



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
JR. MISC. PETITION NO. 13 OF 2008
NAIROBI JR. MISC. PETITION NO. 292 OF 2008
IN THE MATTER OF S. 84(1) CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER S. 70 OF THE CONSTITUTION OF KENYA

BETWEEN

ESPOSITO FRANCO.....PETITIONER

VERSUS

AMAZON JEFFAH KINGI.....1ST RESPONDENT

AMINA KALE..... 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

RULING

1. By a Chamber Summons dated 21st January 2014, **Amason King Jeffah**, the applicant, moved the Court against Esposito Franco, the respondent, seeking the following orders:

i. 1st respondent objects to the Honourable Taxing Masters' decision regarding items 1 and 2 of the respondents' Bill of Costs filed herein.

ii. 1st respondent's objection to the manner the Honourable Taxing Master has exercised her discretion with regard to the use of the applicable provision of schedule V1 (1)1 of the advances Remuneration (Amendment) order 2006.

2. The application was supported by grounds on the face of the summons and an affidavit by the applicant sworn on 21st January 2014. The applicant objected to the taxing master's decision to allow only Ksh.200,000 on item 1 and disallowing item 2, getting up fees. They also faulted the taxing master for holding that the issues before the High court neither raised complex issues nor a novel point of law to validate the fee of kshs.40 million demanded, and that the taxing master in arriving at that decision, failed to take into account the skill and labour expended on the matter which required extensive research and

preparation. The taxing officer was also faulted for failing to allow item 2, and for holding that the proceedings did not fall under **Schedule 2(2)** of the advocates Remuneration order. Further complaint was that the taxing officer erred in awarding an overall amount of Ksh.340,822 thus failed to appreciate the exceptional importance and seriousness of the proceedings as a matter of public interest.

3. According to the affidavit, the petition was dismissed with costs on 15th April 2011 and thereafter party and party Bill of costs was filed and taxed at a global figure of Ksh.340,822. Item 1, instruction fee was taxed at Kshs.200,000/- while item 2, getting up fee was disallowed, prompting this reference objecting to taxation on the two items.

4. The respondent filed grounds of opposition dated 17th February 2017 and filed in court on 20th February 2017. The opposition was to the effect that the application was frivolous, that the amount of Ksh200,000/ was even higher, that proceeding herein did not fall under **Schedule 2(2)** of the Advocates remuneration order, and that the issue was not complex, and that the amount allowable on instruction fee in judicial review is Ksh25,000/-.

5. Mr. Kangethe, Learned Counsel for the applicant highlighted their written submissions and told the court that the taxing officer erred in taxing the applicant's item 1 of the party and party bill of costs at **Kshs200,000** instead of awarding the claimed Kshs40,000000. Counsel submitted that the reasons given by the taxing officer were not sufficient. Counsel further submitted that the taxing officer failed to consider the law in arriving at the decision, that the taxing officer failed to consider the complexity of the matter, skill and labour expended. Counsel submitted that, although item 2 which had sought **Ksh.13,333,333.30 getting up fee** was not opposed, the taxing officer non the less failed to allow the same, yet the matter had gone into full hearing and a judgment delivered.

6. According to counsel, item 2 was declined on the ground that no witness was called to testify during the hearing. Counsel argued that since the matter was disposed of by way of submission, it was an error to decline to allow getting up fee, given that constitutional petitions are disposed of by way of submissions, Counsel was of the view, that the applicant's bill of costs on item 1 and 2 was reasonable and should have been allowed as claimed. Counsel relied on the case of **Rogan Kemper V Grosvenor (CA NO 33 OF 1976) [1989] KLR**, for the definition of the word reasonable to mean *endowed with reason, sensible, proper... that which does not outrage or jolt the mind, that which does not give rise to confrontation...*

7. Counsel argued that the fee was justified because of the complexity of the matter which began as an election petition and later mutated into judicial review proceedings, and that *complexity* should have been taken into account. He referred to the case of **Lembaga Pembangunan Dan Tana v Crystal** to support the submission that the overriding considerations in determining costs include complexity of the matter, and **Stanley Livonjo Livondo v Raila Amolo Odinga, CA NO 76 of 2008** to support the submission that both skill and labour were employed in the case hence the fee was justified.

8. The other consideration in taxation, counsel submitted, is the value of the subject matter, and relied on the case of **Joreth v Kigano & Associates Advocates [2002]1EA 92** to support this submission. Counsel submitted that the decision of the taxing officer to allow the applicant's bill of costs at such a meagre amount was "bereft" of the understanding of the skill employed in the matter and asked that the application be allowed.

9. On their part, counsel for the respondent opposed the reference and submitted that it was not merited and should be dismissed. **Mr. Otare**, learned counsel for the respondent, submitted that the application was not clear on what the applicant really wanted, and that the prayers cannot be granted as framed. Secondly, Counsel submitted that the court had not been asked to set aside the decision of the taxing officer hence the application is incompetent. Further submission was to the effect that what had been heard before the High Court was a "**judicial review**" and not an "**election petition**" hence the minimum amount allowed on instruction fee under the Advocates Remuneration (Amendment) Order, 2006, Schedule V1(1)(b) is Kshs.49000/=. Counsel referred to the case of **Republic v Minister of Agriculture & 2 Others Exparte Samwel Muchiri Wayuguna & 6 Others[2006]eKLR**, to support his

submission that responsibility required in the case was quite ordinary, which called for nothing than normal diligence. He referred to the case of *Mayers & Another v Hamilton & Others [1975]EA and Kipkorir Titoo & Kiara Advocates & Reliance Bank Ltd (in Liquidated) Misc Cause No 914 of 2003*, to support his submission.

10. Learned Counsel further referred to the case of first **American Bank v Shah & others [2002] EA 64**, submitting that increase of instruction fees was a matter of discretion of the taxing officer. According to Counsel, the taxing officer did not err in principle hence the application should be dismissed given that there were no circumstances to warrant the costs that were claimed.

11. I have considered this reference, the response and submissions by counsel; I have also considered the authorities relied on by Counsel for both parties. This is a reference from the decision of the taxing officer, (**L.W. Gicheha**), Principal Deputy Registrar, dated 4th November 2011. The taxing officer taxed the applicant's party and party Bill of costs dated 3rd July 2011 in which the applicant had sought a gross figure of **Ksh.53,625,865.30**. On item 1, the applicant had sought **Ksh.40,000,000** while item 2 sought **Ksh.13,333,333,30**, one third of the instruction fee. The taxing officer taxed item 1 at **Kshs.200,000**, while item 2 was not allowed at all. The total Bill was taxed at **Ksh.340, 822/=**. The applicant being dissatisfied, filed this reference and asked the court to set aside the taxation on both items. The respondent on the other hand, submitted that the application is incompetent, and that in any event, there was no error on the part of the taxing officer since this was a normal **judicial review** matter.

12. There are three issues for determination in this matter. The first question is whether this application is competent. According to the respondent, the prayers in the application are ambiguous and incapable of granting the way they are. I have carefully looked at the application and the prayers sought. It is true that the way the prayers are not couched in the best way possible. However, the grounds in support of the application appearing on the face of the chamber summons, as well as the affidavit in support, clearly show that the applicant was dissatisfied with taxation on item **1** and **2**. This is also clear from the letter dated 11th November 2011 which sought reasons for taxation. Even the submissions are clear that the applicant was challenging taxation on the two items.

13. From the foregoing, I do not think the application is so hopeless that it cannot be determined fairly and on merit. The duty of the court is to decide cases and render substantial justice rather than applying restrictive procedures that would lead to hindrance of justice. That is why **Article 159** requires that courts administer justice without undue regard to procedural technicalities. This is also the principle in **Sections 1A and 1B** of the Civil Procedure Act, and **rule 3(5) of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, which require just determination of cases. I do not therefore find any prejudice to be suffered if the application is determined on merit. The first ground of objection is, therefore, without merit and is dismissed.

14. The second issue is that **item 1** of the applicant's Bill of costs was taxed at Ksh200, 000/- which the applicant says was low. Taxation of a Bill of Costs involves exercise of discretion by the taxing officer, and the law is clear that this court should not interfere with the taxing officer's exercise of discretion unless there is evidence that he took into account irrelevant factors or failed to take into account relevant ones which lead to a failure of justice as will be demonstrated later in this ruling.

15. The case before Court was a Petition which had sought three declarations, (one), on equal protection of the law, (two), that **section 21** of the National Assembly and presidential (Elections) Act Cap 7 laws was inconsistent with the constitution, and (three), that **section 21** was null and void to the extent of the inconsistency. The other prayer was for stay of proceedings in **Petition No 1 of 2008** at **Malindi High Court**. It is therefore obvious from the above facts that what was before court was a **constitutional petition** and not an election petition. The submission by the applicant, therefore, that what was before court was an election petition is incorrect.

16. I have perused the decision of the taxing officer and noted that she too found that what was before court was a constitutional petition as opposed to an election petition, and further, that the Advocates Remuneration (Amendment) Order, 2006, was the one applicable for taxation of the Bill of costs. I have

myself perused the record of the proceedings before the High court and I agree with the taxing officer, that indeed, what was before the High Court was a constitutional petition and not an election petition. The petition was filed in 2008 and for that reason, the Advocates Remuneration (Amendment), Order, 2006, applied to the taxation herein.

17. On instruction fee, (item No 1), the Taxing Officer found that this being a normal constitutional petition, the issues were not complex and taxed that item at Ksh.200,000/=, applying Schedule VI(I) of the Advocates Remuneration(Amendment) Order, 2006, which provides a fee of not less than Ksh28,000/-. The taxing officer stated:-

“I have considered the submissions by Counsel and the authorities they have relied on. Instructions in this case were given on 10th June 2008 and thus the Advocates Remuneration Order (ARO) applicable is Advocates Remuneration Order (ARO) 2006. The Advocates Remuneration Order (ARO) provides in schedule V1(1) “therefore such sum as may be reasonable but not less than 28000”. The court therefore has discretion to award more than 28000/- so long as it is reasonable...”

The taxing officer then continued:

“I have considered the proceedings before me. Firstly the election petition and constitutional petition should not be confused to be one and the same. This(sic) are two different petitions which have two separate provisions of costs. Therefore schedule V1(1) 1 of Advocates Remuneration Order (ARO) cannot be applied to this proceedings nor are the authorities cited by applicants for purposes of comparability as these were instructions fees in an election petition”.

18. As pointed out earlier, I agree with the taxing officer, first, that what was before court was a constitutional petition which sought to declare certain provision of the Elections Act unconstitutional. That did not make those proceedings an election petition. Second, the applicable Schedule was Schedule VI (I).In schedule VI I (i), the fee allowed for presenting or defending election petitions is **kshs.42,000/=** while schedule VI I (j) provides for a fee for prerogative orders at **Kshs.28,000/=** I have also seen the submissions in this reference. It has not been argued that the taxing officer applied a wrong schedule in arriving at her decision on item 1. In justifying the amount allowed on item 1, the taxing officer stated;

“The cost issue in this case emanate from a constitutional petition. I have perused the proceedings and in my opinion they cannot be considered to have been overly complex. The application only sought for a declaration that the provision of section 21 of national assembly (elections) Act Cap 2 (sic) laws of Kenya, were inconsistent with the provisions of section 44 as read with section 60 of constitution. The counsel may have researched as in shown by the authorities they relied on but really no novel point of law came up. This was an ordinary case and for that reason the sum of 40 million claimed is the (sic) higher side. Taking into consideration the professional works done I award 200,000...”

19. I have on my part carefully perused the record and the pleadings before the court; this was a constitutional petition challenging constitutionality of a provision of an Act of parliament. Learned Counsel for the applicant did not justify why their claim of the sum of **Ksh.40 million** should have been allowed in a constitutional petition. The principles applicable in taxation of costs are well settled. Costs are meant to reimburse a party that which he paid his advocates but not to enrich him. That is what the court held in the case of **Premchand Raichand Ltd & Another v Guarry Services of East Africa Ltd [1972]EA 162**, when it stated thus;

“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)

20. Taxation of costs involves exercise of discretion and this court will not interfere with exercise of the taxing officer’s discretion unless there are good reasons to do so, and it is the duty of the applicant to show that those reasons exist. This principle was stated by **Ringera J**, (as he then was), in the case of **First American Bank Ltd v Shah & Another [2002] 1 EA 64** thus

–“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)

21. There has not been serious a submission, in my view, to show that the taxing officer took into account irrelevant factors or failed to take into account relevant ones in arriving at her decision on item 1, bearing in mind that this was taxation of costs in a constitutional petition. Moreover when taxing a bill of costs, the taxing officer, in determining the amount to allow, takes into account the value of the subject matter where known, complexity of the case, skill and labour employed and the importance of the case to the parties. These factors are of important consideration in taxing a bill of costs.

22. These factors were not only stated in the **First American Bank Ltd v Shah**(supra),but also in the case of **Ochieng Onyango, Kibet and Ohaga Advocates v Adopt a Light Ltd Misc 729 of 2006**, where **Warsame J**, (as he then was) stated thus;

“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....” (emphasis)

23. And in the case of **D Njogu & Co. Advocates v Panat Corp. Engineering Limited [2006] eKLR**; the court again restated that 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 the shoulders of counsel.

24. Learned Counsel for the applicant has not shown that, in the circumstances of this case, the amount of **Ksh.200,000/=** allowed on **item 1** was inordinately low, or that the taxing officer took into account irrelevant matters or failed to take into account the relevant ones as to amount to an injustice. The Court should not interfere with the taxing officer’s exercise of discretion merely because a party feels the amount allowed on costs is insufficient. Insufficiency is not a ground for setting aside a taxing officer’s decision.

25. In the **Premchand Raichand case (Supra), Spraj V. P**, stated at page 104:-

“The taxing of costs is not a mathematical exercise; it is entirely a matter of opinion based on

experience. A court will not, therefore, interfere with the award of a taxing officer, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an un injustice to one party or the other.” (emphasis). (see also Republic v Minister for Agriculture & 2 Others Ex parte Samuel Muchiri W’Njuguna & 6 Others [2006].eKLR).

26. For my part, I am not satisfied that there are good reasons for interfering with the taxing officer’s exercise of discretion on item 1 in this matter. The taxing officer took into account the relevant matters as well as the applicable law in arriving at her decision on **item 1**. That complaint has no merit and is dismissed.

27. The applicant also complained that the taxing officer declined to allow item 2 for **getting up fees**, which they were entitled to, saying that the taxing officer was wrong given that item had not been opposed. Item 2 claimed **Ksh.13,333,333,30** being **one-third** of the instruction fee of Kshs.40. Million that had been claimed. The taxing officer declined to allow this item and stated.

“Getting up fees

They are provided under schedule V1 (2) Advocate Remuneration Order. In subsection (ii) it provides “No fee under this paragraph is chargeable until the case has been confirmed for hearing under subsection (iii), states in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

28. The taxing officer then concluded that the case did not go to hearing because according to her, *hearing* or *trial* is under taken when witnesses have been called. She taxed off the whole amount of **Ksh.13,333,333,30** claimed under items 2. **Schedule V1 2** of the Advocates Remuneration (Amendment) Order, 2006 which is the applicable remuneration order provides as follows:

”In any case in which denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one-third of the instruction fee allowed on taxation.

Provided that-

(i) This fee may be increased as the taxing officer considers reasonable but it does not include ant work comprised in the instruction fee;”

29. I have perused the court file and proceedings before the High court. The record shows that after the petition had been filed, parties filed responses by way of replying affidavits and lists of authorities. On 2nd October 2008, the court directed that the file be placed before the Hon. Chief Justice for empanelling a bench to hear it. On 30th March 2009, the matter came up before The **Hon. Chief Justice Gicheru**, who ordered that the petition be heard on **15 and 16th June, 2009** before two judges, and on **12th June 2009**, he appointed **Hon. Lady Justice Wendoh** and **Hon. Mr. Justice Dulu** to hear the petition on the scheduled dates. The petition was heard on 16th and 17th June 2009 by way of oral submissions.

30. I, therefore, agree with the applicant that the taxing officer erred in declining to allow any fee on item 2 on grounds that the matter never proceeded to hearing. As a matter of practice, constitutional petitions and applications for judicial review, proceed by way of oral or written submissions. Parties hardly call witnesses. In this case parties prepared researched and filed authorities, after which they orally argued their cases. It was, therefore, an error of Principle on the part of the taxing officer to disallow item 2 on grounds that no witnesses were called. It was not necessary to call a witness in a case challenging constitutionality of a statutory provision. As was stated by this court in the case of **Mastermind Tobacco (K) Ltd v Attorney General Petition Number 416 of 2008;**

“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”.

31. On that ground, the applicant’s complaint has merit that the taxing officer erred and must succeed.

32. Consequently, I allow the application dated 21st January, 2014, set aside the taxing officer’s decision dated 4th November, 2011 with regard to **item 2**, and remit the applicant’s Bill of costs dated 13th July, 2011 for reconsideration of item 2, **on getting up fee**. Each party will however bear own costs for this Reference.

Dated, Signed and Delivered at Nairobi this 2nd Day of May, 2017

E C MWITA

JUDGE