



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

MISCELLANEOUS APPLICATION NO 9 OF 2020

PROF. TOM OJIENDA & ASSOCIATES ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

THE CITY COUNCIL OF NAIROBI.....RESPONDENT/CLIENT

ARISING FROM

NAIROBI PETITION NO. 618 OF 2014

THE LAW SOCIETY OF KENYA.....PETITIONER

VERSUS

CABINET SECRETARY MINISTRY OF LANDS,

HOUSING, AND URBAN DEVELOPMENT.....1ST RESPONDENT

THE NATIONAL CONSTRUCTION AUTHORITY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

THE CITY COUNCIL OF NAIROBI.....INTERESTED PARTY

RULING

APPLICATION

1. The Applicant through a Chamber Summons dated 11th March 2021 seek the following orders:-

a) That this application be certified urgent, and service hereof be dispensed within the first instance.

b) That the findings and Ruling of Hon. Njeri Thuku in awarding Kshs.363,965/= in Misc. Application No. 9 of 2020 be varied and/or set aside in relation to Item No. 1 of the Bill of Costs.

c) That the Advocates Bill of Costs dated 20th February 2020 be taxed afresh inter-parties and / or this Court proceeds to make a finding.

d) That this Honourable Court be pleased to interrogate the Applicant's Bill of Costs in light of actual work done and adopt the Applicant's proposal on taxation of the costs.

e) That costs and further incidentals to this Application be provided for; and

f) That such further or other relief as the Honourable Court may deem just and expedient to grant.

2. The Application is premised on several grounds on the face of the application.

RESPONDENT'S RESPONSE

3. The Respondents filed a Replying Affidavit sworn by Abwao Erick Adhiambo opposing the Application herein.

BACKGROUND

4. The Applicant filed a Bill of costs dated 20th February 2020 against the Respondent seeking a free of Kshs.53,260,819.40/= for representing the Respondent in the ***Petition No. 618 of 2014 Law Society of Kenya vs. Cabinet Secretary of Ministry of Lands Housing & Urban Development, National Construction Authority, Attorney General & Nairobi City County.***

5. The Petition was filed against the National Government for contravening ***Articles 43(1) (b), 46(1) (c), 185(4) (a) & (b), 201, 209(4) and Part 2 of the Fourth Schedule of the Transition and Consequential Provisions of the Constitution*** by raising the Construction levy rate to 0.5% within Nairobi.

6. That at the time of filing Petition No. 618 of 2019, the Petitioner was on the verge of putting up an Arbitration Centre worth Kshs.1,200,000,000/= and the same was to attract a construction levy of Kshs.6,000,000/=.

7. The Applicant successfully applied for the Respondent to be enjoined in Petition as the construction levy made it lose revenue since investors and developers were shying away from construction in Nairobi County.

8. On 4th March 2021 the Taxing Master delivered a Ruling taxing the Applicant's Bill at Kshs.363,965/= against the Respondent.

ANALYSIS AND DETERMINATION

9. I have considered the Chamber Summons, the response as well as the parties rival submission and from the same only one issue arise in this application thus:-

a) Whether the Applicant has met the threshold to warrant varying and/or setting aside sums awarded in respect of Item No. 1 of the Bill of Costs.

10. The Applicant herein is only challenging the taxation of instruction fees as taxed by Hon. Njeri Thuku on 4th March 2021.

11. The Applicant filed a Bill of Costs dated 20th February 2021 against the Respondent seeking a fee of Kshs.53,260,819/40 for representing the Respondent in Petition No. 618 of 2014 Law Society of Kenya vs. Ministry of Lands, Housing & Urban Development, National Construction Authority, Attorney General & Nairobi City County.

12. The Respondents in response states that the Petition was only seeking a decision that a statutory provision was unconstitutional and therefore the Petitioner cannot pay that instruction fees on a purported value of construction.

13. The Applicant urge that the Court of Appeal laid down the principles applicable in assessing instruction fees in the case of ***Joreth Ltd Vs. Kigano & Associates CA 66/1999*** where the Court laid down the principles applicable in assessing instruction fees as – nature and importance of the cause of matter, amount value of the subject matter interest of the parties, general conduct of the parties, complexity of the issues raised and novel points of law, time, research and skill expended in the brief and, the volume of documents involved.

14. The Applicant submits on the nature and importance of the matter, that the instruction fees awarded by the taxing master was excessively low as the matter was handled under extreme urgency. It is therefore contended that placed great responsibility on the Applicant to expend numerous hours in preparation of the matter as the construction levy made the Respondent to lose construction revenue within its borders.

15. It is further contended by the Applicant that the taxing master erred in principle by failing to appreciate the complex nature of the Petition and the novel points of law it raised. This goes hand in hand with the fact that the Ministry of Land, Housing and Urban Development vide ***Legal Notice 74*** gazetted the ***National Construction Authority Regulations (2014)*** imposed a 0.5% construction levy on all construction works whose value exceeded Kshs.5,000,000/=. In so doing ***Articles 43(1) (b), 46(1) (c), 185(4)(a) & (b), 201, 209(4) and Part 2 of the Fourth Schedule of the Transition and Consequential Provisions of the Constitution (2010)*** were contravened by the National Government in failing to consult with the Respondent as required under ***Article 201 of the Constitution of Kenya*** and ***Section 4(c), (e), (h), 5(a), (b), (c) and 6(a) of the Inter-governmental Relations Act.***

16. The Applicant assert that it had to undertake extensive research and consider the legal principles relevant to the circumstance of the case vis-à-vis the remedies available to the Respondent. In support of the extensive research and principles adopted therein, the Applicant relies on the case of ***Thomas James Arthur vs. Nyeri Electricity (supra); Bunson Travel Services & Others v. Kenya Airways [2006] eKLR*** where it was held that skill, industry and labour of the applicant are relevant factors to be considered in assessing advocate's bill of costs.

17. The Applicant further aver that the nature and importance of the case as well as its novelty was not appreciated by the Taxing Master. Neither the responsibility borne by the Applicant, nor the specific elements of the complexity or time spent, research done, skill deployed by counsel, were set out in the Ruling in a summarized form.

18. It is further contended that in the circumstances the Taxing Master found the value of subject matter not ascertainable, she ought to have used her discretion judiciously after taking the aforementioned factors into consideration.

19. The Applicant urges in spite of the Taxing Master relying on the decision of Lady Justice Koome (as she then was) in **Royal Medical Services vs. Telkom Kenya Ltd & 13 others (2010) eKLR**, at paragraph 7 of the Ruling, the Taxing Master deviated from the same – specifically, (i) (b) That a successful litigant ought to be fairly reimbursed for the cost he has incurred; (c) That the general level of remuneration of advocates must be such as to attract recruits to the profession – by awarding the instruction fees at an all-time low.

20. Looking at the affidavits in support and in opposition of the Chamber Summons herein, it is evident that the Petitioner was seeking declaration that a statutory provision was unconstitutional. The instruction fees could therefore be based in the prayers in the Petition but not on a purported value of the construction as alluded by the Applicant. The Bill as drawn and filed seeks Kshs.30,000,000/= on instruction fees which was not in accordance with the **Advocate (Remuneration) Amendment Order**.

21. The Petition herein being HC Petition No. 618 of 2014 was filed in 2014 and the applicable order is the **Advocate (Remuneration) (Amendment) Order 2014**. It is provided under the said Order that Petitions are to be taxed at a figure of not less than Kshs.45,000/= for simple and undefended Petitions and a figure of not less than Kshs.100,000/= for complex and defended Petitions. The Applicant in the instant matter was awarded Kshs.100,000/= as instruction fees.

22. The Bill of Costs was accordingly taxed in accordance with the provisions of the **Advocates (Remuneration) (Amendments) Order 2014** and hence in accordance with the law in force as of the time of filing the Petition.

23. The Advocate (Remuneration) (Amendment) Order the basis of taxation on instruction fees is ordinarily pegged on either the value of the subject matter, the judgment, or settlement if any. This rule is clear that it applies to the realm of private law. Any Petition, as is the case herein, falls squarely in the realm of public law. In the instant Petition there was no dispute as to the ownership of any property, and therefore the main issue for determination was the constitutional conformity as a subsidiary legislation. I find it therefore improper and unjustifiable for Applicant to attempt to base the instruction fees on the value of the property whose ownership or use or construction was not in dispute in the already determined Petition.

24. It is not in dispute that the **Advocates (Remuneration) (Amendment) Order 2014**, was the correct order for the purposes of taxation of the Applicant's Bill of Costs. Further it is noted that under schedule 6 it provides that Petitions, if unopposed, should attract a fee of not less than Kshs.45,000/=. However, if a Petition raises a substantial matter of law and is duly opposed, then a reasonable sum being not less than Kshs.100,000/= is to be awarded.

25. I have considered the Applicants' submissions and pleadings in challenging the taxed amount under Item No.1, thus on instruction fees, and I find that the Applicant was not shown any misdirection on part of the Taxing Officer. It has not been shown that the Taxing Master did not correctly apply the correct principles and that she exercised her discretion unjudiciously or that she took into account irrelevant factors which were not supposed to be taken into account, or that she disregarded and declined to take into account relevant factors or that she exercised judicial discretion not in accordance with the established principles of law or that she awarded the Applicant fees which is inordinately low to justify interference of this Court.

26. It is trite that for the Court to interfere with the decision of a Taxing Master, there must be a misdirection on the part of the Taxing Master in taxing the Bill or that sum taxed / awarded is too low or too high considering the circumstances of the case.

27. To buttress the above reliance is placed in the case of **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'Njuguna & 6 Others, (2006) eKLR**, the Court aptly stated that:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other... The 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 manifestly excessive as to justify an inference that it was based on an error of principle.” (Emphasis added)

28. In the Petition before this Court, it is clear that the matter was in the realm of public law and the Petition thereto only involved the Constitutionality of a legislation, I find that there was no novelty or any other special circumstances to warrant a departure from ordinary scope in the **Advocate (Remuneration) (Amendment) Order, 2014**. In view whereof I find that the Applicant has failed to demonstrate the requirement for interference with the decision of the Taxing Master.

29. The Court dealing with similar issues in the case of **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'Njuguna & 6 others, (2006) eKLR**, issued the following guidelines on the taxation of instruction fees:-

“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' instructions fees is to be 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 a summarized form."*

30. I have considered the Petitioners' application and submissions and I have found that the Applicant has not shown any novelty at all in this Constitutional Petition. The Applicant in the application states that the Applicant believed *Petition No. 618 of 2014 Law Society of Kenya vs. Cabinet Secretary of Ministry of Lands Housing & Urban Development, National Construction Authority, Attorney General & Nairobi City County* to be a novel matter as it dealt with the interpretation of *Provision 185(4)(a) & (b) and Part 2 of the Fourth Schedule of the Constitution of Kenya*. This was as result of National Government imposing a 0.5% construction levy within Nairobi County without having consultations with the County Government of Nairobi. I do not see how this can be said to show that this was a novel matter and as such I decline the invite to interfere with the decision of the Taxing Master. The Applicant was required to demonstrate that there was an error in principle on the part of the Taxing Master or that the amount awarded or taxed is manifestly excessive or too low to the detriment of a party for this Court to interfere with the Taxing Master's decision.

31. Reliance in support of the above is placed in the case of *Lubelellah & Associates Advocates v. Baranyi Brokers Limited & 2 others (2014) eKLR*, which cited with approval the case of *First American Bank of Kenya v Shah & Shah & Others (2002) E.A.L.R. 64*, where it was stated that:-

"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."

32. As a whole and upon considering the rival submissions and pleadings I find the Applicant has not demonstrated existence or proved any error of principle on the part of the Taxing Master. Further it is noted the Applicant has not proved the Taxing Master awarded a figure that is manifestly low. I find the final award on instruction fees is provided in the applicable law thus the *Advocates (Remuneration) (Amendment) Order, 2014*.

33. *The upshot is that I find no merits in the Applicant's Chamber Summons dated 11th March 2021. Accordingly the Application is dismissed with costs.*

Dated, Signed and Delivered at Nairobi on this 11th day of November, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA