REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 416 OF 2008

IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE TOBACCO CONTROL ACT 2007

IN THE MATTER OF THE CONTRAVENTION AND OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

MASTERMIND TOBACCO (K) LIMITED ……PETITIONER

VERSUS

ATTORNEY GENERAL ……..……RESPONDENT

RULING

By chamber summons dated 23rd July, 2014 and filed in court on the same day, the applicant sought the following main order.

> ***1. That the decision of the taxing master in this matter in the party and party Bill of Costs between the interested party and the petitioner made on 9th July 2014 be reviewed in terms of items 1 and 11 of the Bill of Costs.***

According to the affidavit in support of the application sworn on 23rd July 2014 the taxing master taxed the interested party's party and party Bill of costs, but the applicant was dissatisfied with that decision in respect of items 1 and 11, that is on instruction and getting up fees. On instruction fee the taxing master allowed a sum of kshs. 400,000/=, while no award was on getting up fees. The applicant therefore filed this application challenging that decision and the reasons thereof.

The grounds for challenging that decision were that by taxing off Ksh7,600,000/,- the taxing master's decision was unreasonable for failing to apply the correct and proper standards in taxing the Bill of Costs.

The respondent filed as replying affidavit by Athony Karuma Muriu sworn on 24th September 2014 opposing the applicant's application. According to the respondent, costs should be commensurate to the work done not an unjust reward. The respondent stated that the petition raised constitutional issues of Public interest and for that matter it would be unfair to punish the respondent with hefty costs that would amount to denial of access to justice which is a constitutional right under **Article 48** of the constitution.

The respondent further stated that the two items on instruction and getting up fees where the applicant had sought Kshs. 8,000,000/- and kshs. 2,666,666,66/- respectively, were highly exaggerated given the

circumstances of this case. The respondent maintained that the petition was dismissed by the court on its own motion and for that reason, the applicant could not justify the fees claimed on the two items. The respondent was of the view, that since the petition never proceed to hearing and parties had only filed written submissions, getting up fee could not be awarded. The respondent therefore supported the decision of the taxing master and sought dismissal of the application.

The application was disposed of by way of written submissions which counsel for both parties highlighted. Mr. Ongoya, learned counsel for the applicant, submitted that it was wrong for the taxing master to disallow Ksh7,600,000/- on item 1 in the bill of costs and fail to award fees for getting up on item 11. Counsel submitted that whereas one taxing master had allowed those two items in an advocate – client Bill of Costs in the same matter, there was no justification for taxing the applicant's bill of costs at ksh. 400,000/- on item 1 and decline to allow getting up fee on item 11 which counsel interpreted to be application of double standards in the same matter.

Learned Counsel submitted that in the Advocate / client Bill of costs, item 1 had been allowed at Ksh8,000,000/-while item 11 was allowed at Kshs.3,616,669/-. Counsel wondered why in the case of the applicant, the taxing master awarded costs of Ksh400,00 only on item 1 and declined to award costs on the 11. Counsel felt that taxing item 1 at $1/20^{th}$ of the advocate / client Bill of costs was inordinately low which was not justified. Counsel admitted that this court while exercising its jurisdiction should rarely interfere with the exercise of a taxing master's discretion, but held the view that in this particular case, there was good reason to interfere because there was no justification in the decision to disallow an item that had been allowed in the other bill of costs and at the same time allow far less than what was allowed by the other taxing master on item 1.

On getting up fees, counsel submitted that although the taxing officer was alerted of the fact that the same item had been allowed in the other taxation, the taxing master went ahead to disallow item 11 thus made an error of principle which amounted to application of double standards in the same matter. Counsel faulted the taxing officer for dismissing the fact that her counterpart had allowed item No 11 without offering a plausible reason. In counsel's view, where parties had been directed by the court to file written submissions as a mode of disposing the petition, and had fully complied with those directions, that entitled a party to getting up fees. Counsel relied on a number of decisions to support his arguments and prayed that the application be allowed.

For the respondent, Mr. Omoganda urged the court not to interfere with exercise of discretion by the taxing master because no good reason had been advanced. According to learned Counsel, this was a public interest litigation hence courts are slow in awarding costs that would appear to hinder access to justice Counsel continued to submit that the petition was not heard hence there was no justification for awarding getting up fees. Counsel also argued that the amount of work done did not warrant the fees sough in the Bill of costs. According to counsel, the fact that the applicant was not the main respondent, did not justify the exorbitant fee sought. Learned counsel referred to decisions contained in their list of authorities to buttress his arguments. In counsel's view, taxation is not a mathematical exercise but takes into account the amount of work done and the decision on how much to award as cost is a question of opinion based on the experience of the taxing master.

Counsel concluded therefore, that the complaint by the applicant was on quantum as opposed to error on principle, which falls below the threshold for reviewing a taxing master's decision. He supported the taxing master decision submitting that awarding the amount sought would be oppressive. He sought dismissal of the application.

I have considered the application, reply there to, submissions by counsel and authorities relied on. The application before court seeks review of the taxing officer's decision which awarded Ksh400,000/- out of the claimed fees of Ksh8,000,000/- under item 1 and decline to award getting up fees on item 11 in the applicant's party and party Bill of costs.

The applicant was an interested party in this litigation having applied to be enjoined as such. The petition was later dismissed for want of prosecution on 4^{th} December 2012 and the Court awarded costs to the

interested party. The applicant filed its party and party Bill of costs which was taxed and item 1, instruction fee was allowed in the sum of ksh400,000/- while item 11, getting up fees was disallowed. The applicant then took out a chamber summons under Rule 11 of the Advocates Remuneration Order to challenge the Taxing Officer's decision on those two items. Rule 11 allows a party dissatisfied with the taxing master's decision to move the High Court and challenge such a decision.

The general principle of law is that this court should not interfere with the exercise of discretion of a taxing master unless it is shown that the taxing master in exercise of that discretion, applied a wrong principle of law, the award of costs was inordinately low or inordinately high so as to amount to an injustice, or that the taxing master took into account irrelevant factors or failed to take into account relevant ones thus occasioned an injustice. But even in doing so, the court should not interfere with the taxing master's discretion where the complaint is on quantum.

The principles to be considered when dealing with the issue of taxation were set out in the case of **Premchand Ranchand Ltd & another v Quarry Services of East Africa [1972]EA 162** where the court stated.

> ***"The court must consider the following principles:-***
>
> ***(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 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." (emphasis)***

In the case of **First American Bank Ltd v Shah & Another [2002] 1 EA 64, Ringera J, (**as he then **was),** stated with regard to interfering with a taxing master's discretion-

> ***"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… it would be an error of principle to take into account relevant factors or to omit to take into account relevant factors… some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge…not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him…" (emphasis)***

The first question that has to be asked is whether the taxing master in this case overlooked the principles of law thus fell into error which should lead to interference with exercise of that discretion. I have perused the reasons by the taxing master dated 9th July 2014 on why item no 1 was taxed at Ksh400,000/- and item 11 disallowed. On item 1, the taxing master reasoned that the amount claimed, that is Kshs.8,000,000/-, was inordinately high, while on item 11, the reason given was that the case did not go to full hearing hence setting up fees was not allowable. There is an added reason that this was a public interest litigation hence an award of high fees would be punitive and a hindrance to access to justice. Regarding the other Advocate – Client Bill of Costs where item 1 was allowed at ksh 8,000,000/- and getting up fee had also been allowed, the taxing officer stated that she was not bound by that decision.

The petitioner had filed a petition challenging the constitutionality of certain provisions of the **Tobacco Act, 2007**, the petition did not disclose any amount in its body and therefore the taxing master was bound to take into account other relevant factors including the complexity of the matter, interests of the parties,

general conduct of proceedings and directions from the court in determining the amount to allow as instruction fee.

Costs are at the discretion of the taxing officer, but there are factors that must guide the court when taxing a bill of costs. In the case of **D. Njogu & Co Advocates v Panatcop Engineering Limited [2006] eKLR**, it was stated that the taxation of a bill of costs should be based on the nature and importance of the matter to the parties, interest of the parties, complexity and responsibility on shoulders of Counsel. In the case of **Ochieng, Onyango, Kibet and Ohaga Advocates v Adopt Light Ltd HC Misc 729 of 2006. Warsame** J (as he then was), stated ;

> ***"The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in line to the material presented before court. The taxing master must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject. And when the subject matter is unknown, the court is empowered to make what is available as a point of inference. In my view, the point of reference is the figure proposed and accepted…."***

There was no amount mentioned in this case because it was a constitutional petition. There is also no indication that any amount was offered to the applicant at the time of taxation, that could have been the point of reference. The taxing officer had to resort to other consider other factors in arriving at a decision.

Dealing with the issue of unconstitutionality or otherwise of several provisions in a statute cannot be said to have been a simple task. It required a lot of research and preparation in determining whether those provisions are unconstitutional or not. Secondly, the petition and the litigation herein was not filed for the benefit of the general public hence it cannot be said that it was for the public interest. This petition was filed by a private entity as the petitioner. The petitioner, according to the petition, is a manufacturer of tobacco products and for that reason, the petition was not aimed at protecting public interest but was to protect the petitioner's commercial interests. The matter was of importance to the petitioner otherwise it would not have made sense to file the petition.

The petition was challenging the legislation because it was going to affect the petitioner's business interests as opposed protecting the public at large. On the contrary, it was the interested party that was litigating on behalf of the public. The taxing master should therefore have taken this into account in making her decision on item 1.

Regarding item 11, getting up fee, the record shows that the court had directed parties to file written submission for purposes of disposing of the petition a practice of disposing petitions in this Division. It is seldom for parties to give oral evidence in this Division. In preparing written submission, parties put in a lot of time and research preparing those submissions. There is no any other way of getting up except when preparing those submissions and undertaking research for authorities. What remains after that, is highlighting of those submissions or in some instances parties leave it to the court to write its decision based on those submissions.

In my view, the taxing officer failed to consider this as a relevant factor in arriving at her decision. Secondly, the taxing master was wrong in taking the view that this was a public interest litigation which weighed heavily on her in determining the fee to award. This was an error of principle. In the case of **Nguruman Limited v Kenya Civil Aviation Authority and 3 others [2014] eKLR,** the taxing master had allowed getting up fee where parties had filed written submissions. On reference to the High Court, **Lenaola J** (as he then was) agreed with the taxing master holding that preparing submissions required a lot of work and research thus entitling the award of getting up fees. I fully agree with this position.

The applicant's counsel drew this court's attention to the existence of two certificates of taxation in this matter respecting different parties, one between an Advocate and client and the party and party bill of costs the subject of this reference where different principles were applied in taxing those Bills of costs.

Although the taxing officer's attention was also drawn to the earlier Bill of costs, not much consideration was given to it. It is true that one decision of a taxing master does not bind the other, but it was a relevant factor in certain respects especially when it comes to getting up fee. It is not possible that one counsel in this case , counsel for the petitioner, could get up for purposes of this petition while counsel for the applicant did not, yet they were appearing in the same matter. I am not in any way suggesting that the two Bills of costs should have been taxed at the same amount. That is the discretion of the taxing master, but that was a relevant factor that should have been taken into account by the taxing officer in taxing the applicant's Bill of Costs. As stated in the **Premchand Case** (supra), in so far as practicable, there should be consistency in the awards made, and for me, I will add, especially when the awards relate to the same matter.

From what I have stated above, I am persuaded that the taxing officer applied wrong principles and arrived at a wrong decision which justifies this court's interference with the taxing officer's discretion. However it is only fair that the Bill of costs be remitted to the taxing officer for reconsideration rather than this court taking upon itself to tax those contested items.

For the above reasons, I allow the chamber summons dated 23rd July 2014 and make the following orders;

1) The applicant's Bill of Costs dated 5th March 2014 is remitted to the taxing officer to reconsider item 1, instruction fee, and item 11, getting fee, taking into account what the Court has observed above.

2) Costs of this reference to the applicant.

Dated and Delivered at Nairobi this 7th Day of March 2017

E. C. MWITA

JUDGE