



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC. NO. 172 OF 2015**

**1. PEARL BEACH HOTEL LIMITED**

**2. AL NOOR KANJI.....PETITIONERS**

**VERSUS**

**1. KENNETH STANLEY HAJI**

**2. THE COUNTY GOVERNMENT OF MOMBASA**

**3. THE NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....RESPONDENTS**

**RULING**

1. This ruling is on an application by way of Chamber Summons dated 13<sup>th</sup> February 2019 by the Petitioners/Applicants. The Applicants seek to set aside the decision of the Taxing Master dated 16<sup>th</sup> November 2017 with respect to item 1 and 86 on instruction fees and getting up fees on the 1<sup>st</sup> Respondent's party & Party Bill of costs dated 31<sup>st</sup> January 2017 and for it to be re-taxed by this court.

2. The application is supported by the grounds on its face and by the affidavit of Conrad Maloba sworn on 13<sup>th</sup> February 2019. The basis of the application is that the Taxing Master failed to take into account the scale fee prescribed under Schedule VI Rule 1(j) of the Advocates (Remuneration) order 2014 in a Constitutional Petition suit claiming threatened violation of Fundamental Rights and Freedoms and seeking prerogative writs. That in awarding an amount higher than the minimum, the Taxing Master failed to give any justification as prescribed under the said schedule.

3. Mr. Maloba, learned counsel for the Applicants submitted that the issue of the value of the property was brought up in the judgment of Omollo, J. That the 1<sup>st</sup> Respondent had filed a cross- Petition seeking damages as a consequence of the orders sought in the petition. He submitted that the Petition was seeking protection of fundamental rights and the judgment observed that the orders sought in the cross-petition were fundamental rights of protection and freedoms. That for all intents and purposes, the proceedings were geared towards reversing the decisions of the impugned project. That the applicant was not pursuing a private right while all the other prayers were consequential upon whether the approval for the development were properly sanctioned. Mr. Maloba relied on the case of **Emanga Ne-Semata Investments Limited –v- Attorney General & 4 Others (2013)eKLR**. It was his submission that the matter before the court were purely on public law and that Rule 1 (j) Schedule VI of the Advocates (Remuneration) Order has put a maximum of Kshs.100,000/= and therefore the fee taxed at more than Kshs. 8 million is manifestly high. He urged the court to refer it back to the Taxing Master for re-taxation.

4. Mr. Nyongesa, learned counsel for the Respondent submitted that the Petition had 7 substantive prayers and none was consequential or incidental to granting of the other prayers. That each prayer was distinct and was either to be allowed or disallowed. Mr. Nyongesa pointed out that the first four prayers were declaratory in nature, the 5<sup>th</sup> Prayer was in nature of judicial review order of Mandamus and the 6<sup>th</sup> prayer was an order of injunction. He added that the 8<sup>th</sup> prayer was an order of restoration for any damage caused by the development by the respondents /applicants. It was his submission that the issues being raised by the Applicant between private and public remedies were ably canvassed before he Taxing Master who made a lengthy and elaborate ruling giving reasons and even cited decisions. He distinguished the Emanga Ne-Semata Investments Limited case (supra) stating that it was a pure public interest litigation unlike the Petition herein which related to the use of privately owned land and personal access to the ocean. He maintained that this matter was in private law domain dealing with two conflicting interests in land use. Mr. Nyongesa submitted that the Taxing Master was appropriately guided in her assessment and considered the nature of the dispute, the importance of the matter and the amount of the subject matter involved. That the value of the construction was Kshs.184,500,000.00 Mr. Nyongesa relied on the case of **Republic –v- Law Society Disciplinary Tribunal (2019)eKLR** and **J. Thongoria Co. Advocates –v- UBA Kenya Bank Limited (2018)eKLR** and submitted that on the basis of these two decisions, it is only available to vary or set aside the decision of the Taxing Master if the court found that the Taxing Master exercised her discretion

capriciously and without applying the basic principles of taxation. It was Mr. Nyongesa's submission that the ruling herein is not capricious or based on outside basic principles of taxation and urged the court not to disturb it.

5. The issue before the court is whether the Taxing Master erred in the taxation of the instruction fees and getting up fees in the 1<sup>st</sup> Respondent's Bill of Costs dated 31<sup>st</sup> January 2018. The applicable principles are that a court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. The applicant's case is that the instruction fees and getting up fees allowed are so high as to amount to an injustice. It is the Applicant's contention that the Taxation Master failed to take into account the scale of fees prescribed under Schedule 6 Rule 1(j) of the Advocates (Remuneration) Order 2014. Schedule 6 paragraph 1(j) provides as follows: -

**(j) Constitutional petitions and prerogative orders. To present or oppose an application for a constitutional and prerogative orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time extended by the advocate –**

**i. Where the matter is not complex or opposed such sum as may be reasonable but not less than 45000.**

**ii. Where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000.**

6. I have perused the ruling by the Taxing Master dated 16<sup>th</sup> November, 2017. I note that the Taxing Officer applied schedule 6 Paragraph 1 (j) above. She also noted that she has discretion to increase the basic fee taking into consideration the nature and importance of the matter, the amount involved, the interest of the parties, general conduct of the proceedings and other circumstances. The Taxing Master also addressed herself to one of the fundamental principles as submitted by the petitioners/applicants that fees should be reasonable and not impede access to justice and the duty of the court to ensure that fees are reasonable so as not to make justice the echelon of the rich. The Taxing Officer also considered the principles of taxation outlined in **Premchand Raichand Ltd –v- Quarry Services of East Africa Ltd (1972) EA 162** and the case of **Famy Care Limited –v-Public Procurement Administrative Board and Others (2014)eKLR** which was cited by the Applicants.

7. While taxing on the item on instructions fees, the taxing master in her ruling stated at page 3 as follows:

*“This petition is a petition under the Environment and Land Court. It was dealing with the alleged infringement of fundamental rights. The issue of jurisdiction was also raised. It was the petitioners contention that the 8 storey building impeded the petitioners access to its property and blocked the petitioners view of the creek, seabed and other sceneries including Fort Jesus. It also sought a prerogative order for the cancellation of and expunging of all development approvals and an injunction to stop any further developments and finally an order for the restoration of the demolition of the developments undertaken.*

*I concur with Mr. Nyongesa for the Respondents that the last three prayers were of the nature that the value of the development came into play. This is because, had the petitioners succeeded, the developments would have been stopped and the demolished and the 1<sup>st</sup> Respondent would have undergone a loss of the value of the development and lost his expected earnings.*

*As the subject matter value is unavailable the court will make what is available as the point of reference. Attached to the Affidavit sworn by Kenneth Stanley Haji on 1/9/2015 is the contract for the Building work. The contract for the Building works for the development was kshs.184,777,963.00. Further the receipts attached to the said affidavit for approval of developments come to about Kshs.500,000.00 which give a round figure puts the development costs at a value of Kshs. 185,000,000.00. This is the value I shall use.*

*I have had recourse to peruse the file which is quite bulky with numerous documentation. I have also considered the loss which the 1<sup>st</sup> Respondent would have undergone and this shows the weight of the burden that was on counsel's shoulders. It is therefore only fair that he is remunerated commensurably given the value of Kshs.185,000,000.00. Considering the value of the subject matter and the work done, I exercise my discretion and enhance the basic fee to Kshs.6,000,000.00 and tax off Kshs.4,950,000.00*

**Item 86**

***Getting up fee will be taxed at 1/3 of the Instruction fee. I tax off kshs.1,360,000.00. ”***

8. It is my finding that the taxing master did take into account relevant considerations and gave reasons why she exercised her discretion to tax off the instruction fee from Kshs.10,950,000.00 to Kshs.6,000,000.00. However, in my view, the work that was undertaken clearly did not entitle the advocate to getting up fees, as there was partial resolution of the dispute by consent which the court noted or recorded in the judgment. The getting up fees of kshs.2,000,000.00 awarded by the Taxing Master in my view was not payable in view of the partial resolution of the dispute as already stated. Any preparation of the case for trial must have been minimized by such partial resolution which happened before the trial. In the premises, I find that the decision of the Taxing Master to award getting up fees was not justified.

9. In my view, the Taxing Master properly addressed her mind to the principles relating to taxation of party and party costs in a matter such as the one now before me and properly assessed the costs due to the 1<sup>st</sup> respondent in this matter, except for the award of getting up fees.

10. In the premises I find that the decision of the taxing master in awarding instruction fees of kshs.6,000,000.00 was not based on any error of principle neither were the said fees as awarded excessive to justify interference by this court. However, it is my finding that the decision of

the Taxing Master in awarding getting up fees of Kshs.2,000,000.00 was based on error of principle and calls for interference by this court and I hereby set it aside.

I accordingly dismiss the Chamber Summon dated 13<sup>th</sup> February 2019 with regard to item 1 on instructions fees and allow it in respect of the item 86 on getting up fees which I hereby set aside. Costs of the application are awarded to the Respondent.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF NOVEMBER, 2019.**

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**C. K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Mburu holding brief for Maloba for petitioner

Ms. Naliaka holding brief for Nyongesa for 1<sup>st</sup> respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**