



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR MISC APPLICATION NO. 86 OF 2013

MICHAEL MUNGAI.....APPLICANT

**(Proprietor of Purple Educational Centre & a Director
of Purple Centre Limited both in the Registration Stage)**

VERSUS

REGISTRAR OF COMPANIES.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. By his Chamber Summons dated 19th December, 2014, the applicant herein, **Michael Mungai**, seeks the following orders:
 1. **That the Hon Court finds that there is nothing illegal in the commercial billing (invoices) that were served on the respondents in his matter.**
 2. **That the Hon. Court reviews and enhances the taxed amount as billed and invoiced against the respondents.**
 3. **That the Hon. Court grant the applicant (Decree Holder) the costs of this application and any other relief that this Hon. Court deems fit to grant the applicant against the respondents.**
2. According to the applicant, he is a graduate of the chartered institute of marketing and a registered trainer in commerce with over 35 years commerce experience. According to him, he appeared before the registrar of companies, the 2nd respondent herein, this court and the taxing officer in his capacity as the proprietor of the Purple Educational Centre and director of Purple Centre Limited representing shareholders, the Board and the customers of the two entities. In his view, this reference was triggered by the simplification of an otherwise complex matter by the taxing officer.
3. It was the applicant's case that the taxing officer ignored the official capacity in which the applicant was appearing and did not understand commercial principles, procedures and the events involved in this matter. Further the applicant accused the taxing officer of being unfamiliar with the principles guiding appearance by litigants in person hence applied the provisions of the ***Advocates Remuneration Order*** which were inapplicable to the case. In the applicant's view,

ordinarily where professionals appear officially in court and other public offices as he did, they are paid according to their professional rates set rates and allowances and not in accordance with the **Advocates Remuneration Order**. To him since the **Remuneration Order** presumes that advocates work in their working stations, the advocates' rates are lower than those of the other professionals. He contended that applicants acting in person are entitled to allowances of between £100 to £500 as expenses.

4. I have considered the grounds upon which the reference is based. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that the 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 manifestly excessive as to justify an inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64.**
5. It has further been held that whereas the Court may interfere with the decision of the Taxing Officer where there has been an error in principle, it should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job.
6. In **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna & 6 others (2006) eKLR, Ojwang, J** (as he then was) expressed himself *inter alia* as follows:

“The taxation 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, particularly where he is an officer of great experience, 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 injustice to one party or the other...The 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 manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. ...”
7. In this case the applicant contends that his costs ought to be determined in accordance with his profession which according to him awards a higher quantum of costs than the **Advocates Remuneration Order**. Whereas such approach may be deemed sensible in other quarters it ought to be appreciated this is a Court of law and only applies the law as it is and not as it ought to be. In this respect reference ought to be made to **R M (suing thro' next friend J K her Mother) vs. The Attorney General and CRADLE, COVAW and FIDA [2006] 2 KLR 697** where the Court held:

“It is the duty of the Judge to apply such a law as it stands. To do otherwise would be to usurp the legislative functions of Parliament...it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment...The duty of the Court is to interpret the words the Legislature has used; these words may be ambiguous but even if they are the powers and duty of court to travel outside them on a voyage of discovery are strictly limited...It appears to me to be naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guesswork with what material the Legislature would if it discovered the gap, have filled it. If the gap is discovered the remedy is in an amending Act.”

8. Parties who are aggrieved by the legal position ought to petition Parliament to change the law. As was held by **Pall, J** (as he then was) in **Mokombo Ole Simel & Others vs. County Council of Narok & Others Nairobi HCMA No. 361 of 1994:**

“The long established tradition in commonwealth countries is that we look in the main to the legislature rather than to the courts for the development of our law. Moreover it is a different thing if a statute is ambiguous and capable of different interpretations. Here in this case the legislation is clear and certain and not open to any conflict on interpretations. The duty of the court is to expound what the law is and not what in view of social changes it should be. To change the law according to social dictates of society is the function of legislature.”

9. **Ibrahim, J** (as he then was), appreciated this position in **Re Harmonised Draft Constituion of Kenya: Bishop Joseph Kimani & 2 Others vs. The Hon. Attorney General & Others Mombasa HCCP No. 669 of 2009 [2010] 1 KLR 819** when he expressed himself as hereunder:

“The provisions of section 47 provides as to the mode and manner in which Parliament may alter or amend any provision of the Constitution. Parliament is therefore the Supreme Law making body and arm of Government that can make or amend law. This preserve is not for the executive or judiciary. While in law, the three bodies are deemed to be equal in terms of doctrines and principles of separation of power in any Democratic system of Government, yet none of these two, (executive or judiciary) can purport to alter or amend the law and to attempt or purport to do so would be an unconstitutional usurpation of the powers and authority of parliament.”

10. Section 40 of the *Advocates Act*, Cap 16 Laws of Kenya provides:

No costs in respect of anything done by an unqualified person in contravention of this Part shall be recoverable in any suit or matter by any person.

11. Under section 2 of the Act “unqualified person” means a person not qualified under section 9 to act as an advocate. It is not in doubt that the applicant herein was going by the aforesaid definition, an unqualified person. Accordingly, he was not entitled to costs as defined under the *Advocates Remuneration Order*. Could he be entitled to costs under some other provision of the law? The applicant did not cite any legislation that would have entitled him to costs. Under paragraph 1 of the *Advocates Remuneration Order*, the Order applies *inter alia* to taxation of costs as between party and party in contentious matters in the High Court and in subordinate courts. It was therefore held in **David Mukii Mereka T/A Mereka & Company Advocates vs. George Benedict Maina T/A G B M Kariuki & Co. Advocates Nairobi (Milimani) HCCC No. 424 of 1999** that:

“An advocate who acts in person for himself can claim to be remunerated for his professional services so far as they are not rendered unnecessary or impossible as for

instance, in regard to consultation with himself. Such costs are recoverable by an advocate (but not interest), but in the case of a layman who is not a skilled legal person, he can only recover his out of pockets.”

12. In the same vein, in Attorney General vs. Geoffrey Ndungu Theuri [1985] KLR 157; (1982-88) 1 KAR 9-332; [1986-1989] EA 9, it was held that :

“A party who is not an advocate cannot rely on the provisions of the Advocates Remuneration Order... Since the Respondent acted in person and there was, unlike England, no provision in Kenya allowing a litigant to recover any part of the costs as if the work had been done by an advocate, he could only be indemnified against the costs he had actually incurred.”

13. It is therefore clear that in terms of recovery of “costs” incurred in litigation the law as it stands currently in this country is that a lay/unqualified person whether acting in his/her own cause or in the interest of a corporation can only recover the actual costs or disbursements incurred in conducting litigation.

14. The applicant’s grievance seems to have been restricted to the fact that the learned taxing officer failed to take into account that as a “professional” he was entitled to be remunerated according to his “profession”. With due respect to the

applicant, this is a lofty aspiration but it is not the law.

15. In this case apart from the disbursements in the sum of Kshs 2,845/=, the taxing officer awarded the applicant Kshs 100,000.00 on account of court attendances and other costs. The applicant ought to have been contented with this figure in

light of the decisions cited hereinabove. The wise words of the Court of Appeal in *J M Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeal No. 156 of 1997* ought to act as a guide to the applicant herein. In that case the said Court expressed

itself as follows:

“The appellant is a familiar figure in the Law Courts. He does not hesitate to institute litigation on any aspect of perceived breach of his rights. Whereas litigants are perfectly free to bring any number of suits they may so desire, they must understand that in doing so, they are bound to stick to the rules governing the conduct of litigation in courts... no consequence that flows out of the enforcement of law can be said to cause injustice. Moreover, it is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation...”

16. I have considered the objections raised in this reference and based on the fact that this Court on a reference is not entitled to interfere with the taxing master’s decision simply because the Court would have arrived at a different figure,

I am not prepared to interfere therewith. I am not satisfied that the decision in so far as the interests of the applicant were concerned was based on an error of principle, or the fee awarded was manifestly low as to justify interference. In

these kinds of matters the costs awarded are meant to be a reimbursement to the party rather than a profit.

17. In the result I find no merit in this reference which I hereby dismiss but with no order as to costs.

Dated at Nairobi this 9th day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

The Applicant in person

Cc Kazungu