



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 226 OF 2016

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

BETWEEN

NASIBWA WAKENYA MOSES.....APPLICANT

VERSUS

THE UNIVERSITY OF NAIROBI.....1ST RESPONDENT

THE STUDENT ORGANISATION OF

NAIROBI UNIVERSITY (SONU).....2ND RESPONDENT

RULING

Background

1. The ruling herein is on two applications that arise from a ruling on Taxation of Party & Party Bill of Costs dated 20th December 2017 filed by the Applicant herein, and on which a ruling delivered thereon on 7th June 2018 by Honourable E.W. Mburu, who was the Taxing Officer. The Taxing Officer taxed the Bill of Costs as Kshs 5,419,546/=.
2. The Respondents filed the first application by way of a Chamber Summons dated 2nd July 2018, seeking the following orders:
 - a) **That the ruling and/or decision delivered herein on 07.06.18 by the Honourable Learned Taxing Master Honourable E.W. Mburu, taxing the Party & Party Bill of Costs dated 20.12.17 at Kshs 5,419,546/= be set aside and/or vacated.**
 - b) **That the Bill of Costs dated 20.12.17 be remitted back for re-taxation by a different taxing officer with appropriate directions.**
 - c) **That in the alternative, this Court do tax the Party & Party Bill of Costs**
 - d) **That the costs of the application be provided for.**
3. The Applicant responded to the said application in a replying affidavit he swore on 3rd October 2018. The Applicant also in addition filed the second application by way of a Notice of Motion dated 3rd October 2018, seeking orders that judgment be entered for the Applicant against the Respondents for the sum of Kshs 5,419,546/= as it appears in the Certificate of Taxation dated 7th June 2018, with interest at the applicable court rates from the date of taxation until payment in full. The Applicant also sought orders as to costs.
4. The Respondents did not file any response to the Applicant's application, despite being given leave and the opportunity by the Court to do so. This Court on 9th October 2018 directed that the two applications would be heard and determined together by way of oral submissions, and a hearing of the said applications was duly held on 22nd October 2018. The respective cases of the Applicant and Respondents is as follows.

The Applicant's Case

5. The Applicant's case from the pleadings it filed in court and submissions made at the hearing, is that the matter before the Court involved an application for judicial review orders which proceeded to full hearing and where orders were issued in his favour, and also included contempt of court proceedings. Further, that the matter was complex in nature, as numerous applications were filed by the Applicant's Advocate, and required a lot of research and preparation. Further, that the matter took long duration with several court attendances.

6. Therefore, that the Taxing Officer while taxing the Bill of Costs discharged her discretion and considered all these factors, and accordingly taxed the Bill of Costs in a fair and just manner. In addition, that where the value of the subject matter in a case cannot be ascertained, the Taxing Officer has discretion as to the amount to be taxed as instruction fees, and that the instruction fee of Kshs 4,000,000/= that were taxed were not excessive as the amount in the Bill of Costs was Kshs 28 million.

7. The Applicant distinguished the judicial decisions relied upon by the Respondent during the taxation on the grounds that in Nyangito & Company Advocates vs Doinyo Lessos Creameries Limited (2014) e KLR the matter did not go to full hearing, and that in National Oil Corporation Ltd vs Real Energy Limited & Another, (2016) e KLR, the matter therein was not complex.

8. Lastly, Mr. Nyangito, the counsel for the Applicant, submitted during the hearing that the reference was filed out of time, as the Taxing Officer's ruling and reasons were given on 7th June 2018, yet the reference was filed on 2nd July 2018, without leave of the Court and beyond the required 14 days.

The Respondents' Case

9. The Respondents on the other hand averred that the ruling of the Taxing Officer should be set aside, for reasons that the Taxing Officer erred in law in failing to properly subject the Party and Party Bill of Costs dated 20th December 2017 to Schedule V, particularly by not justifying the basis for departing from what the law provides for, and by finding that the matter was so important to warrant Kshs 4,000,000/= as instruction fees. Further, that the Taxing Officer erred in law and fact in failing to take into account all the relevant factors in the taxation of the said Bill of Costs as contained in the Respondent's submissions filed during the taxation.

10. In addition, that the Taxing Officer erred in law and fact in attaching importance of the matter to the considerations that the Applicant is a student leader in a recognized public university and bears great responsibility, and is in the public limelight.

11. During the hearing, Ms. Mochama, the counsel for the Respondent, submitted on three issues. First, on the issue whether the reference was filed out of time, Ms Mochama relied on the decision in Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board (2005) e KLR for the position that time began to run from the date the response on the reasons for a ruling is got from the Taxing Officer. That in this regard, the Respondent's counsel wrote to the Taxing Officer requesting for the reasons by a letter dated 8th June 2018 and received a copy of the ruling and reasons on 20th June 2018.

12. Second, on whether the instruction fees taxed were excessive, Ms Mochama submitted that the issue of the matter being complex was not raised by the Taxing Officer, who only stated that the matter was important to the client, which was an irrelevant consideration. Reliance was placed on the decisions in National Oil Corporation Ltd vs Real Energy Limited & Another, (supra) and Republic vs Commissioner of Domestic Taxes ex parte Ukwala Supermarket & 2 Others (2018) e KLR for the position that the instruction fees be revised downwards as the matter was not complex.

13. Third and last, Ms. Mochama submitted that the current trend in awarding instruction fees in judicial review cases is that a minimum fee of Kshs 100,000/= is provided for, and asked that the amount taxed of the instruction fees be reduced to Kshs 150,000/=.

The Determination

14. A preliminary issue was raised by the Applicant as to whether the Respondent's application is properly before this Court, for reason of having been filed out of time. The procedure for the challenge of a taxing master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:

“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the 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 the parties concerned, setting out the grounds of his objection.”

15. From the foregoing, it is clear that the reasons for the decision are to be sought for by way of a notice within 14 days of the decision of the taxing officer, and the reference is to be filed within 14 days of receipt of the reasons. In the present case, the record shows that the Respondent wrote a letter dated 8th June 2018 to the Deputy Registrar of the Judicial Review Division at the Milimani Law Courts, who was the Taxing Officer, indicating their objection to the ruling delivered on 7th June 2018 with respect to item 1 of the Bill of Costs, and seeking reasons for the said item.

16. The said letter bears a stamp of receipt at the Judicial Review Division on 11th June 2018, and was thus filed within the 14 days of the said ruling. Another letter dated 13th June 2018 from the Respondent's Advocate sought a copy of the ruling, and is shown to have been

received by the Deputy Registrar on 19th June 2018.

17. There is no record of a response by the said Deputy Registrar, and the Respondents subsequently then filed their reference on 3rd July 2018, to which they attached a copy of the Taxing Officer's ruling dated 7th June 2018, which they averred in the supporting affidavit they received from the Registry on 20th June 2018. Given that there is no response from the Deputy Registrar, and the last shown dated of receipt of the Respondent's request was 19th June 2018, I find that time began to run from this date, and the filing of the Respondent's reference on 3rd July 2018 was in time.

18. In addition, it was held as follows in this regard in **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2) (2006) 1 EA 5**;

“Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

19. I accordingly find that the Respondent's application dated 2nd July 2018 and filed on 3rd July 2018 is properly on record for the foregoing reasons.

20. The only substantive issue in dispute in the reference filed by the Respondent that was raised in the pleadings and submissions made by the Applicant and Respondent, is the taxation by the Taxing Officer of item 1 on instruction fees in the Applicant's Party and Party Bill of Costs dated 20th December 2017. It is not disputed in this respect that the applicable law as regards taxation of Party and Party Bill of Costs is Schedule 6A of the Advocates (Remuneration) Order 2014, which provides for party and party costs of proceedings in the High Court.

21. Paragraph 1(j) of the said Schedule provides as follows as regards instruction fees in 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—

(i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000

(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

(iii) to present or oppose application for setting aside arbitral award- 50,000.”

22. The applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer's decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in **First American Bank of Kenya Vs Shah and Others [2002] E.A.L.R 64** at 69 by Ringera J. (as he then was) who delivered himself thus;

“First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle”.

23. These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) 1 EA 92**, where the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

24. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) e KLR** :

“ 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;

2. the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;

3. the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;

4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
7. where responsibility borne by advocates is taken into account, its nature is to be specified;
8. where novelty is taken into account, its nature is to be clarified;
9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form."

25. These guidelines were also applied by Odunga J. in Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd [2014] eKLR, and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

26. I have perused the ruling by the Taxing Officer dated 7th June 2018, and note that she properly applied Schedule 6A of the Advocates Remuneration Order, and she noted that the basic instruction fee was Kshs 100,000/=. She also noted that she has discretion to increase the amount taking into account factors such as the nature and importance of the cause or matter. The Taxing Officer also considered the principles as regards taxation of costs outlined in Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (supra)

27. While taxing on the item on instruction fees, the taxing master in her ruling stated as follows:

“The court has however, looked at the nature of the case that was before the court, and importance of the same to the Applicant. It is Judicial noted that being a student leader in a recognized public university as the 1st Respondent, bears great responsibilities and places one in the public lime light and several other avenues including politics. The importance is more so as the trial court allowed the application and directed the Applicant be sworn in officers as the dully legally elected official of the 2nd Respondent.

For this reason, to me this was not an ordinary case but a case which bore great importance to the Applicant. I am thus persuaded to enhance the minimum fees from Kshs. 100,000/= to Kshs 4,000,000/= having stated Kshs. 15,000,000/= is on the higher side. Kshs. 11,000,000/= is thus hereby taxed off form this item.

28. It is my finding that that the taxing Officer did take into account relevant considerations, as the importance of a cause is specifically provided for in Schedule 6A as a factor that can be taken into account in increasing instruction fees, and that she gave reasons why she exercised her discretion to tax off the item on professional fees from Kshs 15,000,000/= to Kshs 4,000,000/=. The instruction fee awarded was also not excessive in the circumstances. I have in this regard noted that the Applicant filed numerous applications, pleadings and submissions, that necessitated numerous court attendances and research, and the matter was heard and determined over a period of one year.

29. The proceedings were therefore urgent and time consuming, and also important to the Applicant as they were affecting his position of leadership and political career in the Respondent organisations. This in my view was ample justification to increase the instruction fee to Kshs 4,000,000/=. and the Taxing Officer therefore did not err in her findings.

30. In the premises I find that the decision of the taxing master in awarding instruction fees of Kshs 4,000,00/= was not based on any error of principle, neither were the said cost as awarded excessive to justify interference by this Court.

31. The only outstanding issue is whether judgment can be entered on the taxed costs as sought by the Applicant. The only reason that a court of law cannot enter judgment on a Certificate of Costs is if the same has been set aside or altered, or where there is an issue with retainer, none of which is shown in the instant case. This is the position as held in the cases of Dally and Figgis Advocates v Homelex Limited (2013) eKLR and Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Ltd (2012) eKLR.

32. Section 51(2) of the Advocates Act gives this Court power to enter judgment in the Advocates' favour on the taxed costs, while Rule 7 of the Advocates Remuneration Order provides for the interest on the said costs at 14 % until payment in full. This position was also confirmed in and the decision in Ahmednasir Abdikadir & Company Advocates vs National Bank of Kenya Limited, (2007) e KLR.

33. In the premises, I order as follows:

I. The Respondent's Chamber Summons dated 20th June 2018 is not merited and the same is dismissed with costs to the Applicant.

II. The Applicant's Notice of Motion dated 3rd October 2018 is granted and I accordingly enter judgment for the Applicant against the Respondents for the sum of Kshs 5,419,546/= as it appears in the Certificate of Taxation dated 7th June 2018 with

interest at 14% per annum from the date of taxation until payment in full.

III. There shall be no order as the costs of the Notice of Motion dated 3rd October 2018.

34. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2018

P. NYAMWEYA

JUDGE