REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Misc Appli 284 of 2007

REPUBLIC OF KENYA
.....APPLICANT

VERSUS

THE SENATE STUDENTS DISCIPLINARY COMMITTEE KENYATTA UNIVERSITY.....1ST RESPONDENT

KENYATTA UNIVERSITY .....2ND RESPONDENT

RULING

The background information is that the applicant herein moved this court's jurisdiction by way of an application for judicial review seeking an order of certiorari to quash the respondent's decision to discontinue the studies of the applicant. The matter came before Nyamu J. on 21.03.07 when interim orders were given and inter- partes hearing ordered for 27.3.07. On 27.3.07 counsel for the applicant intimated to the court, that the respondent had not been served. The record reveals that the matter was stood over to 2.45 pm for hearing inter-parties. At 2.45 pm the court record reveals that both counsels appeared and sentiments of each were recorded as follows:

"*Mr. Kaluma: the chamber summons dated 21.3.07. We are negotiating. We request to have a hearing on 3.4.07 to record a consent if issues will have been resolved. The matter is urgent as the council has cancelled her graduation.*

Mr. Kuria: we are negotiating.

Court: it will be vacation time. Due to urgency on 31.4.07 before vacation judge."

On 4.6.07 the respondent's counsel is indicated to have stated that they were not opposing stay and that intimation gave rise to orders by consent as follows:

- *"Leave to apply for judicial review was granted. The substantive application was ordered to be filed within 7 days from that date of 4.06.07."*

On 18.06.07 when the file came up for mention, parties were advised to file written skeleton arguments within 7 days and upon completion to have that matter listed for disposal.

On 24.10.07 the parties appeared before Nyamu J. for directions which were given as follows.

- *"The respondent to file and serve replying affidavit within 5 days.*

- *Applicant to respond within 7 days.*

- *Matter to be heard by any judge within the Division."*

On 9.11.07 the matter was not heard due to lack of time. On 21.11.07 the parties recorded the following consent:

"*By consent an order of certiorari do issue quashing the decision of the council of the respondent contained in the letter dated 12.2.07 purporting to discontinue the applicant from studying at Kenyatta University. Costs follow the event."*

Following that consent, the applicant's counsel presented a bill of costs dated 27th day of November 2007 and filed the same date, to the total tune of Kshs.3,415,848.00.

The bill went before the taxation master of this court on 7.3.08 and it was taxed in the presence of both parties, with each sides representations' being heard and arguments for and against reflected on the record. The taxing master's ruling was given on 17.4.08. The salient observations of that ruling are as follows:-

- There was a partial consent of the parties on the bill on items 2 - 63 for a compound sum of Kshs.66,769.00

- items contested were number 1 and 59

- .This was an application for judicial review and hence the scale applicable to it was that of Schedule VI (1) (J) of the Advocates Remuneration Order of 2006 as the suit was instituted in the year 2007.

- That the schedule provides for not less than Kshs.28,000/=.

- That in the exercise of this discretion the taxing officer required to be guided by the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings or direction by the trial judge and all the relevant circumstances.

- In this application, the applicant had been discontinued from pursuing her degree at the respondent's university when she had completed her studies on the allegation that she had access to examination papers. This had the effect of missing her graduation which was to be conducted in the month of November 2007.

- There was a possibility of the action affecting her teaching career with her employer.

- It was noted that the application for leave was allowed by consent after the matter had been prepared for hearing.

- By reason of the above, the learned taxing master made findings that he found that this was not a very complex matter. It did not involve a lot of documentation, labour and skill required were normal as for any other judicial review application.

- By reasons of the above, the learned taxing master found the applicant's bill of 2.1m on the high side while that offered by the respondent of Kshs.28,000.00 not being reflective of the work required on a judicial review.

- On that account, the taxing master found a figure of Kshs.210,000/= to be fair and reasonable and

taxed off Kshs.1,890,000/=.

- On item 59 the taxing master was satisfied that the matter had gone up to the direction stage, parties had filed written skeleton arguments with a list of authorities and on that account allowed the kshs.70,000.00 as getting up fee which is ? of the instruction fees.

- Item 2 - 63 were agreed in the sum of Kshs.66,769.00.

- That this is a party and party costs and as such VAT was not payable.

The bill was therefore taxed at Kshs.66,769.00 + 210,000+ 70,000 which comes to Kshs.346,769.00.

The respondent became aggrieved with those orders and came to this court by way of chamber summons under certificate of urgency.

The application is brought under rule 11 (2) of the Advocates Remuneration Order, Section 3 of the CPA and all other enabling provisions of the law. It sought 6 prayers, namely:

(1) Spent,

(2) That court be pleased to order a temporary stay, of execution and the ruling/or orders and/or decision issued on 17.4.2008 pending the hearing and determination of the application inter-parties.

(3) That this Honourable Court be pleased to order stay of execution of the taxation rulings/ or order and/or decision dated 17.4.2008 pending the hearing and determination of the reference by the applicant.

(4) That the rulings and/or order and/or decisions of 17th April 2008 by the learned taxing officer Hon. Muya (Mr.) taxing the respondent's party and party Bill of Costs herein at Kshs.346,769.00 and the certificate of taxation be quashed and/or set aside.

(5) That the bill of costs herein be taxed a fresh by the High Court or remitted for fresh taxation by the Court's Taxing Officer.

(6) That cost of this application be borne by the respondent herein.

The applicant appeared before the duty judge on 27.7.08 for an interim relief. The court granted an order for temporary stay on condition that the sum of Kshs.346,769/= is deposited in court, within 5 days failing which the order of stay would lapse.

On 24.9.08 the parties recorded the following consent:

(1) "By consent the chamber summons application dated 23.7.08 be and is hereby converted into a reference to the taxation of the bill of costs dated 27.11.07 and the decision of the taxing officer dated 17.4.08.

(2) The sum of Kshs.66,769.00 taxed by consent of parties and already deposited in court, be released forthwith to the firm of Limumba, Mumma & Co. Advocates.

(3) The matter to proceed to hearing on items number 1 and 59 on 22.10.08 at 3.00 pm

Signed advocate for applicant

Signed advocate for respondent"

On 22.10.98 the parties entered into the following consent:

(1) By consent the parties herein do agree to proceed with the application before court as a reference under rule 12 of the remuneration order.

(2) The parties do hereby agree and propose that for the purposes of these proceedings the reasons given by the taxing officer in the ruling made on 17.4.08 in the taxation shall be treated as the taxing officer's reasons under the Rule 11".

In there oral highlights, counsel for the applicant stressed the following points:

(1) They contend that the amount awarded was on the high side considering the amount of work done. That the matter touched on judicial review and as such no defence was filed.

(2) They had intimated to the counsel for the opposite party that this was a matter that they were willing to settle and were going to settle and it was indeed eventually settled.

(3) That getting up fees on item 59 should not have been charged because it is usually awardable when parties prepare for main hearing and not when the matter is fought on affidavit evidence. It is also chargeable when there is a defence or denial of liability and issues are either joined or framed. Herein no issues were framed or liability denied. No pleadings were filed.

On the basis of the afore setout argument, counsel urged this court to exercise its discretion in favour of the applicant and interfere with the taxing master's award.

In response, counsel for the respondent to the application urged the court, not to disturb their award because of the following reasons:

1. The principles are set out in schedule 6 rule 1 namely, the nature and the importance of the matter to the parties and any urgency involved. Herein the facts demonstrated confirm the urgency involved as the matter involved a student who had completed her studies and was about to graduate when the said graduation was cancelled.

- The cancellation had the effect of shuttering her career with the TSC.

- Without the graduation, the applicant could have lost her employment. The integrity of the university was at stake and as such the matter was very important.

- They contend that they filed papers, prepared submissions and the respondent responded to the said application and filed written submissions and were ready for arguments and that is when the consent came up.

- The court, is urged not to interfere with the award as the taxing master exercised his discretion properly. This court, can only interfere with the award if it can be shown that there is an error. Herein there is no error of law or principle demonstrated and so the award for the instruction fee should be confirmed.

On item 59, the counsel also stated that the amount allowed should not be disturbed because the applicant presented an application for judicial review, an advocate was appointed and paper work prepared, filed and served. It is their argument that the respondent responded and sought leave to file papers and it is only after they were ready to be heard is when the consent was offered. That the taxing master took into consideration all these relevant factors and arrived at the correct award which should not be disturbed.

In reply to that submission, counsel for the current applicant urged the court, to take note of the court's record which speaks for itself.

On the court's assessment of the facts herein, there is no dispute that the taxing master set out the principles on the basis of which he was to proceed with the taxation which are already set out in this

ruling. The taxing master went further to state that he was exercising his discretion in awarding the award he made on the two items which are being contested.

It is also on record that the current applicant has moved to this court, asking this court, to exercise its discretion to interfere with the said award. Whereas the current respondent on the other hand is asking this court, to exercise its discretion not to interfere with the taxing master's discretion and not to disturb the award.

It therefore follows that there is no doubt that both the taxing master and this superior court, are both vested with judicial discretion but exercising the same in different capacities. There appears to be two aspects of this discretion that this court, has to deal with, namely to interfere with the award. Although no authority was cited to this court, on interference with a taxing master's award, this court has no doubt that the principles governing interference with other types of awards would definitely also apply here. Those that this court, has judicial notice of and which have been refined by the court of appeal are that:-

(1) An appellate court or a court exercising supervisory power over a junior court can only interfere with an award made by the supervised court if it can be shown that the same is inordinately too high or too low,

(2) Or that the same is based on some wrong principles or,

(3) That it is obviously wrong.

Herein the current applicant has not stated that it is inordinately too high but it is said to be on the high side and it should be interfered with. Whereas though the current respondent has not stated that the award is too low he has stated that it should not be interfered with.

In addition to the principles that this court has judicial notice of there are those set by the court of appeal. In the case of **CMC HOLDINGS LTD. -VS- NZIOKI [2004] 1 KLR 173.** For purposes of the record, these are:-

(1) The discretion must be exercised upon reason and judiciously.

(2) It should not be exercised wrongly.

(3) Neither should the court Act perversely.

(4) It should be exercised so that a litigant does not suffer injustice.

By being invited to revisit the taxation issue, the court, is invited to step into the shoes of the taxing master, consider the matter a fresh and then determine whether the conclusions reached by the taxing master are to stand or not. This court, has duly done so and in dealing with the matter, the court bears the following factors in mind, namely:-

(1) That the current applicant indeed took action against the current respondent which action they have conceded by conduct to have been not proper by reason of them consenting to the allowing of the action.

(2) That the current respondent who was the original applicant became aggrieved by that action and took out judicial review proceedings.

(3) That the action done by the current applicant who was the original respondent was an administrative action by a public body.

(4) That a proper way of moving the court, to quash that action was by way of judicial review.

(5) That the original applicant who is the current respondent was entitled to exercise her undoubted right of access to a court of law to seek redress.

(6) That the said original applicant also had a right which she rightly exercised by hiring the services of counsel.

(7) That the said counsel's services are not free, a fact that this court has judicial notice of.

(8) That the payment for services may be by the party hiring the services or the opposite party if the opposite party has been faulted. Herein the opposite party has been faulted and that is why the bill has been taxed against them.

(9) The amount payable has to be determined within the ambit of the principles set in the remuneration order which requires the claimant to demonstrate and or justify the claim. The standard form of doing that is by presentation of an itemized bill of costs, which action the original applicant presented. He has indicated in the justification column what services he rendered for which the amount claimed is meant to cater for.

This court, has perused the argument before the taxing master and before this court and the court, does not trace a challenge to any of those activities by the current applicant, that they were not undertaken. That means that the taxing master was justified in taking all of them into account, and that this court, is also entitled to take all of them into consideration in so far as item 1 is concerned.

As for item 59 the taxing master observed that the determining factor is usually simply a requirement that it be ? of the amount awarded under item 1.The amount that had been claimed by the original claimant under item 1 was 2,100,000.00 and he was awarded 210,000.00 which is 10%, meaning that 80% was slashed off in favour of the respondent. The ? item under item 59 followed the event.

In this court's opinion, it is to be assumed that the current applicant which is the original respondent must have carried out investigations and satisfied themselves that breach or an irregularity had been committed by the original applicant before moving to take action against her. In a situation where it turns out that they should not have taken action in the first place, they can only blame themselves for the costs incurred which costs are to be paid by them.

The court, believes the taxing master's observation that had the action not been forestalled, serious consequences would have befallen the original applicant. For this reason, the court, therefore believes counsel for the original applicant that the matter required not only serious but also urgent action and adequate preparation whose documentation is displayed on record.

When brought to their notice, the respondent at first intimated that they were negotiating, but later when it transpired that a consent was not forthcoming, directions were taken, the original respondent sought and they were granted leave to file a reply which they failed to do. Parties were ready to be heard and both were asked to file submissions, which the original applicant did but not the current applicant, it therefore follows that the current applicant cannot hide under the conduct of asking for leave to file reply and then failing to do so, and then showing willingness to proceed and when given an opportunity to file a reply and skeleton arguments failed to do so and then turn round and use that, as an excuse to show that there was no defence and no preparations for trial, in order to attempt to water down the amount of efforts put both in the preparation and execution. Of importance to the court, is a realization that after parties intimated to court, that negotiations had failed and were prepared to be heard and realizing that they would not meet what they had requested to be allowed to do in the matter, there is no indication that they reached out to the current respondent, original applicant either by phone or correspondence that a consent was forthcoming. The record bears witness that in fact it was on the second date of the hearing that a consent was entered into. Meaning that the original applicants' counsel had all along been ready and willing to have the matter heard on merit. He had displayed proof of preparedness items on the record. The taxing master was satisfied and gave him 10%. This court too is satisfied that that discretion was properly exercised.

As for the current applicant's assertion that getting up fees is not payable in the circumstance of this case, the court makes an observation that no authority, that it is only main hearing which are prepared. This court takes judicial notice of the fact that judicial review is a special jurisdiction. Parties access it through pleadings titled affidavit and statements which the original applicant prepared. Defence to the same is by way of a replying affidavit. It cannot be termed to have been non existent because the defence was brought on board and intimated by conduct that they were willing to defend and when given an opportunity to file their defence, they failed to do so. Despite failure to put in a reply as a defence, they showed interest that they were willing to participate in the arguments and when given an opportunity to file skeleton arguments, they failed to do so and then entered a consent. This courts', conclusion on that conduct is that it is a proof that they had no justification in taking the action they did which action sparked off the current proceedings. They have to bear consequences of meeting the costs occasioned which in this court's opinion they are not punitive in nature

The court, is therefore satisfied that as per provisions applicable to judicial review, pleadings were duly filed by the originator and these were defended in the manner specified above. Irrespective of failure to file papers, the rules allow the current applicant to defend on points of law which option they availed themselves of. Getting up fee is therefore payable in the circumstances of this case and was rightly awarded.

For the reasons given in the assessment, the court, makes a finding that the taxing master exercised his discretion properly, judicially and with reasons and for the reasons given in the assessment herein there is no justification to interfere with it. The applicant's application dated 23rd day of July 2008 and filed on 23.7.08 and which was converted into a reference by consent of the parties has no merit. The same is dismissed with costs to the respondent to it. The taxing master's order on taxation is confirmed.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER 2008.

R N NAMBUYE

JUDGE