



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ELECTION PETITION 31 OF 2008**  
**TITUS KIONDO MUYA.....PETITIONER**

**V E R S U S**

- 1. PETER NJOROGE BAIYA**
- 2. ROBERT K. MUNGAI**
- 3. ELECTORAL COMMISSION OF KENYA .....RESPONDENTS**

**R U L I N G**

On 7<sup>th</sup> May, 2008 the Petitioner's parliamentary election petition herein was struck out with costs to all the Respondents. The 1<sup>st</sup> Respondent subsequently filed his **bill of costs dated 25<sup>th</sup> June, 2008**. On 27<sup>th</sup> November, 2008 the bill was taxed at KShs. 1,076,974/00 (all inclusive).

The Petitioner has challenged that taxation by **chamber summons dated 19<sup>th</sup> December, 2008** under **paragraph 11** of the **Advocates (Remuneration) Order**. The challenge is in respect only to **items 1 and 5** of the bill of costs. Item 1 claimed an instruction fee of KShs. 3 million to oppose the petition. KShs. 1 million was awarded. Item 5 claimed an instruction fee of KShs. 300,000/00 to present the application that resulted in the striking out of the petition. KShs, 50,000/00 was awarded.

The taxation on the two items is challenged upon two grounds:-

1. That the awards were so excessive as to be unreasonable.
2. That costs in election petitions should not be allowed at such a level as to confine access to the court only to the wealthy.

The reference is opposed by the 1<sup>st</sup> Respondent.

I have considered the written submissions filed on behalf of the parties, including the authorities cited. It is now well settled that in matters of taxation of costs the taxing officer is better placed and suited than a judge. A judge will intervene only if it is demonstrated that the taxing officer erred in some principle in arriving at the challenged award. A judge may also intervene if it is demonstrated that the award is so manifestly low or excessive as to amount to an erroneous award. In other words, the award must be reasonable in the circumstances of the case.

I have read the taxing officer's ruling on taxation. He did not commit any error of principle. He applied the correct scales in Schedule VI of the Advocates (Remuneration) Order where a minimum of KShs. 42,000/00 is provided for presenting or opposing an election petition. KShs. 3500/00 is provided for presenting or opposing the kind of application that resulted in the striking out of the petition.

The taxing officer had the discretion to award any **reasonable** sum subject to these minimums. He awarded KShs. 1 million on item 1 and KShs. 50,000/00 on item 5. In the exercise of his discretion he took into consideration, as he should have, the nature and importance of the matter, the interest of the parties in it, the general conduct of the proceedings and all other relevant circumstances. He recognised the great importance of election petitions to the parties and their constituents and also to the country as a whole. He noted awards of costs in similar matters. He did not depart from the trend of awarding fairly high sums for instruction fees in election petitions.

The Petitioner has invited the court to depart from this trend set by taxing officers in election petition taxations over many years where awards for instruction fees to present or oppose parliamentary election petitions appear to range between KShs. 1 and 2 millions. He says that this trend, unless checked by the court, will have the undesirable effect of restricting access to courts in matters of election petitions to the wealthy only, and that this would be contrary to public policy.

Generally speaking, the minimums provided in the scales ought to provide some guidance to taxing officers when they exercise their discretion to award reasonable sums. At first glance, a sum of KShs. 1 million would seem to have absolutely no relation to the minimum KShs. 42,000/00, and hence appear to be, *prima facie*, unreasonable. Likewise a sum of KShs. 50,000/00 would appear to have no kinship at all to the minimum of KShs. 3,500/00. Is it the minimums provided that are absolutely unrealistic as far as parliamentary election petitions are concerned, or is it the awards made by the taxing officers that are unreasonable?

On the one hand, the principle that the election court ought to be accessible to any voter, rich or poor, who may want to challenge the election of his parliamentary representative, is an important public policy principle. There is no doubt that unreasonable awards of costs can impede this access. Against this principle the taxing officer must balance the other considerations that he is obligated to consider. These include the nature and importance of the petition, the interest of the parties and the general conduct of the proceedings.

Let us consider the nature of election petitions. This must be informed by the nature of politics in Kenya. We are all aware of the great public interest in politics in this country. Whole communities get involved. It is not difficult to understand why. Politics in Kenya are perceived, wrongly or rightly it does not matter, to have a direct and crucial role in the allocation of public resources (including jobs, land, etc). Whole communities tend to associate themselves with particular candidates for this very reason.

For candidates themselves, elective politics in Kenya have become, again wrongly or rightly it does not matter, a very lucrative source of income and a great forum for self-aggrandisement. So, for many candidates, parliamentary elections are some of the biggest battles or undertakings that they will ever be involved in, in their lives.

After the battle is fought and either won or lost in the field as it were, the war is often continued in the election court. The matter will therefore be of great importance to the parties involved. The battle in election court will often be fought with batteries of lawyers. Just as the courts do, the lawyers and parties will all too often place aside everything else to deal first with the election petition. An effort and industry far greater than the usual will be applied by all concerned.

I am therefore not persuaded that an award of KShs. 1 million for instruction fee to present or oppose an election petition is unreasonable. Likewise, an award of KShs. 50,000/00 to present or oppose an application to strike out an election petition is not unreasonable. In my view, it is the minimums that are prescribed that are totally unrealistic.

I must for these reasons refuse the reference. The same is hereby dismissed with costs to the 1<sup>st</sup> Respondent. It is so ordered.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JUNE, 2009**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 12<sup>TH</sup> DAY OF JUNE, 2009**