



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO.4 OF 2017

CHRISTINE NAFULA SOITA TANGULI.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION1ST RESPONDENT

BILHA KIPTUGEN2ND RESPONDENT

JANET NAGABO WANYAMA.....3RD RESPONDENT

RULING

1. The Chamber Summons application dated **18th February 2020** by the law firm of Kinyanjui Njuguna & company advocates seeks the following reliefs;

(a) this court sets aside and or review the taxation ruling of 30th May 2018 and all consequential orders.

(a) that the applicants bill of costs dated 14th December 2017 be taxed afresh.

2. The supporting affidavit sworn on the even date pork holes into the Deputy registrars ruling dated 30th May 2018 on the grounds that although this court had capped the costs of the petition to be kshs. 3 million the taxing master failed completely to adhere to the same. The application essentially therefore is a reference in terms of **Section 11 of the Advocates Remuneration Order**.

3. The issues or items which the applicant complaints relate to instruction fees, getting up fees accommodation, travelling expenses and the related. He deponed that the court failed to appreciate the principles relating to taxation namely, that a successful litigant ought to be fairly reimbursed, that advocates must be well remunerated and that there must be consistency in the award.

4. He therefore prayed that because of the failure by the taxing master to consider the novelty of the matter the bill should be taxed afresh so as to take into account the labour involved in defending the respondent.

5. The petitioner opposed the application via her grounds of opposition dated **25th September 2020** in which she supported the findings by the taxing master and stated that there was no error apparent on the face of the record. That the decision or the ruling cannot be termed incorrect for this court to disturb as it was not based on the wrong principles of the law.

6. The parties were ordered to file written submissions which they did and the court has had time to peruse the same. The applicant relied on the various authorities in persuading this court to consider the novelty of the matter and that he deserved to be adequately compensated. In summary a successful litigant must always enjoy the fruits of his labour.

7. The respondent on the other hand faulted the application on the grounds that the same was *res judicata* as the court had declined to have the bill taxed afresh. The court however on 10th February 2020 granted the applicant leave to file the reference out of time.

8. He submitted that the applicant has failed to demonstrate any new and important evidence which required review as per the **provisions of Order 45 of the Civil Procedure Rules**. The respondent prayed for the application to be dismissed.

9. Having gone through the application and this court well seized of the matter, the issue of review does not arise as the orders of the court dated **10th February 2020** as submitted by the respondent clearly granted the applicant leave to file a reference out of time and not a review

of the taxation. This court shall therefore proceed to make a determination based on the **provision of Rule 11 of the Advocates Remuneration Order.**

10. This court shall interfere with the decision of the taxing master if it failed to take into consideration the complexity of the matter, the length of the trial and such other general factors which makes the award unfair. See **KANU NATIONAL ELECTIONS BOARD & 20 OTHERS V. SALAH YAKUB FARAH (2018) eKLR** where the court stated as follows;

“Costs are awarded to a successful party in order to indemnify him/her for the expense to which he/she has been put through having been unjustly compelled either to initiate or to defend litigation. This underscores that a moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds. The taxing master is also enjoined to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case. The ultimate question remains whether the Taxing Master in this case struck this equitable balance.

The discretion vested in Taxing Master is to allow costs, charges and expenses as appear to him to have been necessary or proper, not those which may objectively attain such qualities, and that such opinion must relate to all costs reasonably incurred by the litigant which also imports a value judgment as to what is reasonable. The discretion to decide what costs have been necessarily or properly incurred is given to the Taxing Master and not to the Court. This discretion must be exercised judicially in the sense that the Taxing Master must act reasonably, justly and on the basis of sound principles with due regard to the circumstances of the case.

It is trite that the court will not interfere with the exercise of the taxing master’s discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue. The court must be of the view that the taxing master was clearly wrong i.e. its conviction on a review that he or she was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

11. The applicant has raised complaint basically on the taxing master findings on the instruction fees and the getting up fees. The history behind the petition is that the same was dismissed on 7th December 2017 for failing to meet the requirements of **Section 78 (3) of the Election Act**. The court proceeded to cap the costs at Kshs. 3million.

12. When the matter came up for taxation the Deputy Registrar after along discourse found that since the matter did not proceed to a full trial the issues were not novel as submitted by the applicant. She said that;

“I have looked at the petition filed by the petitioner which is thirteen pages. The main and only issue raised in the petition was not complex. There was nothing novel in the petition. The matter did not go to full hearing and was struck out for non-compliance with section 78(3) of the Elections Act. There is nothing indicative of research having been conducted. “

13. She then proceeded to award instruction fees of Kshs.500,000 as a reasonable compensation. On the getting up fees she found that they were entitled to and award them Kshs. 166,666. She did not award accommodation and travelling expenses as there was no evidence provided.

14. On the issue of instruction fees, this court does not find the award of Kshs. 500,000 too low in the circumstances. In fact, the taxing master analysed very well the issues and that the only thing filed by the applicant were the affidavits.

15. Considering that the matter did not proceed to a full trial and that the court dismissed it from a preliminary level the award is reasonable in the circumstances. The same is applicable to the getting up fees. There was not much labour involved. The labour herein presupposes, the efforts made in preparing for battle so to speak. The court finds that in preparation to argue a preliminary point of law, the same is distinct from an actual preparation for a full trial.

16. As regards accommodation and travelling expense the party claiming must provide such evidence. As rightly found by the taxing master, in the absence of any proof the court cannot pluck it from the air and award one. She went on to state that:

“accommodation for advocate declined. No receipts or a voucher to support and again the same is exorbitant and exaggerated.”

17. In the premises, this court finds the award reasonable in the circumstances. It is a fair reimbursement and will attract recruits to the profession. Finally, it is not too high or too low to be interfered with.

18. **The application is dismissed with no order as to costs.**

DELIVERED, SIGNED AND DATED AT KITALE THIS 11TH DAY OF DECEMBER 2020.

H K CHEMITEI

JUDGE