



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.93 OF 2016**

**HON. WILLIAM KABOGO GITAU.....PETITIONER**

**VERSUS**

**HON. FERDINAND NDUNG’U WAITITU.....RESPONDENT**

**RULING**

1. The Applicant through a chamber summons brought pursuant to paragraph 11(2) of the Advocates Remuneration Order dated 16<sup>th</sup> June 2017 seeks the following orders:-

a) **THAT**, this application be certified as urgent and service be dispensed with in the first instance.

b) **THAT**, there be a stay of execution of the taxed costs of Kshs.5, 343,922.00 pending the *interparties* hearing in the first instance and pending the hearing and determination of this reference.

c) **THAT**, this Honourable Court be pleased to vary and/or set aside the decision and ruling of the taxing master delivered on 7<sup>th</sup> June 2017 and remit the Party and Party Bill dated 17<sup>th</sup> January 2017 to a different taxing master for taxation.

d) **THAT**, in the alternative, this Honourable Court re-assess the costs due to the Respondent.

e) **THAT**, costs of the application be provided.

2. The application is based on the grounds on the face of the application nos (i) – (xi) and further supported by an affidavit of William Kabogo Gitau sworn on 16<sup>th</sup> June 2019 and annexure thereto **WKG-1-WKG-7**.

3. The Respondent is opposed to the application and relies on Replying affidavit dated 5<sup>th</sup> July 2018 together with the annexure marked "FW-1".

4. The brief facts of this matter is that on 10<sup>th</sup> March 2017 the petitioner filed a constitutional petition No.93 of 2016 to which the Respondent filed an answer to the petition, replying affidavit and Notice of Preliminary Objection in response dated 4<sup>th</sup> April 2016. The Preliminary objection on jurisdiction was upheld on 7<sup>th</sup> December 2017, leading to the petition being struck out with costs. The petitioner being aggrieved by the ruling has preferred Civil Appeal No.8 of 2017, which is pending hearing and determination at Court of Appeal.

5. Meanwhile the Respondent herein filed a bill of costs dated 17<sup>th</sup> January 2017 seeking costs in the sum of Kshs.50,960,442/-. By court ruling of 7<sup>th</sup> June 2017, the Deputy Registrar S. Mwayuli, taxed the bill and awarded the Respondent costs of Kshs.5, 343,922/- for the party and party bill of costs. The petitioner through a letter dated 8<sup>th</sup> June 2017, notified the Registrar of his objection to the ruling and sought for reasons, for taxation and disputed items. The Deputy Registrar responded through a letter of 9<sup>th</sup> June 2017, informing the petitioner that her reasons were contained in the ruling delivered on 7<sup>th</sup> June 2017.

6. I have perused the application dated 16<sup>th</sup> June 2017, the Replying affidavit dated 5<sup>th</sup> July 2018, the rival submissions by counsel for Applicant and the Respondent, and from the above the following issues arises for consideration:-

a) **Whether the Applicant has demonstrated that there is an error in principle in calculating the instruction fees?**

**b) Whether the Applicant has demonstrated a failure to consider the applicable case law precedents?**

**c) Whether the Applicant has demonstrated that there is an error in principle in calculating the instruction fees?**

7. The petitioner's application is premised under paragraph 11(1) and (2) of the Advocates Remuneration Order which provides:-

**"1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he 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 parties concerned, setting out the grounds of his objection."**

8. The petitioner's contention in his application is, that the taxing officer erred in law and in principle in awarding the Respondent the sum of Kshs.5, 000,000/- as instruction fees. The Respondent on the other hand terms the application as a frivolous and without merit; urging there is no error. The Respondent urges further the application is meant to delay paying the assessed costs.

9. The Respondent further submit, that the petitioner has not demonstrated any valid grounds warranting the setting aside of the order and certificate of costs by the taxing officer, or the Respondent's party and party Bill of costs subject of the present application.

10. The petitioner urges, the taxing officer erred in law and in principle in considering the sum of Kshs.5,000,000 of instruction fees being an increment of fifty (50) times than the provided sum of Kshs.100,000/- as provided under schedule 6 paragraph 1 (j) (ii) of the Advocates Remuneration (Amendment) order 2011.

11. The Party and Party Bill costs dated 17<sup>th</sup> January 2017 brought pursuant to schedule V1 of the Advocates Remuneration (Amendment) order under item No.2 the Respondent was seeking Kshs.50, 000,000/- costs on instruction fees. The taxing officer in her ruling dated 7<sup>th</sup> June 2017 under instruction fees noted that the Advocates Remuneration Order 2014 schedule 6(1) (j) (ii) provides for Kshs.100,000/- as the minimum fees chargeable and proceeded to state that the taxing master has discretion to increase the said minimum figure taking into account a number factors namely:-

1. Nature and importance of the case.
2. Value of the subject matter.
3. General conduct of the parties.
4. Complexity of the issues and novel points of law.
5. Time, research and skill expounded in the brief.
6. Value of documents involved.

That after considering the above the taxing master found that Kshs.5, 000,000/- is reasonable in the circumstances of the case and taxed off Kshs.45, 000,000/- in respect of instruction fees.

12. The principle, that guide the taxing officer in assessing instruction fees for the constitutional petition are set out in Schedule 6 paragraph 1 (j) (ii) of the Advocates Remuneration (Amendment) Order 2014 which provides as follows:-

**'Constitutional petitions 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-**

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

13. In the case of **Joreth Limited vs Kigano & Associates [2002] 1 E A 92** it was held as follows on the factors that the taxing officer should put into consideration in assessing a bill of costs:-

**"We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account among other matters, the nature and importance of the cause of matter, the interest of parties, general conduct of proceedings, any directions of the trial Judge and all other relevant circumstances."**

14. The taxing officer in taxing the Bill of Costs on the instruction fees was properly guided by the above-mentioned authority, however in arriving at a figure of Kshs.5, 000,000/- as instruction fees, fifty (50) times the instruction fees provided for under schedule 6 paragraph 1 (i) (ii) of the Advocates Remuneration (Amendment) Order 2014, did not give reasons to justifying such high increment having found that the petition was not complex and was determined at a preliminary stage. It is of great importance to note what the taxing master stated thus:-

**"The taxing officer takes cognizance of the above factors but is quick to warn herself that in the present case, as much as the matter was very important to the parties and it elicited lots of political interests across the divide as well as media publicity, the taxing officer notes that the issue of complexity was lacking as the same was never mentioned by the trial Judge and that above all, the Petition did not even go to full hearing but was determined at the application stage and most importantly that no expert was involved to discern the constitutional issues herein to warrant the matter complex or having involved specialized skill."**

15. From the above and considering the provisions of schedule 6 paragraph 1 (j) (ii) of the Advocates Remuneration (Amendment) Order 2014, and the assessed costs being fifty (50) times in respect of instruction fees in an opposed constitutional petition, I have no doubt in finding the sum of Kshs.5,000,000/- to be astronomical and excessive for instruction fees for a constitutional petition, and taking into account that the petition was determined on a preliminary point of law and did not proceed to full hearing.

16. I am further of the view, that the taxing master having in her ruling found, that the petition was not complex, that it did not go to full hearing and that no experts were involved made an error in principle in arriving at the payable instruction fees. I find the taxing officer erred in awarding the sum of Kshs.5, 000,000/- as instruction fees. This without doubt was a manifest error in principle on the award of instruction fees which in the interest of justice ought to be varied and/or set aside.

17. The petitioner further urges the taxing officer disregarded the principle of stare decisis and failed to consider the authorities submitted before her. I however have to state, I have perused the ruling of the taxing officer and I am satisfied she relied on authorities setting out some principles to be considered contrary to submissions by the petitioner. I do not agree that the taxing officer disregarded the principle of stare decisis and failed to consider binding authorities as submitted by the petitioner herein.

18. In the case of **Mark Kubai Kariuki & 5 others (suing on behalf of Deliverance Church of Kenya) vs. Japhet Noti Charo & 2 others [2015] eKLR** the court set aside an award of Kshs.500,000.00 on instruction fees and held that that an increment of three to four times in instruction fees could be fair but not seventeen times.

19. In the petitioner's replying affidavit, and submissions, it is submitted that the respondent urges that the petitioner is a man of "*immense wealth*" and therefore offered to pay the taxed costs. This is not tenable as all litigants are equal before the law and the bill of costs are required to be assessed in accordance with the provisions of the law, pleadings and applicable principles on taxation. Considering the submissions by both the Petitioner and the Respondent, I find the petitioner has prima facie demonstrated, that the taxing officer erred in law and in principle in assessing the instruction fees and in awarding Kshs.5,000,000/- thus an increment of ten times in instruction fees, which I find to be unfair and unjust.

20. The upshot is that the chamber summons dated 17<sup>th</sup> June 2017 is meritorious. I proceed to make the following orders:-

**a) The decision and ruling of taxing master delivered on 7<sup>th</sup> June 2017 be and is HEREBY set aside and the Party and Party Bill of costs dated 17<sup>th</sup> January 2017 is remitted back to a different taxing master for taxation.**

**b) Costs of the application be in the cause.**

Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of October, 2019.

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J .A. MAKAU

JUDGE