REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.143 2011

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN PARTY AND PARTY

BETWEEN

NGURUMAN LIMITED.....PETITIONER

AND

KENYA CIVIL AVIATION AUTHORITY....….....1ST RESPONDENT

DIRECTOR GENERAL-KENYA CIVIL AVIATION

AUTHORITY.....2ND RESPONDENT

MINISTER FOR TRANSPORT.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Introduction

1. The Petitioner's Chamber Summons Application before me is dated 20th March 2014. It has been brought under **Paragraph 11(2)** of the **Advocates (Renumeration) Order, 2009** and seeks the following substantive orders;

> ***"(1) …***
>
> ***(2) That pending the hearing and final determination of this Application, there be a stay of execution in respect of the taxed costs awarded to the 1st and 2nd Respondents***
>
> ***(3) That the Taxing Mater's decision in respect of Item No.1 of the 1st and 2nd Respondents' Bill of Costs dated 19th June 2013 be set aside and remitted to such other Taxing Master as the might direct for exercise of his discretion and re-assessment abinitio.***

(4) That the Taxing Master's decision taxing Item No.2 of the 1st and 2nd Respondents' Bill of Costs dated 19th June 2013 be set aside.

(5) That the Taxing Mater's decision taxing item No.3 of the 1st and 2nd Respondents' Bill of Costs dated 19th June 2013 be set aside

(6) That costs of this Application be provided for."

2. The facts are that on 24th August, 2011, the Petitioner filed in this Court a Constitutional Petition dated 23rd August 2011. The said Petition listed the Kenya Civil Aviation Authority and the Director General of the Kenya Civil Aviation Authority as the 1st and 2nd Respondents respectively, the Minister for Transport as the 3rd Respondent and the Attorney General as the 4th Respondent. Having heard the parties, on 8th May 2013, Mumbi J. dismissed the Petition and ordered costs to be paid to the Respondents. Following the judgment, Counsel for the 1st and 2nd Respondents filed a bill of costs dated 19th June 2013 seeking party to party costs under the Advocates (Renumeration) Order, 2009 amounting to Kshs.18,688,938.88.

3. Upon hearing the parties, the Deputy Registrar of this Division acting as Taxing Master delivered his Ruling on 6th March 2014 in which he taxed the 1st and 2nd Respondent's bill of costs dated 19th June 2013 as follows; (i) Item 1 taxed to Kshs.300,000.00 (ii) item 2 taxed to Kshs. 300,000.00, (iii) Item 3 taxed to Kshs.200,000 and (iv) VAT declined.

The Petitioner's Submissions

4. The Petitioner claims that costs under Item 1 of the 1st and 2nd Respondent's bill of costs which covered instruction fee is manifestly excessive and it therefore urged the Court to set aside the said Item and remit the same to another taxing master for re-assessment *ab initio.* In support of this argument the Petitioner cited the case of ***Wanga and Co. Advocates v Busia Sugar Company Ltd (2004) 1 KLR 506.***

5. Secondly, it claims that the Taxing Master erred in principle by awarding instruction fees to the 2nd Respondent and the getting up fees to the 1st and 2nd Respondents in respect of Items Nos.1 and 2 in the said bill of costs. That such an order is contrary to the express provisions of **Rule 62(2)** of the **Advocates Renumeration Rules** which requires the Taxing Master to disallow costs unnecessarily or improperly incurred when the same advocate is engaged to act for two or more defendants and where separate pleadings are also filed. Reliance was placed on the case of ***Nyamogo & Nyamogo Advocate v Kenya Bus Service and Another (2006) eKLR in that regard.*** That in the instant Petition, the advocate for the 1st and 2nd Respondents filed a single Notice of Appointment on their behalf, filed joint pleadings and advanced the same arguments for both of them at the hearing of the case and was entitled to costs once only. The Petitioner thus urged the Court to set aside the Taxing Master's decision on both those items.

6. The Petitioner further claims that the Taxing Master's decision to award getting up fees to the 1st and 2nd Respondents is plainly wrong and is contrary to the provisions of law since getting up fees are not recoverable in an action determined on Affidavit evidence only The Petitioner thus urged the Court to set aside the Taxing Master's decision on item No.3 of the 1st and 2nd Respondent's Bill of Costs dated 19th June 2013 to the sum of Kshs.300,000.00.

For the above reasons, the Petitioner seeks the orders elsewhere set out above.

The Respondents Submissions

7. The Application is opposed. The 1st and 2nd Respondent filed their Grounds of Opposition dated 26th March 2014 as follows;

"(1) The Petitioner/Applicant has not established sufficient and reasonable cause for the grant of the orders sought.

(2) The Petitioner/Applicant has not proved to this Court that it has an arguable case.

(3) The Petitioner/Applicant has not proved that it will suffer any substantial loss or any irreparable harm if the orders sought are not granted.

(4) The Petitioner/Applicant has not expressly stated the nature of loss that it is likely to suffer if the orders sought are not granted.

(5) The Petitioner/Applicant has not proved that the 1st and 2nd Respondents are incapable of refunding the taxation award or any portion thereof, in the unlikely event the Petitioner/Applicant succeeds in its reference.

(6) No security for the performance of the award has been offered or furnished by the Petitioner/Applicant.

(7) The Application is therefore an abuse of Court process and merely intended to delay the 1st and 2nd Respondent's realization of their award.

(8) The therefore scale tilts in favour of the 1st and 2nd respondents who are entitled the award of the Judgment."

They also filed supplementary Grounds of Opposition dated 9th May 2014 which are as follows;

"(1) The Application does not disclose any error of principle committed by the Taxing master to warrant the reassessment and/or setting aside of the decision for the Taxing master on Items 1, 2 and 3 of the bill of costs dated 19th June 2013.

(2) The Application seeks to improperly invoke the jurisdiction of this Court on issues of quantum on Items 1, 2 and 3 of the bill of costs dated 19th June 2013."

8. It was the 1st and 2nd Respondents' submission in that regard that the Petitioner had not fulfilled the conditions enumerated under **Order 42, Rule 6 (2)** of the **Civil Procedure Act** i.e. that the Petitioner had not demonstrated the substantial loss that it is likely to suffer if stay of the taxing master's decision was not granted. They relied on the cases of; ***James Wangalwa & Another v Agnes Naliaka Cheseto (2012) e KLR*** and ***Dilbagh Singh Brothers (Investments) Ltd v Alvi Auto Spares Ltd (2012) eKLR*** *in that regard.*

9. Further that the Petitioner had failed to demonstrate that the 1st and 2nd Respondents are not in a position to refund the costs of the taxed bill of costs in the event that the Petitioner is ultimately successful in its bid to set aside the taxed costs. They referred the Court to the case of ***Sande Investment Ltd t/a Westland Cottage Hospital & 3 Others v Kenya Commercial Finance Corporation & 5 Others (2007) eKLR*** in support of that submission.

10. It was their further contention that the Petitioner had failed to offer any security for the payment of the 1st and 2nd Respondents' taxed costs on the contested items 1, 2 and 3 of the bill of costs despite it being one of the conditions for grant of an order of stay under **Order 42 Rule 6(2)** of the **Civil Procedure Rules.**

11. That in addition the principles upon which this Court may interfere with the taxing masters decision are settled. That the Court will only interfere where there has been an error in principle and the Court will not interfere on quantum as that is at the discretion of the taxing master. Reliance was placed on the case of ***D. Njogu & Company Advocates v Panafcon Engineering limited (2006) e KLR.***

12. On the issue of instruction fees, they submitted that an advocate is entitled to instruction fees once instructed. That the Petitioner had sued each of the Respondents separately and counsel for the 1st and 2nd Respondent entered appearance for both parties and acted at all times to safeguard the interests of the two parties. That orders had been sought by the Petitioner separately against each of the Respondents,

thus each of the Respondent was entitled to instruct Counsel separately and each of the counsel would be entitled to instruction fees separately. They thus claimed the instruction fees awarded to each of the 1st and 2nd Respondent is not a wrongful award and contrary to **Rule 62** of the **Renumeration Order**.

13. They further submitted that **Rule 62** of the **Renumeration Order** relates to costs incurred and claimed in respect of pleadings and not with respect to instruction fees. They thus claimed that the taxing master can, in exercising discretion granted by that Rule, disallow costs claimed on separate pleadings filed in respect of each of the instructing parties. That the 1st and 2nd Respondents were claiming costs in respect of instruction fees and not on pleadings. They relied on the authority of ***D. Njogu & Company Advocates v Panafcon Engineering limited (supra).***

14. They submitted that the Bill of Costs should be taxed on the nature and importance of the matter to the parties, the interest of the Parties, complexity and the responsibility placed on shoulders of Counsel. Relied on the authority of ***Joreth Ltd v Kigano & Associates LLR No. 1508 (CAK)***. That the matter was complex because the area on which the Petition was premised was fairly novel as it raised the question as to whether a ministerial statement in Parliament amounts to a decision in relation to which orders of judicial review can be made against the Respondents. That the Petition also involved and related to a multiplicity of suits. That the 1st and 2nd Respondents' Counsel had to peruse pleadings in other related matters to wit ***Nakuru Judicial Review Case No.52 of 2009, Nakuru HCCC No. 103 of 2009, Nakuru HCCC No. 332 of 2010, Nakuru JR No. 99 of 2010*** and ***Judicial Review Applic No. 172 of 2010.*** They relied on the case of ***Patrick Kimathi Muchena Arimi & Company Advocates v Baseline Architects Ltd (2013) e KLR***. They thus submitted that the instruction fee awarded by the taxing master was not unreasonable, exaggerated or unconstitutional. That the taxing master took into account the complexity, importance and interest of the parties in the matter.

15. On the getting up fees, the 1st and 2nd Respondent claimed that P**aragraph 2** of **Schedule VI** of the **Renumeration Order** that the fees is payable when the matter has been contested and that an advocate got up to prepare for the trial and the hearing. That the 1st and 2nd Respondents are entitled to getting up fees because they filed responses to the Petition, researched and filed written submissions and attended the hearing of the Petition and argued the 1st and 2nd Respondent's case. They thus urged the Court to find that the taxing master exercised his discretion properly in taxing the getting up fees at Kshs.200,000 being a third of the instruction fees of Kshs.600,000.00.

16. The 3rd and 4th Respondents did not respond to the Application at all and for obvious reasons.

Determination

17. I will not delve into the issue of stay of execution in respect of the costs awarded to the 1st and 2nd Respondent as the subject has been overtaken by events. In the circumstances, I will determine only matters that have arisen from the submissions before me i.e. whether the instructions fee as awarded was manifestly excessive and whether the 1st and 2nd Respondents were entitled to separate instruction fees. As a corollary to those two issues, I will also address the issue of getting up fees.

Whether Instructions fees are manifestly excessive.

18. The Petitioner claims that the costs as taxed by the taxing master under Item 1 of the 1st and 2nd Respondent's bill of costs covering instruction fee is manifestly excessive. In that regard, the principles governing the assessment of costs have been settled in various cases. In ***Premchand Raichand Ltd v Quarry Services of East Africa Ltd (1972) EA 162*** for example, the Court outlined the principles of taxation as follows;

> ***"(a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy.***
>
> ***(b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.***

(c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession.

(d) so far as practicable there should be consistency in the award made and

(e) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party."

Similarly, in the case of ***Joreth Limited v Kigano and Associates (2002) E.A 92*** the Court set out various factors that are to be considered in determining the instruction fee. These factors include the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties.

19. I have considered the decision and reasons for taxation dated 15th November 2012 issued by the learned Deputy Registrar. I find that he properly addressed himself to those principles set out in the above mentioned cases. I say so because after citing the various decisions and the principles on the subject, the Deputy Registrar at the relevant part of his decision stated as follows;

"I have analyzed the pleadings and the issues canvassed in this matter. The Petition sought for [a] total of nineteen reliefs including general damages, interests and costs, as well as [the] judicial review reliefs of mandamus and several declarations. The issues involved the granting of a licence in respect of the aerodrome known as Laro Airstrip. Without necessarily giving an opinion of the nature of the case that was before the High Court, I do find that the issues were relatively complex compared to other matters normally canvassed before the same court. The suit was filed on 24th August 2011 and judgment was delivered on 8th May 2013, just about two years down the line. The court record indicates that the documentation involved was not much. However, the parties certainly conducted serious research on the matter and considering as well the importance of the matter to the parties, I am of the view that an instruction fee of Kshs.300,000.00 for each of the two applicants is reasonable in the circumstances. I will therefore tax and allow item 1 and 2 of the Bill of Costs before me at Kshs. 300,000.00."

20. Regarding the powers of a taxing master, Warsame J. in the case of ***Ochieng, Onyango, Kibet & Ohaga Advocates v Adopt a Light Limited, Milimani HC Misc Cause No.729 of 2006***, Warsame J. stated as follows;

"The law gives the taxing master some leeway but like all directions it must be exercised judicially and in reliance to the material presented before Court. The taxing master must consider the case and 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 the benefit 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 reference. In my view the point of reference is the figures proposed to and accepted by Mombasa Municipal council. The law is that matters of quantum are regarded as matters with which the taxing master is particularly fitted to deal and the Court sitting on Appeal will intervene only in exceptional circumstances."

21. I agree wholly with the learned Judge and in the circumstances I find and hold that the learned Deputy Registrar as the Taxing Master exercised his discretion judiciously and explained the various factors that led to his conclusion of Kshs.300,000.00 as instruction fees payable on Item 1 and 2 of the bill of costs. That amount was in any event reasonable in the circumstances and I therefore do not see any reason why I should interfere with his decision.

Whether the 1st and 2nd Respondents were entitled to separate instruction fees

22. The Petitioner claimed that the taxing master erred in principle by awarding instruction fees to the 2nd

Respondent because the advocate for the 1st and 2nd Respondents filed joint pleadings and advanced the same arguments for both of the Respondents at the hearing of the case.

23. On their part, the 1st and 2nd Respondents submitted that an advocate was entitled to instruction fees once instructed and that in this case, he was entitled to instruction fees in respect of each of the two Respondents since the advocate was instructed separately.

24. In considering the issue, I note that in the case of ***Nyamogo & Nyamogo Advocate (supra),*** Mugo J. while determining the same issue stated as follows;

> ***"Where the same advocate is employed by two or more Plaintiffs or Defendants and separate pleadings are delivered or other proceedings had by or for two more such Plaintiffs or Defendants separately, the taxing officer shall consider in the taxation such advocate's Bill of Costs either between party or party or between advocate/client whether such separate pleadings or other proceedings were necessary or proper and if he is of the opinion that any part of the costs occasioned thereby had been unnecessarily incurred the same shall be disallowed. That there were two defendants represented by the advocate herein as submitted before me is not enough to warrant a higher fee without there having been a duplication of pleadings or proceedings as is clearly required in the above cited rule. Counsel having not demonstrated that indeed that was the case, I have no reason to interfere with the taxing officers discretion in regard to that point"***.

25. I generally agree with the learned Judge's views and to answer the question whether the 1st and 2nd Respondents' advocates are entitled to getting up fees in respect of the two Respondents, firstly, I will be guided by the principle that when an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee - See the case of ***D. Njogu & Company Advocates (supra).*** Secondly, the provisions of **Rule 62(2)** of the **Advocates Renumeration Rules** requires the taxing officer to disallow costs unnecessarily or improperly incurred when the same advocate is employed for two or more defendants and separate pleadings are delivered. The taxing master was well aware of this principle and when ruling on this point he stated as follows;

> ***"This does not mean that the advocate has one instruction. Receival of instructions from a client is a separate exercise from drawing of pleading and preparation of documentation for filing.To me, there is nothing wrong in receiving two sets of different instructions from different clients in the same matter and executing those instructions vide single pleading. That does not in any way make instructions one and does not disentitle the executing advocate from demanding payment for each of the separate instructions received.***
>
> ***A claim for instructions fees is one which accrues to an advocate the moment he is seized of the instructions. As was held in Mayers and Another vs Hamilton and Others (1975 E.A at page 16, the advocate becomes entitled, at least to the minimum instruction at the time of being instructed. The Court held thus;- (sic)***
>
> ***"I accept that the moment an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee... In the instant matter, the 1st and 2nd Respondents were totally different persons. The 1st Respondent instructed its advocates from the 2nd Respondent, even though the 2nd Respondent was a director of the 1st Respondent. The Petition sought several reliefs some against the 1st Respondent and not the 2nd and vice-versa."***
>
> ***To hold that these set of instruction ought to be considered as one on grounds that the same pleading was filed for both the 1st and 2nd Respondent is erroneous. What if the 2nd Respondent had instructed the same advocate as the 1st Respondent but only at a later stage in the proceedings, only necessitating that advocate to amend the pleadings already filed as to include the 2nd Respondent? What is one of the two Respondents had withdrawn the instructions before the conclusion of the case? This would have meant that the advocate would have been entitled to full instruction fees from the remaining Respondent, and to instruction***

fees on minimum scales, from the withdrawing client. There are separate instruction fees.

One can also consider a situation where the Petitioner herein had won the case. He would certainly have sought to claim for costs from the Respondents separately. It is incorrect to hold that an advocate who belabours to execute instructions from two clients should be entitled to instruction fees as if he only did work for one client, merely because the two clients did not instruct separate law firms and because the pleading drawn was the same. If the entire case of the two Respondents can be captured in a single set of pleadings, it would save the Court's time drawing and filing one set of pleading rather than two, and this ought not in any way disentitle the advocate representing them from claiming his instruction fees for each of the Respondents.

I am convinced that the advocate for the applicant herein received separate instruction from the 1st and 2nd Respondents (Applicants) and had the same executed. He is entitled to separate instruction fees."

26. I agree with the thorough reasoning of the taxing master above and I see no reason to interfere with his decision in that regard.

Whether a getting up fee was awardable

27. The Petitioner contended that the 1st and 2nd Respondents were also not entitled to a getting up fee because the matter did not go for trial and was decided on Affidavit evidence only. When deciding on this issue, the Taxing Master stated as follows;

"The Respondent argued that the Applicants ought not have charged fees for getting up for trial because this matter did not go to hearing but was determined based on Affidavit evidence and Submissions. According to the Respondent 'hearing of a Matter' denotes the calling of witnesses and adduction of oral evidence in Court. Culminating into a judgment at the conclusion of the case.Counsel for the Respondent referred this Court to the case of National and Grindlays Barik (Civil Case No.1076 of 1964) and also quoted the book 'Judicial Hints on Civil Procedure' at page 147 and 148. I have gone through the same but I do not agree with the Submissions by the Respondent herein that fees for getting up is only allowable where the matter has gone to full hearing. I also do not agree with his Submission that hearing only entails the calling of witnesses and adduction of viva voce evidence.

Schedule VI paragraph 2 of the ARO (2009) states as follows on fees for getting up:-

'In any case in which a 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 …...'

The rule only envisages a situation where in a case, there is denial of liability. That was the case in this matter when the Applicants herein field their response to the Petition. It matters not in which manner the matter was subsequently disposed off.

As such, I find that fees for getting up was properly charged. I tax the same at Kshs.200,000.00 (One third of the instruction fees allowed at Items 1 and 2 above)."

28. I agree with the Taxing Master and I am certain that he addressed his mind correctly to the law in reaching the above decision. Even if the taxing master had been wrong, it is clear that the 1st and 2nd Respondent are entitled to getting up fees. They contested the Petition. From the record before me, the 1st and 2nd Respondents' contested the Petition, filed responses to it, filed written Submissions and attended the hearing of the Petition which was argued before Mumbi J. on 28th November 2012. That to my mind makes the 1st and 2nd Respondent's entitlement to getting up fees as they clearly and separately denied liability for the actions complained of.

Conclusion

29. As to the quantum, it is clear by now that I see no error in principle in regard to the quantum as taxed by the Taxing Master. This Court will therefore not interfere with the discretion of the taxing master on quantum as it is regarded that the taxing master in such matters is particularly fitted to deal with those issues and the Court will only intervene in exceptional cases - See ***Thomas James Arthur v Njeri Electricity Undertaking (1961) E.A 492***.

30. That being the case, what I have said above covers the main grounds of the reference before me. I will therefore dismiss the Application and uphold the award by the taxing master, being Kshs.910,318. As to costs, let each party bear its own costs of this Application.

31. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JULY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Miss Mabele holding brief for Mr. Malonza for 1st and 2nd Respondents

No appearance for Applicant

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE