ought, in accordance with the general practice, to remit this matter to the Taxing Officer for rectification.

Although some of the points to be taken up in addressing the claims of the applicants are straightforward enough, and could easily have been acted upon by a Taxing Officer, the application of the governing principles in a judicial review matter, a subject which is more familiar within the jurisdiction of the High Court, would call for the disposal of the application at this stage.

Consequently, I hereby allow the application by the Chamber Summons of 9th March, 2010, and specifically order and direct as follows:

The taxation of costs as done by the Taxing Officer on 29TH January, 2010 shall be retained but with the following changes:

(1) the element of getting-up fees is set aside and shall have no application;

(2) on Item No. 1 (instruction fees) of the Bill of costs dated 1st July, 2009, the sum of Kshs. 500,000/= is taxed off, leaving Kshs. 1,000,000/=;

(3) on item 41 (travel costs) of the said Bill of Costs, the sum of Kshs. 10,000/= is taxed off, leaving Kshs. 20,000/=;

(4) on item 42 (travel costs) of the said Bill of Costs, the sum of Kshs. 10,000/= is taxed off, leaving Kshs. 20,000/=;

(5) on item 43 (travel costs) of the said Bill of Costs, the sum of Kshs. 10,000/= is taxed off, leaving Kshs. 20,000/=;

(6) on item 44 (travel costs) of the said Bill of costs, the sum of Kshs. 10,000/= is taxed off, leaving Kshs. 20,000/=;

(7) on item 45 (travel costs) of the Bill of Costs, the sum of Kshs. 10,000/= is taxed off, leaving Kshs. 20,000/=;

(8) on item 46 (travel costs) of the said Bill of Costs, the sum of Kshs. 10,000/= is taxed off, leaving Kshs. 20,000/=;

(9) on item 47 (travel costs) of the said Bill of Costs, the sum of Kshs. 10,000/= is taxed off, leaving Kshs. 20,000/=;

(10) the costs of this application shall be borne by the respondent.

Orders accordingly

DATED and **DELIVERED** at **MOMBASA** this 2nd day of July, 2010.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J*

Court Clerk: *Ibrahim*
For the Applicants:
For the Respondent: