



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 625 OF 2017

IN THE MATTER OF THE ADVOCATES ACT

AND

THE MATTER OF THE ADVOCATES REMUNERATION ORDER

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE HON.CHAIRMAN,

BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

AND

ISAAC MAINA IHOMBA.....INTERESTED PARTY

EX PARTE:

JOSEPH KAMAU MUNYORO T/A MIST BAR & LOUNGE

RULING

The Application

1. The ruling herein is on an application made by Joseph Kamau Munyoro T/A Mist Bar & Lounge, the ex parte Applicant herein (hereinafter “the Applicant”), which was filed by way of a Chamber Summons dated 28th August 2019. The Applicant is seeking orders that the decision of the Deputy Registrar dated 14th August 2019, with respect to Item 1 on instruction fees and Item 2 on getting up fees of the Interested Party’s Bill of Costs be set aside and taxed afresh by this Court. Further, that the costs of the application be provided for.
2. The said application is supported by an affidavit sworn on 28th August 2019 by Paul Maingi Musyimi, the Applicant’s advocate.
3. The impugned decision by the Deputy Registrar was made upon taxation of a Party and Party Bill of Costs dated 1st April 2019 filed by the Interested Party herein. The said Bill of Costs scaled the instruction fees as per the Advocates Remuneration Order 2014 at Kshs. 300,000/=, and the getting up fees at Kshs. 100,000/=. The Deputy Registrar upon taxation of the Bill of Costs awarded instruction fees of Kshs. 200,000/=, and getting up fees of Kshs. 66,666.70/=.
4. The Applicant alleges that the Deputy Registrar in her ruling and reasons for taxation found that the matter before the court was not complex in nature, but failed, in exercising her discretion, to apply this in her taxation. Further, that the Deputy Registrar in exercising her discretion in taxing the instruction fees, ought to have been informed by Schedule 6(1)(j)(i) of the Advocates Remuneration Order 2014, which provides for the scale of fees payable for matters seeking prerogative orders which are not complex in nature, and not Schedule 6(1)(j) (ii) as stated in her ruling and reasons for taxation.
5. In addition, that the said taxation failed to take into account that the Bill of Costs tabled before the court was that of an interested party and not a respondent, and as such the amount awarded ought to be on the lower scale based on the minimum amount allowed under the

Advocates Remuneration order 2014. Lastly, that the Deputy Registrar failed to provide reasons for the enhancement of the instruction fees to Kshs. 200,000/=, which is twice the minimum amount allowed under the Advocates Remuneration Order 2014. Therefore, that as a result, the final amount awarded as costs was erroneous as it was not taxed in adherence to the Advocates Remuneration Order 2014.

6. The Interested Party filed a replying affidavit sworn on 11th October 2019 in response to the application. He averred that there is no reason advanced why the instruction and getting up fees should be taxed afresh, and that the Deputy Registrar has the duty and discretion to increase or decrease the instruction and getting up fees so long as it is done judicially. Further, that this suit was a defended, and the taxing master correctly fixed the fees on a higher scale as per the schedule. Therefore, that there was no error in the taxation of the Bill of Costs and no reason to interfere with the same. Lastly, the Interested Party averred that this application is a ploy by the Applicant to delay the enjoyment of the fruits of his judgment.

The Determination

7. The application was canvassed by way of written submissions. Maingi Musyimi & Associates, the advocates on record for the Applicant, filed submissions dated 18th November 2019, while N.A Owino & Company Advocates filed submissions dated 14th November 2019 for the Interested Party. I have considered the pleadings and submissions filed, and note that the Interested Party in his submissions raised a preliminary issue of the propriety of the instant application, which requires to be determined first.

8. According to the Interested Party, the instant application is defective, and appears to be seeking stay of execution, and review and setting aside of the Deputy Registrar's taxation orders. That it therefore ought to have been brought pursuant to the provisions of Orders 22 and 45 of the Civil Procedure Rules. The Interested Party at the same time submitted that the Applicant needed to follow the strict rules of procedure under Rules 10 and 11 of the Advocates Remuneration Order. Reliance was in this regard placed on the decision in **Joreth Limited vs Kigano & Associates, Nairobi Civil Appeal No. 66 of 1999.**

9. The instant application was brought by way of a Chamber Summons which is expressly stated to be filed pursuant to Rule 11 of the Advocates Remuneration Order among other provisions of the law, and was seeking to set aside a taxation ruling made by the Deputy Registrar. The prayer for stay of execution orders in the application was on an interim basis pending the hearing of the application. It is thus evident that the substantive application was with respect to setting aside of a taxation decision.

10. Rule 11 of the Advocates Remuneration Order provides as follows as regards applications challenging taxation decisions:

“(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.”

11. I find that the instant application is therefore brought pursuant to the proper provisions of the law, as the Applicant is aggrieved with the taxation decision of the Deputy Registrar who was the taxing Officer, and has filed a reference to this Court as required to do by Rule 11. As to whether the Applicant followed the correct procedure in bringing the application, Rule 11 requires an objector to a decision of a taxing officer is required to give notice within 14 days thereof of the items objected to, and the reference is to be filed within 14 days of receipt of the reasons for the decision from the taxing master.

12. In the present case, I note that there is a letter dated 16th August 2019 from the Applicant's Advocates on record, which was addressed to the Deputy Registrar of the Judicial Review Division of this Court, seeking to be furnished with the reasons for taxation. The said letter is stamped as having been received on the same date. The current application was thereafter filed on 28th August 2019. There is however no record that the Interested Party filed any notice of objection.

13. I also note that the Applicant did annex a copy of the ruling delivered by the Deputy Registrar on 14th August 2019 to its supporting affidavit to the instant application. The omission to file a notice of objection was therefore not fatal, as in any case the ruling containing the reasons were availed to the Applicant, and the reference was filed within the 14 days of the date of the ruling, and contained the substance of the objections made.

14. I accordingly find that the Interested Party's application dated 28th August 2019 and filed in Court on the same date is properly on record for the foregoing reasons. Having so found, I will proceed to consider the two substantive issues that arise for determination. The first is whether there was an error made in the taxation of item 1 on instruction fees and item 2 on getting up fees in the Interested Party's Bill of

Costs dated 1st April 2019. Second, is whether the remedy sought is merited.

15. The Applicant submitted that the application of Schedule 6(1)(j)(ii) and the minimal value provided therein of Kshs. 100,000/= was an error apparent on the face of the ruling, as it contradicts the finding of the Deputy Registrar that the matter before the court was not complex. The Applicant relied on the case of **Satnam Singh Bahra vs Joseph Mungai Gikonyo T/A Garam Investments & Another [2012] eKLR** for the position that the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it.

16. However, that the Deputy Registrar did not give reasons for the application of Schedule 6 (1) (j)(ii) of the Advocates Remuneration Order 2014, and the ruling on the instruction fees and the getting up fees is therefore an arbitrary determination which deviates from the judicial exercise of discretion. The decision in **Paul Imison & Another vs Jodad Investments Ltd [2014] eKLR** was cited for this position.

17. The Interested Party on his part gave a background to the Bill of Costs, and the proceedings in the Business Premises Rent Tribunal and High Court giving rise to it. He submitted that there is no apparent error on the face of this record, and no good reason to interfere with the Deputy Registrar's decision. Further, that this case involves an appeal arising out of a tenancy dispute between the parties, and that the procedure for filing appeals from Business Premises Rent Tribunal stipulates that they be brought by way of judicial review. Therefore, that it was not a case on human rights as the Applicant would like this court to believe.

18. The Interested Party further submitted that the Deputy Registrar applied herself to the proper Advocates Remuneration Order in taxing the Bill of Costs, and in particular the instructions fees and the standing up fees. In addition, that the discretion of the Deputy Registrar can only be interfered with where it is obvious that she applied the wrong position of the law, or awarded excessive damages. However, that the costs awarded are reasonable and not excessive in the circumstances, and the getting up fees is 1/3 of the instructions fees, which is what the Deputy Registrar awarded. Reliance was placed on the case of **Kayam Madhany and 5 others vs Industrial Promotion Services (K) Ltd and Others, Nairobi Civil Case No. 268 of 1998**

19. It is not disputed in the present application that the applicable Schedule as regards taxation of the Interested Party's Bill of Costs is Schedule 6A of the Advocates (Remuneration) Order 2014, which provides for party and party costs of proceedings in the High Court. Paragraph 1(j) of the said Schedule provides as follows as regards instruction fees in applications for constitutional and prerogative orders:

“To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

(i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000.

(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than 100,000.

(iii) to present or oppose application for setting aside arbitral award- 50,000.”

20. The Applicant alleges that the applicable paragraph is (1)(j)(i) and not (1)(j)(ii) which was applied by the Deputy Registrar, on account that the Deputy Registrar found this matter not to be complex. However, the Applicant did not dispute the averments made by the Interested Party that the matter herein was a judicial review application, which was defended.

21. I note from the court record that the Applicant filed a Notice of Motion dated 24th October 2017 seeking judicial review orders of certiorari and prohibition, and that on the same day the Interested Party filed a replying affidavit thereto, and submissions on 13th June 2018. Therefore, the matter herein was clearly a matter in which prerogative orders were sought by the Applicant, and which was opposed by the Interested Party. Paragraph 1(j)(ii) of Schedule 6A was thus the applicable law in the taxation of the instruction fees in the Interested Party's Bill of Costs.

22. Specifically as regards the factors required to be taken into account when taxing instruction fees, Ojwang J. (as he then was) provided the following guidelines 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.”

23. 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 held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

24. I have perused the ruling by the Deputy Registrar dated 14th August 2019, and note that she properly applied Paragraph 1(j)(ii) of Schedule 6A of the Advocates Remuneration Order, and noted that the basic instruction fee was Kshs 100,000/=. She also noted that she has discretion to increase the amount taking into account factors such as the nature and importance of the cause or matter and amount or value of the subject matter, and the complexity of issues and novel points of law, The Deputy Registrar also considered the principles as regards the exercise of discretion in taxation of costs outlined in *inter alia* Joreth Ltd vs Kigano & Associates (2002) 1 EA 92, Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd. (supra) and Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others. (supra).

25. While taxing on the item on instruction fees, the Deputy Registrar in her ruling justified the increase from the basic fee of Kshs 100,000/= to Kshs 200,000/=. after taking into account the time taken in the matter, the scope of the work and the nature of the dispute. She accordingly taxed off the sum of Kshs 100,000/= from the amount of Kshs 300,000/= sought as instruction fees in the Bill of Costs .

26. In coming to my decision as to whether the Deputy Registrar in so doing was in error, I am guided by the principles on setting aside or varying a taxation of a bill of costs, namely, 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”.

27. These principles reiterate the position of the Court of Appeal in Joreth Ltd vs Kigano & Associates (supra), 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. Further, 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.

28. I note that the Deputy Registrar did take into account relevant considerations in taxation of the instruction fees, and took into account factors specifically provided for in Schedule 6A to increase the instruction fees as illustrated in the foregoing. Furthermore, the Deputy Registrar gave the reasons why she exercised her discretion to tax off the item on instruction fees from Kshs 300,000/= to Kshs 200,000/=. This Court has also already found that the applicable basic instruction fee was Kshs 100,000/= as correctly found by the Deputy Registrar, since the judicial review proceedings herein were opposed and defended by the Interested Party. The instruction fee awarded by the Deputy Registrar was therefore not excessive in the circumstances.

29. I therefore find that the decision of the taxing master in awarding instruction fees of Kshs 200,000/= was not based on any error of principle, neither were the said fees as awarded excessive to justify interference by this Court.

30. As regards the taxation of item 2 on getting up fees, paragraph 2 of Schedule 6A of the Advocates (Remuneration) Order 2014, provides as follows:

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that—

(i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

(ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;

(iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.”

31. Paragraph 2 only requires denial of liability in a case, for getting up fees to payable. In addition, a close reading of the paragraph shows that the matter need not proceed to full hearing, and it is sufficient that it is ready for and has been confirmed for hearing. In this respect It is not disputed that the present application was contested and proceeded to full hearing. It is also on record that the parties filed submissions and attended Court on various dates for hearing, which items were not contested by the Applicant.

32. Lastly, under the applicable provisions of paragraph 2 of Schedule 6A of the Advocates (Remuneration) Order 2014, the allowable minimum of getting up fees is one-third of the instruction fees. In this case the Deputy Registrar awarded instruction fees of Kshs 200,000/= and one-third of the said sum is Kshs 66,666.70. The taxation of the item on getting up fees at this amount was thus not in error.

33. The prayers in the Applicant's Chamber Summons application dated 28th August 2019 are therefore not merited for the foregoing reasons, and the said application is hereby dismissed. The Applicant will pay the Interested Party the costs of the said application of Kshs 30,000/=.

34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2020

P. NYAMWEYA

JUDGE