



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 206 OF 2016**

**SATINDERJIT SINGH MATAHRU.....PETITIONER**

**VERSUS**

**ARMAJIT SINGH GAHIR .....1<sup>ST</sup> RESPONDENT**

**SURINDER SINGH SIHRA.....2<sup>ND</sup> RESPONDENT**

**JASPAL SINGH VIRDEE.....3<sup>RD</sup> RESPONDENT**

**SARWAN SINGH KALSI.....4<sup>TH</sup> RESPONDENT**

**HARJINDER SINGH ROOPRA.....5<sup>TH</sup> RESPONDENT**

**EAST AFRICAN RAMGARHIA BOARD...6<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to the application dated 1<sup>st</sup> March 2018 which has been brought under Sections 45, 48 and 49 of the Advocates Act Cap 16. In the said application, the respondents/applicants seeks orders to set aside the orders of the Taxing Master dated 17<sup>th</sup> July 2017 and for further orders that the Bill of Costs dated 23<sup>rd</sup> September 2016 be taxed by this court.

2. The application is premised on the grounds that the amount taxed is grossly high and that the taxing master did not consider the applicants' written submissions in respect to instructions fees and getting up fees. It is the applicant's contention that it is a humanitarian organization that depends on support from well wishers and is therefore unable to settle the taxed costs if execution proceeds.

3. The applicants' case is that the Taxing Master proceeded with the taxation on wrong principles and without taking into account the provisions of the Advocates( Remuneration)(Amendment)Order, 2014 and the facts of the case.

4. The application is supported by the affidavit of the applicants' advocate, **Ben Musundi**, who states he was not aware of the date for the ruling on taxation that was initially slated for 26<sup>th</sup> June 2017 when the ruling was not delivered and that he later learnt that the petitioner's costs had been taxed at kshs. 800,996.00 as shown in the certificate of costs marked as annexure "BM1". He avers that the time for filing a reference had lapsed as at the time that he learnt about the ruling on taxation. He further avers that the learned Taxing Master erred in making an award of costs which is higher than the award of damages made by this court on 30<sup>th</sup> August 2016 contrary to the principles of proportionality.

5. The petitioner filed grounds of opposition in response to the application in which he stated that the application, as drawn, cannot be granted for reasons that:

**1. The applicant has not demonstrated to court any ground to warrant setting aside if he Taxing Master's Ruling dated 17<sup>th</sup> July, 2017.**

**2. The Taxing Master gave the reasons at arriving at the fee taxed and went ahead to give authorities she relied on to arrive at the fees taxed.**

**3. The Taxing Master is clothed with the discretion to award costs while considering the principle of reasonableness. This discretion was judiciously exercised by the Taxing Master.**

**4. The Taxing Master is not enjoined to consider the financial ability or otherwise of a party in taxation.**

**5. The applicant has not given any notice in writing to the taxing master on the items in the Bill of Costs objected to.**

**6. There is no error in principle, the Taxing Master properly applied the correct schedule, and, in her ruling, she explained the basis of taxation.**

6. Parties thereafter filed written submissions to the application which I have carefully perused and I discern the main issue for determination to be whether the Taxing Masters exercise of discretion was proper.

7. It is trite law that the taxing officer has discretion in taxing Bills of Costs and may either increase or decrease instructions fees but such discretion must be exercised judiciously and not capriciously. Taxation must also be based on sound principles given that it is not based on precision of figures but is rather a matter of opinion depending on what is reasonable according to the circumstances of the case.

8. In the case of **Premchand Reichand vs Quarry Services of EA Ltd & Others EALR [1972] EA 162**, the Court of Appeal stated the principles of taxation as follows:

**“(i) (a) that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;**

**(b) That a successful litigant ought to be fairly reimbursed for the costs that he has had to incur.**

**(c) That the general level of remuneration of advocates must be such as to attract recruits to the profession and**

**(d) That so far as practicable there should be consistency in the awards made**

**(ii) The court will only interfere when the award of the taxing officer is so high or so low as to amount to injustice to one party;**

**(iii) In considering bills taxed in comparable cases allowance may be made for the fall in value of money.....”**

9. The petitioner’s case was that costs are intended to reimburse a successful litigant and should only be interfered with where there is an error on principle and not on the quantum or amount awarded.

10. The applicants’ argument on the other hand was that the Kshs. 800,996.67 costs awarded was not proportional to the award of general damages of kshs 500,000/- made to the petitioner.

11. In a rejoinder the petitioner argued that his case against the respondents/applicants was not only about a claim for general damages as there were five other orders made in the judgment that gave rise to the taxation in which case, the Taxing Master was under a duty to consider the case in a holistic manner when determining the costs due to the petitioner.

12. According to the petitioner the taxation was fair as the Bill of Costs was reduced from kshs 2,024,296.67 to kshs 1,223,300/-. Counsel reiterated that the Taxing Master’s award of kshs. 800,996.67 is fair and he urged the court to uphold it. He relied on the decision in the case of **Joreth Ltd vs. Kigano & Associates [2002] I EA 92** where the Court of Appeal held that the judge sitting on a reference against assessment of instructions fees by the taxing officer ought not to interfere with the assessment of costs unless the taxing officer has misdirected himself on a matter of principle.

13. In the said **Joreth Ltd** case (supra), the court also gave the guidelines or principles to be applied during taxation in exercise of discretion to increase instructions fees and noted that the Taxing Master needed to demonstrate in his ruling the following reasons for increasing fees:

- i. Care and labour required by the advocate.
- ii. Specify the number and length of the papers to be perused,
- iii. The nature of importance of the matter.
- iv. The value (where ascertainable) of the subject matter.
- v. Interest of the parties.
- vi. Novelty of the matter.

In the said case, the Court of Appeal observed as follows:-

**“We would at this stage point out that the value of the subject matter of a suit for the purposes 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, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”**

14. In the case Republic Vs. Minister of Agriculture Ex-parte Samuel Muchiri W/Njuguna [2006] eKLR the court held at p. 14 -

**“The complex elements in the proceedings which guide the exercise of the Taxing Officer’s discretion must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute, the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry, and was inordinately time – consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be clarified, assessed and simplified, the details of such initiative by counsel must be specifically indicated apart of course from the need to show if such works have not already been provided for under a different head of costs.”**

and at p. 15 of the same case, the court added -

**“It follows in my view, that the responsibility entrusted to counsel in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field. I have to state that there was nothing novel in the proceedings on such a level as would justify any special allowance in costs.”**

15. In the present case, a perusal of the ruling by the Taxing Master, that gave rise to this reference, shows that while he clearly appreciated the principles governing the increase of instructions fees as was expounded in the above cited cases, she did not set out, in a clear manner or demonstrate, with specificity, the reasons for the increase in the instructions fees and only stated:-

**“ The bill of costs at hand has been taxed at the instructions fees by taking into consideration the above stated factors and I am of the view that the instructions fees of kshs 500,000/= is reasonable under the circumstances.”**

16. I find that nowhere in the said ruling did the Taxing Master explain how the factors governing increment in instructions fees were applicable in the case at hand apart from merely listing the factors that ought to be taken into consideration in the exercise of the discretion to increase instructions fees.

17. Under Schedule VI of the Advocates Remuneration Order 2009, the Taxing Officer, in exercise of his discretion in matters arising during proceedings, shall take into consideration the other fees and allowances of the advocate, if any, in respect of the work to which such allowance applies, the nature and importance of the cause, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge and all relevant circumstances.

18. The applicant’s case was that one important consideration that the Taxing Master ought to have taken into account was that the general damages awarded by the court was kshs 500,000/= in which case the costs awarded should not have exceeded the award of general damages. My take is that the award of general damages was an important consideration which should have guided the Taxing Master in exercising discretion to determine the amount to be increased on the instructions fees. It was therefore incumbent on the Taxing officer to consider the amount of general damages as a relevant factor and a pointer to the importance and value of the subject matter in assessing costs.

19. In the petition gave rise to the taxation of the petitioners costs, the petitioner challenged decision to expel him from the membership of the 6<sup>th</sup> respondent society while citing the breach of his constitutional rights and sought orders of prohibition, certiorari, damages and declaratory orders. In my humble view, the petitioner’s case was an ordinary dispute of a member of a society challenging the decision of the board of the said society. To my mind therefore, the Taxing Officer, in awarding increased instructions fees, needed to explain, with certainty, the reasons for the high increment of instructions fees by at least 400%.

20. In this case, the Taxing Officer, as I have already found in this ruling, did not even allude to the additional action or special services undertaken by the petitioners advocates that prompted her to increase the instructions fees by at least 400%.

Article 48 of the Constitution stipulates that:-

**The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.**

21. As I have already stated in this ruling, Court of Appeal in the Premchand Raichand case (supra) laid down the principles that govern taxation of costs and going by the principles espoused in the said decision, it was expected that the Taxing Officer would make formal and specific references to what she considered to be the relevant factors that guided her in exercising her judicial discretion to increase instructions fees from 100,000 to 500,000/=.

22. In my humble view therefore, the Taxing Officer erred in principle in failing to specify the factors that informed the increase in instructions fees apart from merely stating that the increase was reasonable.

23. For the above reasons, I find that the decision by the Taxing Officer to award the advocate extra instructions fees of kshs. 400,000/= was

erroneous and I proceed to set it aside. The award of kshs 100,000/- instruction fees is hereby upheld and similarly, I also uphold the award made for the attendances. I make no orders as to the costs of this application.

**Dated, signed and delivered in open court at Nairobi this 3<sup>rd</sup> this October 2018.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Leila for the petitioner

Mr. Odongo for the respondents

Court Assistant – Kombo