



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

ELECTION PETITION NO.2 OF 2017

IN THE MATTER OF ARTICLE 10,22,23,38,1,8,159,258

AND 259 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ELECTION ACT NO.24 OF 2011(AS AMENDED)

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT(2011)

AND

IN THE MATTER OF THE ELECTION OF THE MEMBER OF THE

NATIONAL ASSEMBLY OF KIMILILI CONSTITUENCY

BETWEEN

SULEIMAN KASUTI MURUNGA.....PETITIONER

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

MOSES MUNYESI RETURNING OFFICER

KIMILILI CONSTITUENCY.....2ND RESPONDENT

DIDYMAS WELESA SARASA alias DIDYMAS MUTUA.....3RD RESPONDENT

JUDGEMENT

This is a reference to the high court was brought by the 1st and 2nd Respondents in election Petition No 2 of 2017 as a challenge to the decision of the taxing master delivered on the 25.10.2018 in respect of the 1st and 2nd Respondent's Bill of Costs dated 17.04.2018. The particular item in contention is item 1 on instruction fees to be paid. The high court Judge capped instruction fees at kshs.3,000,000/= for purpose of the bill of costs.

Brief facts of the claim.

The taxing master **Hon. E.N. Mwenda** who is the deputy registrar herein on the 25.10.2018 taxed the 1st and 2nd Respondent instruction fees Item 1 on Bill of costs dated 17.04.2014 at Kshs.800,000/=.The instruction fees had already been capped by the trial judge in a judgement delivered on the 20.2.2018. The 1st and 2nd Respondent been aggrieved by the ruling dated 17th April 2018 filed a chamber summons dated 20th December 2018 for orders;

i. that this Honourable Court be pleased to review and/or set aside the decision of the learned taxing master issued on the

25.10.2018 on the 1st and 2nd respondents bill of costs and substitute the same with proper finding.

ii. That the costs of the reference be provided for.

The reference was supported by supporting affidavit of Moses Munyees Lokuwom sworn on the 20th December 2018 briefly stating that the leaned taxing master erred in law and in fact holding to lower the instruction fees to Kshs.800,000/= from Kshs.3,000,000/= as charged in item 1 of the 1st and 2nd Respondents bill of costs. The Petitioner and 3rd Respondent did not file any response to the application.

When the application came up for hearing Parties to the reference agreed to dispose of it by way of written submissions. From the record that only the 1st and 2nd respondents filed submissions in support of the reference while the Petitioner and 3rd Respondent did not file any submissions.

The 1st and 2nd respondents have submitted that the taxing master's reasoning disclosed a misdirection through which he arrived at the sum awarded. The respondents submitted that taxing master does not have powers to review trial judge orders on instruction fee as he did in the instant case. They submitted that that the taxing master erred in law and in fact in reducing the instruction fees from **Kshs.3,000,000/=** to **Kshs.800,000/=** without justification as the issue on instruction had been settled by the trial judge on the judgement delivered on 20.2.2018.They relied on the authority of **KAYAM MADHENY & 5 OTHERS Vs. INDUSTRIAL PROMOTIONS SERVICES(K) LIMITED & 20 OTHERS MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 268 OF 1998(2001) Eklr.**

Having considered the application the only issue before this court is with regard to instruction fees to be paid and thereof the question that arise is whether the deputy registrar can revise instruction fees that had been capped by the trial judge.

The High Court, Mrima- J in the Judgement dated 17.4.2018 stated;

219. Having patiently considered all the grounds in the petition and found that none was proved as required by law,I now make the following final orders:-

a) *The Petition be and is hereby dismissed with costs*

b) *The instruction fees for the 1st and 2nd Respondents are capped at Kshs.3,000,000/= as well as the instruction fees for the 3rd Respondent which is capped at Kshs.3,000,000/=*

c) *The total costs shall be taxed and certified by the Deputy Registrar of this court.*

d) *The Respondent shall equally share the security deposit upon the certification of the costs and the deputy Registrar shall take into account the amount of money the 1st and 2nd Respondents were to pay in respect of the exercise carried out vide the ruling of this court of 23/07/2017 if the amount remain unsettled.*

e) *A certificate of the determination of this petition in accordance with section 86(1) of the Election Act,2011 shall issue to the independent Electoral and Boundaries Commission and the Speaker of the National Assembly.*

The Judge in capping the costs took into account nature of the claim, effort made by the parties, complexity of the matter and research involved to arrive at the instruction fees and thereof the judge having capped the instruction fees it was not available to the deputy registrar to revise the same downwards as it had been settled by the trial Judge. The instruction fees of Kshs.800,000 is hereby set aside and replaced with Kshs.3,000,000/=. The rest of the items in the bill of costs remain undisturbed.

Dated and Delivered at Bungoma this 10th day of July, 2019.

S.N.RIECHI

JUDGE