



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO 375 OF 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PEST CONTROL BOARD.....1<sup>ST</sup> RESPONDENT

PYRETHRUM BOARD OF KENYA.....2<sup>ND</sup> RESPONDENT

EX PARTE: ORION EAST AFRICA LIMITED

RULING

**The Reference**

1. Orion East Africa Limited, the *ex parte* Applicant herein, is aggrieved by the decision of the taxing master delivered on 10th November 2020 whereat the taxing master awarded a sum of Shs. 600,000/= as the instruction fees in respect to the *ex parte* Applicant's party and party Bill of Costs.

2. The *ex parte* Applicant consequently filed a reference by way of a Chamber Summons dated 24<sup>th</sup> November 2020, brought under Rule 11 of the Advocates (Remuneration) Order, Section 3 and 3A of the Civil Procedure Act, in which it is seeking the following orders:

**a. The Ruling and Orders issued by the taxing master on 10th November 2020 in respect to the item on instruction fees in the Respondent's Bill of Costs dated 9th September 2019 together with getting up fees be set aside in entirety.**

**b. The Honourable Court be pleased to issue appropriate directions as to the re-taxation of the items on instruction fees and getting up fees in the Applicant's Bill of Costs dated 9th September 2019.**

**c. Costs of this application be provided for .**

3. The application is based on the grounds that the taxing master failed to exercise her discretion judicially and thereby awarded the Respondent a manifestly low amount as instruction fees justifying an inference that the decision was based on an error of law and fact. Further, that the taxing master's decision was based on an error of principle since in awarding the Applicant the sum of Kshs 600,000/= as instruction fees, the taxing master failed to consider relevant factors inter alia that the suit was of tremendous importance to the Applicant, hence the responsibility bestowed upon counsel to ensure that judgment was entered in favour of the Applicant was enormous.

4. The reference is supported by an affidavit sworn on 24th November 2020 by the Applicant's Managing Director, Mr. Peter Ruo Maina wherein he gave a detailed account of the origins of the suit herein, the pleadings filed, and proceedings leading to the judgment in its favour delivered herein on 3rd November 2011 wherein it was also awarded costs of the suit.

5. The deponent averred that the *ex parte* Applicant accordingly filed a party and party bill of costs dated 9th September 2019, seeking payment of the sum of Kshs. 7,000, 000/= as instruction fees and Kshs 2,333,333/- as getting up fees. However, that by a ruling delivered on 10th November 2020, the taxing master awarded the *ex parte* Applicant a sum of Kshs 600,000/= as instruction fees and Kshs 200,000/= as getting up fees. Further, that the Applicant's bill of cost was therefore taxed at a sum of Kshs 894,709/=. He deponed that the taxing master failed to consider the factors listed hereinbelow, and thereby awarded an inordinately low amount in respect of instruction fees and getting up

fees

a. The revocation of certificate of registration of the *ex parte* Applicant's product namely Pesthrin 60 EC, Pesthrin Public Health EX and Vet Dust 0.4% would affect the Applicant's business which would have led to a projected loss of about Kshs 200 million. The suit called for thorough preparation and in depth research of judicial precedence which was time consuming.

b. The instruction fees of Kshs 7,000,000/= sought by the *ex parte* Applicant was justified and commensurate with the work involved, the importance of the matter to the Applicant and the responsibility bestowed upon counsel to ensure that judgment was entered in favour of the Applicant.

c. Despite stating that "My analysis of the Application has shown that the application was of great importance to the Applicant," the taxing master failed to appreciate the nature of the case and the importance of the same to the *ex parte* Applicant.

6. The Respondent did not file any response to the reference, and opted to file submissions thereon instead.

### **The Determination**

7. The reference was urged by way of written submissions. Ngatia and Associates, the advocates for the *ex parte* Applicant filed submissions dated 26<sup>th</sup> March 2021, wherein they submitted that the taxing master is called upon to exercise discretion judiciously and not in a capricious manner as stated by the Court of Appeal in the case of **Peter Muthoka & Another vs Ochieng [2019] eKLR**. The counsel submitted that the Taxing Master failed to exercise her discretion judicially by declining to consider relevant factors in assessment of instruction fees, and thereby awarded the *ex parte* Applicant a manifestly low amount of justifying an inference that the decision was based on an error of principle. Reference was further made to the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board, Civil Appeal No. 220 of 2004** for the proposition. The counsel reiterated the factors the taxing officer failed to consider, which they submitted called for thorough preparation and extensive legal research.

8. In support of the submissions that Kshs 600,000/= was inordinately low, the counsel urged this Court to be guided by the decisions in **Republic v University of Nairobi & another ex parte Nasibwa Wakenya Moses, [2018] eKLR** where the *ex parte* Applicant was awarded instruction fees in the sum of Kshs 4,000,000/=; and **Republic vs Cabinet Secretary, Internal Security & 2 others; Federation of Kenya Employers & another (Interested Parties) Ex parte Gragory Oriaro Nyauchi, [2019] eKLR** where the *ex parte* Applicant was awarded a sum of Kshs 1,000,000/= as instruction fees. Also relied upon were the cases of **Republic vs Capital Markets Authority exparte Munir Sheikh Ahmed, Judicial Review Miscellaneous App. No. 269 of 2018** and **J. Thongori Co. Advocate vs UBA Kenya Bank Limited, Judicial Review Miscellaneous Cause No. 31 of 2015**, in which the *ex parte* Applicants therein were each awarded a sum Kshs 1,500,000/= as instruction fees.

9. The *ex parte* Applicant further relied on the case of **Eastland Hotel Limited vs Wafula Simiyu & co. Advocates [2014]eKLR** the Court of Appeal cited with approval the case of **Steel Construction & Petroleum (E.A.) Ltd vs Uganda Steel Factory Ltd (1970) EA 141 at page 143** for the proposition that where it is demonstrated, as in this appeal, that a taxing officer's decision was based on an error of principle the High Court can intervene. Further, the *ex parte* Applicant's counsel submitted that in the case of **Moronge & Company advocates vs Kenya Airports Authority [2014] eKLR** the Court of Appeal held that 'a *Judge of the High Court of has jurisdiction to tax the bill himself.*' The counsel therefore urges this Court to assess the appropriate instruction fees due to the *ex parte* Applicant taking into account the factors.

10. Judith Chimau, Senior State Counsel in the Office of the Attorney General, filed submissions dated 18<sup>th</sup> March 2021 on behalf of the Respondent in which it was submitted that the Reference arose from the ruling of the Taxing Master to the Applicant's Bill of Costs dated and filed in Court on 9<sup>th</sup> September 2019 in the sum of Kshs 9,441,043 and was taxed at Kshs 894,709 thereby taxing off Kshs 8,546,334. They identified two issues for determination namely, whether the taxing master exercised her discretion judicially in awarding the *ex parte* Applicant the sum of Kshs 600,000 as instruction fees and whether the taxing master's decision was based on an error of principle.

11. On whether the taxing master exercised her discretion judicially, the Respondent submitted that the taxing master in her ruling observed the applicable laws, namely Schedule 6 (1) (j) of the Advocates Remuneration Order 2006. While citing the cases of **Apungu Arthur Kibiria vs Independent Electoral and Boundaries Commission & 3 Others, [2019] eKLR**; and **Stanley Kang'ethe Kinyanjui vs Toney Ketter & 2 others, Civil Application No Nai 31 of 2012**, the Respondent submitted that the Applicant did not therefore demonstrate that the taxing master's decision was based on whim, was prejudicial or was capricious. In addition, that the taxing master increased the instruction fees to Kshs 600,000/= from Kshs 28,000/=.

12. On whether the taxing master's decision was based on an error of principle, the Respondent urged that the taxing master considered the relevant factors *inter alia* the suit was tremendous importance to the Applicant and the responsibility bestowed on counsel to ensure that judgment was entered in his favour. The Respondent placed reliance on the decisions in **Republic vs Cabinet Secretary, Internal Security & 2 others; Federation of Kenya Employers & another (Interested Parties) Exparte Gragory Oriaro Nyauchi [2019] eKLR**, **First American Bank of Kenya vs Shah and others (2002) 1 EA 64** and **Joreth Limited vs Kigano & Associates (2002) 1 EA 92**, for the proposition that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that the decision was either based on an error of principle of the fee awarded was manifestly excessive to justify interference.

13. Further reliance was placed on the factors stated in the case of **Republic vs Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 Others [2006] eKLR** and the case of **Nyangito & Co. Advocates vs Doinyo Lessos Creameries Limited [2014] eKLR** where the Court held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

14. I have considered the arguments made by the *ex parte* Applicant and Respondent, and restate the procedure for challenging a taxing master's decision is provided under the Rule 11 of the Advocates Remuneration Order as follows:

**“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.**

**(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”**

**(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**

**(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**

**(5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”**

15. The parties do not dispute that the taxation of the *ex parte* Applicant’s Party and Party Bill of Costs dated 9<sup>th</sup> September 2019 was regulated by Schedule 6A of the Advocates (Remuneration) Order 2014. Paragraph 1(j) of the said Schedule provides as follows as regards instruction fees in constitutional petitions and prerogative orders :

**“To present or oppose an application for a Prerogative order; such sum as may be Reasonable but not less than 28,000.”**

16. In addition, the applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer’s decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69 by Ringera J. (as he then was) who delivered himself thus;

**“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”.**

17. These principles reiterate the position of the Court of Appeal in Joreth Ltd vs Kigano & Associates (2002) 1 EA 92, wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

18. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others, (2006) e KLR :

**“ 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;**

**2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;**

**3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**

**4. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;**

**5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;**

**6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**

**7. where responsibility borne by advocates is taken into account, its nature is to be specified;**

**8. where novelty is taken into account, its nature is to be clarified;**

**9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”**

19. These guidelines were also applied by Odunga J. in Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd, [2014] eKLR, and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

20. I have perused the ruling by the Taxing Officer dated 10<sup>th</sup> November 2020, and note that she correctly applied Schedule 6(j) of the Advocates Remuneration Order of 2006 since this suit was filed on 22<sup>nd</sup> December 2010, and noted that the basic instruction fee was Kshs 28,000/=. While taxing on the item on instruction fees, the Taxing Officer after considering the applicable law, judicial authorities and principles guiding the exercise of her discretion. After noting that the substantive application was of great importance to the Applicant and was filed in the year 2010 and concluded in the year 2011 within 1 year, the Taxing Officer found as follows:

**“On the question of the increase of the aforesaid basic fee and this being a Party and Party Bill of Costs, I am of the view that Kshs 600,000/= is a reasonable instruction fees taking into account the time taken in this matter, scope of the work done and the nature of the dispute herein as stated above.”**

21. It is my finding that while the Taxing Master did take into account most of the relevant considerations, it is apparent from a perusal of the ruling dated 10<sup>th</sup> November 2020 that the factor of the value of the subject matter of the suit herein as pleaded by the *ex parte* Applicant was not considered. While the value of the subject matter in dispute may not be the determinant and only factor in deciding the quantum of costs payable, it was held in Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd (supra) and National Oil Corporation Limited v Real Energy Limited & another [2016] eKLR that the same may be taken into account in considering the interest and importance of the matter to the parties. This is particularly relevant in judicial review applications such as in the present case, which have as their basis commercial arrangements between the parties.

22. In the premises I find that the decision of the taxing master in awarding instruction fees of Kshs 600,000/= was in error of principle, as a relevant factor in the exercise of the discretion to increase the minimum instruction fee namely the value of the subject matter, and which is specifically provided for in proviso (i) to Schedule 6 of the Advocates (Remuneration) Order 2006, was not considered.

23. As regards the taxation of item 2 on getting up fees and award of Kshs 200,000/= by the taxing master for this item, paragraph 2 of Schedule 6 of the Advocates (Remuneration) Order 2006, only requires denial of liability in a case for getting up fees to payable, which is not contested in the present case, and provides for the allowable minimum as one-third of the instruction fees. Since the award on instruction fees of Kshs 600,000/= has been found to be in error, it therefore also follows that the taxation of the item on getting up fees was thus also in error.

24. Lastly, on the plea that this Court be pleased to assess the fee due to the Advocate as instruction fees, it was in this respect held as follows in Republic vs Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Limited & 2 Others [2018] eKLR:

**“... It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done...”**

#### **The Disposition**

25. In the premises I find that the decision of the Taxing Master in awarding instruction fees of Kshs 600,000/= and consequent getting up fee of Kshs Kshs 200,000/= was made in error of the applicable law and principles, and justifies interference by this Court with the said award.

26. The *ex parte* Applicant’s Chamber Summons dated 24<sup>th</sup> November 2020 is accordingly allowed to the extent of the following orders:

**i. The Ruling and Orders issued by the taxing master on 10th November 2020 taxing item1 of the *ex parte* Applicant’s Party and Party Bill of Costs dated 9th September 2019 on instruction fees at Kshs 600,000/=:, and item 2 on getting up fees at Kshs 200,000/=:, be and is hereby set aside only with respect to the said items.**

**ii. The *ex parte* Applicant’s Party and Party Bill of Costs dated 9th September 2019 shall be remitted to another Taxing Master in the any Division of the High Court at Nairobi, for the re-taxation of items 1 and 2 only.**

**iii. Each party shall meet their respective costs of the *ex parte* Applicant’s Chamber Summons dated 24<sup>th</sup> November 2020.**

27. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER 2021**

**J. NGAAH**

**JUDGE**