



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
ELECTION PETITION 2 OF 2003

LORNA CHEPKEMOI LABOSO PLAINTIFF

VERSUS

ANTONY KIPKOSKE KIMETO1ST RESPONDENT

CAPT. (RTD) SYLVESTER BIWOTT2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

RULING

This is a reference to the High Court from the decision of taxing officer under the provisions of **Rule 11 (2)** of the **Advocates Remuneration Order**. The applicant who was the petitioner in the **Election Petition Number 2 of 2003** seeks for review setting aside, or variation by way of decreasing the fees awarded in **items 1, 2 – 12, 14 - 21 and 22 - 25** arising out of the decision of **Ms. E. Ominde** of 2nd September 2005.

The genesis of this application can be traced to petition by the applicant against

1. **Antony Kipkoskei Kimetto**
2. **Captain Silvester Biwot (Returning Officer Sotik Constituency)**
3. **The Election Commission of Kenya**

The Petitioner sought for a determination that **Antony Kipkoskei Kimetto** was not duly elected.

That the election in Sotik Constituency be declared void and that a certificate to that effect be issued to the speaker of the National Assembly.

That the respondents be condemned to pay costs of the petition and other incidentals and such other further orders be made by this Honourable Court as may be deemed just.

The Respondent successfully applied by way of Notice of Motion to have the petitioner's petition struck out with costs for reasons that the petition was not served in time by an order of **Hon. Apondi J** made on 19th November 2004.

Following the above order, the 1st respondent filed a party and party bill of costs which was presented before the taxing officer and taxed for **Kshs.2,052,410/-**. The petitioners Counsel urged this court to find that the taxation is manifestly excessive, unreasonable and lacking in legal basis. **Mr. Akanyo** faulted the decision of the taxing officer for awarding **Kshs.2 Million** as instruction fees on **Item 1** which he termed as misdirection from the laid down principles in assessing the instruction fees. The instruction fees in regard to an election petition are governed and should be taxed under **schedule 6** which provides the basic instruction fees as **Kshs.30,000/-** as the minimum. The taxing officer has discretion to increase the sum but his should be done reasonably and judicially while taking into account factors indicated under **schedule 6**. Counsel made reference to the decision of the case of **Kipkorir, Titoo and Kiara Advocates – vs – Deposit Protection Fund Board Milimani Commercial Court Misc. Appl. No. 888 of 2003.**

Counsel argued that the taxing officer over relied on the fact that an election petition should be disposed of expeditiously despite the fact even the **National Assemblies and Presidential Election Act** does not set a time limit within which a election petition should be disposed.

In the regard, therefore this should not have been a factor in increasing the instruction fees to such an astronomical figure from **Kshs.30,000/-** to **2 Million**.

According to Counsel for the petitioner the amount of work involved and the interest of the parties and complexity of the matter are legitimate factors to be taken into account however the decision of the taxing officer was faulted for failing to consider that the matter never went for full hearing.

The Election Petition was disposed of on a preliminary issue and thus the amount of work could not have been equal to the work if the petition was determined after a full hearing. Counsel also relied on the case of

Danson Mutuku Muema Vs Julius Muthoka Muema

HCCA No. 6 of 1991 where *Hon. Mwera J* delivered himself as follows;

“Taxing officers while applying the schedules should know and seriously apply their minds, within the discretion allowed, with due seriousness to the exercise. They should ensure only proper, lawful and justified bills roll off their desks All the time he/she should bear in mind that taxation is a judicial function subject to appeal. And that costs if not carefully handled can incapacitate a litigant and/or cause litigants to lose confidence in litigating their rights in Court.”

On behalf of the respondents, **Mr. Wamasa** opposed this reference on points of law as the respondent did not file any replying affidavit or grounds of objection. In his view, the taxing officer complied with the provisions of the Advocates Remuneration Order and properly applied the principles and exercised her discretion when she taxed the instruction fees for **Kshs.2 Million**. She gave reasons that are sound and thus the authorities cited by the petitioner’s Counsel are distinguishable which in any event were civil suit filed under the **Civil Procedure Act**. Counsel urged to consider the volume of the file, the complexity of issues involved in an election petition and not to interfere with the sum awarded. He argued that an election petition is a matter of considerable interest to the parties and even the electorate and the discretion of the taxing officer was properly exercised when the awarded **Kshs.2 Million** instead of **Kshs.30,000/-** which is the minimum.

I now wish to analyse the above arguments. The learned taxing officer gave the following reasons for the taxations:

- 1) “Election Petitions are unlike other civil matters governed by the Civil Procedure Act. They come under the National Assembly and Presidential Elections Act which Act provides for imprisonment for offences committed under it. Costs here are therefore to be treated differently.**
- 2) Election Petitions are disposed of on a priority basis because people of Kenya need to know**

whose their leader is.

3) Due care, diligence and utmost attention and hard work is involved in preparing the defence. The court also took the complexity of the issues raised on awarding costs higher than the amount prescribed.”

I have considered the above reasons with an anxious mind. It is trite that the High Court is not entitled to upset a taxation merely because, in its opinion, the amount awarded is high and it would not interfere with a taxing officer's decision unless 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. (*See Case of **Construction Petroleum Engineering (E.A) Ltd Vs Uganda Sugar Factory [1970] E.A 141.***)

Under the Advocates Remuneration Order, some of the relevant factors to be considered are the nature and importance of the 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 (*See case of **First American Bank of Kenya –Vs- Shah & others H.C Milimani Commercial Court Nairobi No. 2255 of 2000***) where *Ringera J (as he then was)* delivered himself as follows;

“The full instruction fees to defend a suit is earned the moment a defence has been filed and the subsequent progress of the mater is irrelevant to that item of the fees. In the premises, I do not consider that the taxing officer erred in not taking into account that the suit was withdrawn only three days after it was filed and that no hearing had taken place.”

In this regard, I accept that the taxing officer properly considered the instruction fees regardless of whether the matter was disposed of on a preliminary point or a full hearing. The issue that I have to address myself to, is whether the increase of the instruction fees from the minimum that is **Kshs.30,000/-** which was within the taxing officer's discretion, that discretion was exercised judicially and rationally. Some of the reasons advanced was that this matter is different from other civil matters that are filed under the **Civil Procedure Act** and also due diligence and utmost attention and hard work is involved in preparing the defence. The above in my humble view are not factors for taking into account in increasing the instruction fees. It is within the normal duties of an advocate to apply due diligence and give utmost attention to his work, the advocate will just have done his work and no more than what is expected of him.

On the other issue if Parliament intended that matters of election petition be taxed differently from those under the Civil Procedure, nothing would have been harder than having the **Advocates remuneration Order Schedule 6** spell out a higher figure as the minimum instead of the sum of **Kshs.30,000/-**.

In summary, I find two errors in the application of the reasons that were given by the taxing officer. I find the discretion to increase the instruction fees from **Kshs.30,000/-** by an astronomical **66%** manifestly excessive and based on the wrong principle. In this way, I agree with **Justice Mwera's** findings in the case of **Danson Mutuku Muema (Suppra)** that the courts and justice generally should be made accessible to all Kenyans. It should not be left for the preserves of the rich, and one way of driving away Kenyans from seeking legal remedies through the courts is by multiplying the instruction fees that will scare away litigants. Counsel for the respondent submitted that the elections are preserves of the rich, I hold a different view that even if that may be the case, awarding high and unjustified costs against parties will perpetuate that *status quo*, the doors of justice must be equally accessible to both the poor and rich.

Arising out of the submissions that were made before me, the only item that was contested was the instruction fees. Having arrived at the finding that, that the amount was manifestly excessive and based on wrong principles, it would save judicial time to access the instruction fees instead of referring this matter to another taxing officer. (*See case of **Rosafrika Ltd –Vs- The Central Bank Milimani Commercial Court No.1389 of 2001 (unreported)***) instead of saddling the parties with further costs and for time constraints, I should therefore consider the instruction fees. According to the **Advocates Remuneration Order Schedule 6**, the basic instruction fee is **Kshs.30,000/-** considering the complexity of the mater and the interest of the parties involved which by all means is of considerable interest to all

the Kenyans, I would assess the basic instruction fees as **Kshs.900,000/-**.

In the result, the reference is allowed with costs to the petitioner and the instruction fees is varied from **Kshs.2 Million** to **Kshs.900,000/-** thus the party and party costs awarded to the respondent is **Kshs.952,410/-** instead of **Kshs.2,052,410/-**.

It is so ordered.

Ruling read and signed on 8th December 2006.

MARTHA KOOME

JUDGE