



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 131 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

KIRINYAGA CONSTRUCTION CO. LTD...EX-PARTE APPLICANT

(Being a reference from the decisions of the Taxing Officer, A N Ongeri (Mrs) DR on 23rd December, 2014)

RULING

1. This ruling arises from a taxation by **Hon. A N Ongeri** (Mrs) DR (as she then was). By her decision dated 23rd December 2014, the learned Taxing Officer taxed the instructions fees in the sum of Kshs 500,000.00
2. This reference was instituted by way of Chamber Summons dated 22nd January, 2015 in which the applicant seeks the following orders:

1. That the costs allowed by the Deputy Registrar Mrs. A. N. Ongeri on taxation of the Bill of costs (“the Bill”) filed in this suit by the Applicant against the Respondents and dated 12/8/2014 in respect of Items 1 and 63 of the Bill be reviewed and enhanced or remitted with appropriate directions to a Taxing Officer as the Court shall deem fit for reconsideration.

2. That the costs of this application be provided for.

3. The application was supported by an affidavit sworn by **Ahmed Dubow Jelle**, an advocate in the applicant’s firm on 23rd January, 2015.
4. According to the deponent, the Applicant filed HCCC No. 885 of 2009 **Kirinyanga Construction (K) Limited vs. AG** seeking *inter-alia* damages for the breach by the Ministry of Roads and Public Works of a contract relating to the construction of Muranga-Sagana-Marua Road. On 8th November, 2010 the Applicant and the Respondent entered into a consent in court, whereby the Respondent agreed to pay the total sum of Kshs. 321,986,586.94 to the Applicant and the Applicant duly extracted the order in respect of the consent as well as the Certificate of Order against the Government, both of which have been duly served, such service having been duly acknowledged.
5. It was deposed that payment of the debt by the Government became payable by the line ministry only upon authorization by the Principal Secretary, Ministry of Finance who neglected and/or refused to effect the said payment forcing the Applicant to file these Judicial Review proceedings

- seeking *inter alia* an order of Mandamus to compel the Principal Secretary of the Ministry of Finance and/or the Principal Secretary of the Ministry of Roads and Public Works, jointly and severally to pay the amount owed. That judgment was duly delivered by this Court on 8th July, 2014, granting the order of Mandamus compelling the Principal Secretary of the Ministry of Finance and/or the Principal Secretary of the Ministry of Roads and Public Works, jointly and severally to pay the sum of Kshs 321,986,586.94.
6. It was averred that the *ex parte* Applicant consequently filed its Bill of Costs on 12th August, 2014 and thereafter the honourable Deputy Registrar directed that both parties file their submissions on the basis of the Bill of Costs, which the Respondents failed to do. When the matter came up for mention on 23rd December, 2014 in the presence of the deponent but in the absence of the respondents' legal representative the Deputy Registrar directed that she would deliver her Ruling on the Bill of Costs at 2.30 p.m on the same date. However, upon delivery of the Ruling, the *ex parte* Applicant was dissatisfied therewith hence necessitating the filing of this Application for Reference.
 7. According to the deponent, the applicant was aggrieved with the decision of the Taxing Officer in respect of items 1 and 63 of the Bill of Costs due to the following errors of principle:
 - a. The Taxing officer failed to take into account the nature and importance of the matter to both the *ex parte* Applicant and the Respondents. The Ex Parte Applicant especially, exerted a significant amount of effort towards the final determination of the matter, underlying the magnitude of the consequences to both parties.
 - b. The Taxing Officer despite mentioning it in her Ruling and Request for Reasons, failed to take into account that the dispute was based on a substantial amount of money which, if not paid by the Respondents will have adverse effects on the *Ex parte* Applicant and its commercial interests.
 - c. The Taxing Officer failed to take into account the general conduct of the proceedings which clearly indicate the lethargic and almost disinterested manner with which the Respondents have approached the dispute.
 - d. The Taxing Officer erred in assessing the instruction fees in the sum of Kshs 500,000/- and adopted wrong principles in the exercise of her discretion.
 - e. The Taxing Officer erred in assessing the getting up fees in the sum of Kshs 166,667/- and adopted wrong principles in the exercise of her discretion.
 8. According to the *ex parte* Applicant the Taxing Master's award was legally unsubstantiated, extremely prejudicial on the *ex parte* Applicant herein and for the abovementioned reasons, the *ex parte* Applicant is entirely deserving of the amount prayed for in the Bill of Costs.
 9. It was submitted that in reaching her decision the Taxing Officer failed to take into account the complexity of the dispute, its significance to both parties as well as substantial amount involved. It was further submitted that the Taxing Officer took her duties as a mere mathematical exercise by failing to apply the cardinal legal principles required in taxation and that whilst the learned Deputy Registrar set out the guiding principles quite well, she nonetheless erred in failing to accurately discharge the mandate bestowed upon her by diligently taxing the bill and awarding the applicant reasonable amount based on the legal services rendered. In support of the submissions the applicant relied on **Republic vs. Ministry of Agriculture & 2 Others exp Muchiri W'njuguna & 6 Others [2006] 1 EA 359.**
 10. After retracing the history of the litigation, it was submitted that it was this history that the learned Taxing Officer failed to consider in reaching her findings and in support of this submission the applicant cited **Joreth Limited vs. Kigano & Associates [2002] 1 EA 92 at 99** and **Green Hills Investments Ltd vs. China National Complete Plant Export Corporation (Complaint) eKLR.**
 11. It was submitted that the statement by the taxing officer that the applicant was merely seeking an order of mandamus to compel payment of the decretal sum was a sweeping remark made without careful consideration of the nature and importance of the matter taking into account the amount

- involved. In support of this line of submission the applicant relied on **Nyangito & Co. Advocates vs. Doinyo Lessos Creameries Ltd [2014] eKLR**. Most importance to the parties not only in the light of the amount involved but the issues involved such as the intricate agreement between the Applicant and the Ministry of Roads and Public Works.
12. On the fee chargeable in respect of getting up fees it was submitted based on **Judicial Hints on Civil Procedure** by **Richard Kuloba** and **Nguruman Limite vs. Kenya Civil Aviation Authority & 3 Others [2014] KLR** that the same is chargeable once there is a joinder of issues on the pleadings. It was submitted on the authority of **Mayers & Another vs. Hamilton & Others [1975] EA 13 at 16** that an advocate's entitlement to instructions fees grows as a matter progresses hence the applicant is entitled to both instructions fees and getting up fees.
 13. It was the applicant's position that since the reference was unopposed, pursuant to the provisions of Order 51 rule 14 of the **Civil Procedure Rules, 2010** and the authority of **Odera Obar & Co. Advocates vs. Bibiana Mbatha Ngotho [2014] KLR** the conduct of the respondent evinces a clear lack of impetus to participate in this matter hence the application ought to be granted as prayed.
 14. The applicant therefore urged the Court to set aside the ruling of the learned Deputy Registrar of 3rd December, 2014 and refer the same back for fresh taxation.

Determinations

15. I have considered the foregoing and this is the view I form of the matter.
16. 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 practise 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**.
17. Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but 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; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling

to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

18. Further guidance if necessary may be obtained in the case of **Joreth Limited vs. Kigano & Associates** (supra) where the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement 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 matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.
19. In **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna** (supra) **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. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state 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. 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...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved...Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for...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 classified, 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...”

20. While remitting the matter for fresh taxation the learned Judge in the above matter gave the

following guidelines:

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.**

21. In my view the complexity of a case is not necessarily determined by the value of the subject matter in terms of the amount of money involved. It may well be that the amount of money involved may be high but the issue may be a very simple legal issue. However, it cannot be gainsaid that where the amount is high the issue is likely to be very important for the parties. In this case, the applicant applied for an order of mandamus to compel the respondent to satisfy the consent judgement entered into in favour of the applicant. The applicant was not seeking that judgement be entered in its favour as that had already been done. To base fees on the subject matter of the consent would in my view amount to awarding the applicant instructions fees twice over in respect of the same subject matter. As was held by the Supreme Court in **Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR:**

“So the *basic rule* on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to *penalize the losing party*; rather, it is for *compensating the successful party* for the trouble taken in prosecuting or defending the suit.”

22. This is the position taken by Justice Kuloba's in *Judicial Hints on Civil Procedure*, at p.94 where he states:

“[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

23. As was held by Ojwang, J (as he then was) in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra):

“The taxing officer was wrong in law to incorporate profit levels of the tea production sector as an element in her taxation of costs in a judicial review matter...Although the taxing officer referred to the complexity of issues in judicial review proceedings, the judgement has not shown anything in the application to have risen at all above the work a day chores of legal practitioners. It follows 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...There was nothing novel in the proceedings on such a level as would justify any special allowance in costs. There is nothing to indicate any time-consuming, research-involving or skill engaging activities as to justify an enhanced award of instruction fees. There is also no great volume of crucial documents which counsel for the judicial review applicants had to refer to, to prosecute their cause successfully. Further the

matter was not urgent, for urgency would have mainly attached to prayers for orders of prohibition...The taxing officer was not properly guided when she conducted the taxation. Her exercise of discretion was done perfunctorily and as a mere formality. It is necessary to specify clearly and candidly how she had exercised her discretion since discretion as an aspect of judicial decision-making is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs...Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer should avoid the possibility of unjust enrichment for any party and ought to refuse any claim that tends to be usurious; so far as possible the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of the matter to the parties, or importance of the matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the court and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel...Private law claims do not fall in the same class as public law claims such as those in judicial review, in constitutional application, in public electoral matters. Such matters are in a class of their own and the instruction fees allowable in respect of them should not, in principle be extrapolated from the practices obtaining in the private law domain which may involve business claims and profit calculations.." [Underlining mine]

24. In this case the basic instructions fees payable was Kshs 28,000.00. As was held in First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64, the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it. The taxing officer however did set out the basic fee and was aware of the principles guiding taxation of costs. The learned Taxing Officer also appreciated that the case involved a colossal sum of money but appreciated that what was in issue was an application for an order of mandamus. She proceeded to award the applicant Kshs 500,000.00 in respect of instructions fees. This sum, it is clear was 17 times the minimum instructions fees of Kshs 28,000.00. She however did not say why in her view the basic fee had to be increased from Kshs 28,000.00 to Kshs 500,000.00. In Opa Pharmacy Ltd vs. Howse & McGeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233, it was held:

“Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave no reason whatsoever for doubling the instruction fee. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer’s mind. The failure to give any reason for the choice, surely, must, therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one’s discretion.”

25. The principles guiding taxation were similarly reiterated by the Court of Appeal of Uganda in Makula International vs. Cardinal Nsubuga & Another [1982] HCB 11 where the Court pronounced itself as follows:

“The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

26. In the case of **Paul Ssemogerere & Olum vs. Attorney General - Civil Application No.5 of 2001** [unreported] the Court held:

“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference.”

27. In **Danson Mutuku Muema vs. Julius Muthoka Muema & Others Machakos High Court Civil Appeal No. 6 of 1991** which was cited in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra) Mwera, J (as he then was) held that whereas the Court was entirely right to give the costs within its discretion, the amount allowed being ten times the sum provided for, the Court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The Court further found that since the Taxing Officer was bound to give reasons for exercising his discretion and as none were given in his ruling save to say that he simply exercised his discretion, it was just and fair to set aside the sum he allowed.

28. This Court is aware that in **Butt & Another vs. Sifuna T/A Sifuna & Company Advocates Civil Appeal No. 45 of 2005 [2009] KLR 427**, the Court of Appeal while appreciating that the basic instructions fees was Kshs 9,000.00 in a winding up petition nevertheless awarded Kshs 150,000.00 in respect of instructions fees which was 17 times the basic instructions fees.

29. In **Kenya Union of Commercial Food & Allied Workers (K) vs. Banking Insurance & Finance Union (K) Civil Appeal No. 60 of 1988**, instructions fees was taxed downwards from Kshs 1,000,000.00 to Kshs 150,000.00 where leave to apply for judicial review proceedings was disallowed.

30. I wish to disabuse the applicant of the notion that where a reference is unopposed, the reference must be allowed. Taxation of costs is a judicial process which is not determined by the positions taken by the parties or not as costs, as stated hereinabove, is not meant to penalize the losing party but to compensate the successful party for the trouble taken in prosecuting or defending the suit. Order 51 rule 14 of the ***Civil Procedure Rules*** was dealt with in **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998** in which the Court of Appeal held that:

“Order 50 rule 16(2) does not say that the applicant may proceed *ex parte*, but empowers the Court to make orders *ex parte* on being satisfied that the Respondent has no good reason or reasons for not filing its papers at all and therefore it is not true that documents filed out of time in response to an application are necessarily invalid and should not be looked at. A court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so... It is an error for the Court to hold that a failure to file grounds of opposition automatically entitles the applicant to orders *ex parte* as the applicant is not

relieved of the onus on him of justifying his application.

31. Whereas this Court must express its dissatisfaction with the fact that the learned Taxing Officer did not indicate the factors which led her to award 17 times the basic instructions fees, considering the foregoing decisions, I am not satisfied that I ought to interfere with the award even if the Court itself would have awarded a different figure and I am not prepared to interfere therewith. I am not satisfied that the decision was based on an error of principle, or the fee awarded was manifestly excessive or low as to justify interference.

Order

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

Dated at Nairobi this 2nd day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Jelle for Mr Fred Ojiambo, SC for the Applicant

Cc Patricia