



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

ELECTION PETITION NO. 4 OF 2017

ALUDO FLORENCE AKINYI.....PETITIONER

VERSUS

I.E.B.C AND 2 OTHERS.....DEFENDANT

RULING

1. The Ruling is in relation to a Reference from the decision of the learned Taxing Officer, Hon. P. Mbulikah.
2. It is the applicant's position that the Taxing Officer had erred by finding that the Costs incidental to the Instruction Fees were only incurred in respect to Travelling and Filing Fees.
3. As far as the applicant was concerned all the other items listed on the Bill of Costs were also incidental costs, and should therefore have been allowed as drawn.
4. The applicant also faulted the Taxing Officer for holding that the sum of Kshs 500,000/= which had been awarded by the learned Trial Judge was the total costs recoverable by the applicant.
5. When canvassing the application, Mr. Ragot the learned advocate for the applicant submitted that the Taxing Officer had erred when she restricted the entire costs to the sum of Kshs 500,000/=.
6. In his considered view, the trial court had only put a lid on the Instruction Fees.
7. He added, that the term "***Instruction Fees***" is a creature of the Advocates Remuneration Order, and must be interpreted appropriately.
8. The Taxing Officer is said to have made a mistake when she placed reliance upon the "***Black's Law Dictionary***" as the foundation for defining "***Instruction Fees***."
9. The result of the mistake made by the Taxing Officer was said to be an absurdity.
10. In response to the application, Mr. Odinga, the learned advocate for the respondent submitted that it was the Election Court which had capped the costs to Kshs 500,000/=.
11. It was the respondent's understanding that the capped costs were inclusive of the costs for both the Petition and the Application which culminated in the striking out of the Petition.
12. It was the understanding of the respondents that the Election Court had actually capped the Instruction Fees plus the Incidental Costs at Kshs 1.0Million.
13. As the Election Court had already capped the Instruction Fees at Kshs 500,000/=, the respondent submitted the Bill of Costs should have been limited to Incidental costs only.
14. The respondent also pointed out that the Taxing Officer only consulted the "***Black's Law Dictionary***" to find the meaning of the phrase "***Incidental costs***".
15. In effect, the Taxing Officer is said to have arrived at a decision that the fee to be taxed was exclusive of the Instruction Fees, as the

Election Court had already made a decision in that regard.

16. In his reply to the respondent's submissions, the applicant reiterated that whilst "Incidental Costs" excluded the Instruction Fees, the same could not be limited to only Traveling expenses and disbursements.

17. After giving due consideration to the submissions on record, coupled with a close scrutiny of the decisions of both the Election Court and the Taxing Officer, I find that the sum of Kshs 500,000/= was not inclusive of all the costs recoverable by the applicant.

18. The Election Court had awarded costs to the Respondents as follows:

"(i) Kshs 500,000/= as the total instruction fees for the petition and application for the 1st and 2nd respondent.

(ii) Kshs 500,000/= as the total instruction fees for the petition and application for the 3rd respondent.

(iii) All other incidental costs shall be taxed and the total costs certified by the Deputy Registrar of this Court.

(iv) The certified costs awarded shall be paid out of the security deposit on a pro rata basis."

19. When called upon to tax the bill of Costs, the learned Taxing Officer was fully alive to the fact that the Election Court had already determined the quantum of the Instruction Fees. At no time did the Taxing Officer say that she could not tax any costs which were not a part of the Instruction Fees.

20. The applicant was thus in error when he faulted the Taxing Officer for allegedly holding that it was only Kshs 500,000/= that was recoverable as the full costs.

21. In her ruling the Taxing Officer made it clear that the total costs of the Petition and the Application was ***"Kshs 500,000/= and incidental costs are to be taxed by the taxing master."***

22. The Taxing Officer did not, thereafter, seek to establish the meaning of the phrase ***"Instruction Fees."***

23. She actually made the following statement;

"This raises the question, what are incidental costs?"

24. The answer to that question was derived from the ***"Black's Law Dictionary."***

25. In the result, the applicant erred by asserting that the Taxing Officer ought not to have consulted the law dictionary, in an endeavor to find out the meaning of "Incidental Costs."

26. The law dictionary stated that Incidental Costs, in an election petition would be the costs incidental to the main purpose.

27. The Taxing Officer taxed off the Getting up fees on preparation for the trial.

28. I find that the Taxing Officer was right to reject the claim for Getting up Fees, as the Petition was truck out, and therefore there was never a need for the applicant to prepare for trial.

29. The Election Court came to the conclusion that;

" 37. As the petitioner did not serve the petition on the 2nd and 3rd respondents personally or directly, the petition is a nullity and must now be struck out."

30. In effect, the Petition was struck out at the preliminary stage, before the pre-trial conference was held.

31. Those are the circumstances which the Taxing Officer was enjoined to take into account when taxing the Bill of costs.

32. In my considered view, the learned Taxing Officer was right to have taxed-off the following costs;

(a) "3. – Perusing the Petition....." as the applicant cannot have been perusing a petition which had not been served upon him;

(b) " 4. Perusing the Response to the Petition....."

(c) " 5. Drawing the 1st and 2nd Respondent's Answer to the Petition....."

(d) " 6. Perusing the 3rd Respondent's Form 39A, 39B and 39C....."

(e) “ 7. Attending Court to file the Response to the Petition.....”

33. All these actions could only have been justifiable if the applicant had been served with the petition.

34. But the applicant had moved the court, to strike out the Petition on the grounds of non-service. As the court accepted the applicant’s contention that he had not been served with the Petition, there would be no basis for awarding to the applicant, costs which would have only been incidental if the Petition had been duly served.

35. This same reasoning is applicable to the items numbered 8, 9, 10, 11 and 12 of the Bill of Costs dated 30th November 2017.

36. However, I find that the items numbered 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25 and 26 of the Bill of costs are incidental to the Petition and the Application.

37. Accordingly, I find that the learned Taxing Officer erred by taxing-off a total of Kshs 29,485/=.

38. In the result, the applicant’s costs are now enhanced by that sum, to Kshs 587,945/=

39. As the application has been successful to only a small extent, whilst the bulk of the applicant’s claim has been rejected, I find that it would be unfair to condemn the respondent to pay the costs of the reference.

40. In the result, each party to the Reference from Taxation shall bear his or her own costs.

DATED, SIGNED and DELIVERED at KISUMU, this 10th day of September, 2018.

FRED A. OCHIENG’

J U D G E