REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

JUDICIAL REVIEW DIVISION

ELC JUDICIAL REVIEW APPLICATION NO. 8 OF 2014

(Formerly NAIROBI HC JR NO. 442 OF 2014)

NYERI COUNTY GOVERNMENT.....APPLICANT/RESPONDENT

-VERSUS-

CENTRAL KENYA COFFEEE MILL LTD....RESPONDENT/EX PARTE APPLICANT

REPUBLIC …….…….....……... APPLICANT

JUDGMENT

1. The original respondent, now the applicant, moved the Court by Chamber Summons dated **16th May, 2016** *(hereinafter referred to as the reference)* objecting to the ruling on taxation delivered by the taxing officer, Hon. C. Wekesa, on **11th May, 2016**, in respect of certain items in the bill of costs filed by the respondent, especially item Nos. 1, and 2.

2. The reference, which is brought under **Rule 11(2)** of the Advocates (Remuneration) Order, is founded on the grounds that, *the respondent's bill of costs dated 17th October, 2015 was not taxed in accordance with the Advocates Remuneration (Amendment) order, 2014, schedule 6 thereof and other applicable paragraphs and that the respondent has filed an objection to the alleged illegal taxation.*

3. It is contended that the taxing master failed to take into account the nature and importance of the matter and as a result awarded the respondent Kshs. 85, 060/- which is grossly low.

4. Arguing that the taxing master visited an injustice on it, the respondent *inter alia* urges the court to set aside the order of the taxing master dated 11th May, 2016 and to order taxation of the bill afresh.

5. The reference is supported by the affidavit of the respondent's advocate, **Charles Wahome Gikonyo**, in which the grounds on the face of the application are reiterated.

6. The reference was disposed of by way of written submissions.

Submissions on behalf of the respondent/applicant

7. On behalf of the respondent/applicant, it is submitted that in taxing item number (1) (instruction fees)

at Kshs. 45,000/- and giving no reason for the same, the taxing master fell into an error of principle. The amount awarded in respect of instruction fees is said to be outside reasonable limits hence manifestly inadequate to such extent to be a mockery of legal representation.

8. Arguing that the matter was complex, novel and strenuously opposed, counsel for the respondent faults the taxing master for placing it under schedule 6A J (i) as opposed to 6AJ(ii).

9. The taxing master is also said to have failed to take into account the lengthy submissions by both the applicant and the respondent and the value of the subject matter hence completely disregarding the law on taxation.

10. Based on the decisions in the cases of **Green Hills Investments Ltd v. China National Complete Plant Export Corporation (Complant) T/A** Covec-Nairobi HC (Milimani Commercial Courts) Civil Case No. 572 of 2000 (2004) e KLR; **Republic v. Kenya Avenue Authority ex parte Middle East Bank Kenya** (2012)e KLR and **Wambugu, Motende & Company, Advocates v. Attorney General of Kenya** (2013)e KLR, it is reiterated that the taxing master was wrong in taxing off Kshs. 2, 955, 000/= from item 1 (instruction fees).

11. According to counsel for the respondent, contrary to the finding of the taxing master, the matter was opposed. The advocates took time to research and prepare submissions including filing many authorities.

12. Based on the case of **Republic v. Kenya Avenue Authority *ex parte* Middle East Bank Kenya** (*supra*) where Kshs. 1 million was allowed as instruction fees, it is submitted that in the circumstances of this case Kshs.3 million was fair and reasonable.

13. With regard to item 2 (getting up fees), it is pointed out that the taxing master disallowed it and submitted that the taxing master erred by holding that the matter did not proceed to trial.

14. In respect of that item, it is reiterated that the matter proceeded for trial and submitted that by disallowing the item, the taxing master fell into an error of principle.

15. The taxing master is also said to have fallen into an error of principle on item No.8 (drawing a replying affidavit-12 folios which was taxed at Kshs.240/=).

16. In respect of that item it, is submitted that a replying affidavit being a pleading, ought to have been taxed under paragraph 4(f) as opposed to paragraph 4(a).

17. The taxing master is further faulted for disallowing item 25 on the ground that counsel did not attend court yet she acknowledged that the advocate had sent a representative.

18. Other items in respect of which the taxing master is said to have committed an error of principle are items Nos. 26, 27, 28 and 29 where she taxed the bill at Kshs. 2,300/= on account of court attendances.

19. With regard to those items, the taxing master is faulted for giving an award based on the ordinary scale for one hour as opposed to half day in respect of court attendances and submitted that the ordinary scale applies only when the matter is not opposed. Because the matter was opposed, it is submitted that the higher scale was the one applicable to those items.

20. The applicant wonders how the taxing master arrived at one hour, yet the bill was drawn at half day, for court attendances being Kshs.7, 100/=.

21. With regard to item numbers 31, 32, 36 and 39 (photocopying costs), based on **Section 74** of the Advocates (Remuneration) Order, it is submitted that the taxing master should have asked for the receipts in respect of those items instead of disregarding them.

22. Maintaining that the taxing master committed an error of principle, the respondent/applicant prays

that the taxing master's ruling dated 11th May, 2016 be set aside and the bill taxed afresh by this court or referred for taxation afresh by a different taxing master.

Submissions on behalf of the applicant/Respondent

23. On behalf of the original applicant/respondent it is submitted:

i. that taxation of bills is a matter which solely vests in the taxing master;

ii. that the decision of the taxing master should not be interfered with unless exceptional circumstances are proven and that the respondent/applicant has not proved existence of exceptional circumstances to warrant issuance of the orders sought.

24. With regard to the contention that the taxing master misdirected herself in taxing the instruction fees, reference is made to the case of **Desai, Sarvia & Pallan Advocates v. Jambo Biscuits (Kenya) Limited** where **Kimondo J**., observed that taxation of a bill of cost, like any other aspects of litigation, is based largely on evidence and that it behooved the applicant to present to the taxing master all documents and materials in support of its claim and submitted that the applicant did not prove that the value of the subject matter was 200 million or that the matter was novel, complex, sensitive and of great nature and importance.

25. The taxing master is said to have agreed with the applicant/respondent's submissions that judicial review suits are not money suits as they merely seek declaratory reliefs and orders.

26. The taxing master is also said to have been persuaded and bound by the decisions in the cases of **Rosafric Ltd v.The Central Bank of Kenya and Another,** Civil Suit No.1389 of 2001; **Republic v. Nyeri County Government ex parte Central Kenya Coffee Mill Limited; Republic v. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W' Njuguna & 6 Others** (2006)e KLR **and Joreth Ltd v. Kigano & Associates** (2002)1 E.A 92 (CAK).

27. According to the applicant/respondent's counsel item 1 could have been taxed at 3 million only and only if the respondent/applicant had proved that the issues brought out in the suit were complex, sensitive or of great nature and importance, which he failed to prove.

28. It is asserted that the matter was straight forward and as such called for nothing more than normal diligence and the workday chores of a legal practitioner.

29. In view of the foregoing, it is submitted that the respondent/applicant failed to justify his exaggerated costs.

30. It further submitted that the award cannot be reviewed without proper particularization and on the basis of misleading facts.

31. With regard to item 2 (getting up fees) it is acknowledged that the applicant filed a response to the application and that the application was confirmed for hearing but contended that the matter never proceeded for hearing.

32. Because the matter was disposed of by way of written submissions, it is submitted that the hearing contemplated in law did not take place. In this regard reference is made the concept of hearing espoused in **Black Laws Dictionary the cases of Nguruman Ltd v. Kenya Civil Aviation Authority & 3 Others** (2014) e KLR and a passage from **judicial Hints on Civil** Procedure by retired **Justice Richard Kuloba.**

33. According to the counsel for applicant/respondent none of the parties prepared for hearing.

34. With regard to items 26, 27 and 29 reference is made to paragraph 50 of the Advocates (Remuneration) Order and submitted that under that order, unless the court has made an order under

paragraph 50A thereof, where schedule 6 provides a higher and lower scale, the costs shall be taxed in accordance with the lower scale.

35. The applicant is said to have failed to urge a case for taxation of those items based on the higher scales in his submissions.

36. Because items 26 and 29 depicted mentions which ordinarily do not take more than one hour, it is submitted that it would have been irregular to award costs as taxed, based on half day.

37. With regard to items 31, 32, 36 and 39, the respondent/applicant is said to have failed to discharge his burden of providing evidence in respect thereof (were not proved).

39. Because more than one sixth of the total amount of the bill of costs presented by the respondent/applicant was taxed off, based on paragraph 77 of the Advocates (Remuneration) Order, it is submitted that the applicant is not entitled to costs. This court is urged to direct the respondent/applicant to reimburse the money paid pursuant to the orders of the taxing master.

Analysis and determination

39. I have carefully read and considered the cases urged in support and opposition to the respondent/ applicant's bill of costs, including the authorities cited in respect thereof and I find the issues for determination to be:

> **i. Whether the taxing master committed an error or errors of principle while taxing the applicant's bill herein?**
>
> **ii. If the answer to (i) above is in the affirmative, in respect of which item(s) was the error of principle or were the errors of principle committed?**
>
> **iii. What orders should the court make?**

40. On whether the taxing master committed an error of principle or errors of principle in taxing the respondent/applicant's bill of costs hereto, the respondent/applicant thinks she did because she, *inter alia*, held that the matter did not proceed to trial yet the evidence on record shows that it was heard by way of written submissions.

41. The applicant/respondent in his submissions concedes that the matter was opposed but contends that the bill should not have been taxed on the higher scale because it was not adjudged complex and that the bill in the circumstances of the case could not be based on the value of the subject matter.

42. The section of the law relied on in making the impugned award provides as follows:

> **"To present or oppose an application for 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 expended by the advocate-**
>
> > **j(i) Where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000/=.**
> >
> > **ii. Where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than 100,000/="**

43. In the circumstances of this case, even though legal, the award is said to have been inordinately low for the reasons cited herein above.

44. Counsel for the applicant/respondent, does not think that the matter was complex because it did not require anything more than the normal exercise of diligence on the part of counsel.

45. I have read the submissions by the respective parties concerning that award. Whilst I agree with counsel for the applicant/respondent that this being a judicial review matter instructions fees did not turn on the value of the subject matter and that the matter was not so complex to warrant the issuance of the instruction fees charged, based on awards in similar matters and taking into account the principle that in as far as is possible there should be consistency in taxation of costs and on the basis of current trends in award of costs for judicial review matters, I am of the considered view that the award should have been based on the higher scale as opposed to the lower one. I say this because trends in awards in similar matters depict awards far beyond the award assessed in the circumstances of this case. For instance in the case of **Republic v. Kenya Revenue Authority ex parte Middle East Bank Kenya Ltd** (*supra)* an award of Kshs. 1,000,000/= was upheld as instruction fee for a judicial review application which was determined preliminarily. In upholding the taxed bill of costs the court observed:

> "**Looking at the court record and the proceedings in the Judicial review application, it would appear that the amount claimed by the applicant of Kshs. 3, 500,000/= was in fact excessive considering that the hearing in this matter was not protracted and the time spent by the advocate in adjudicating this matter was relatively short. It is worth noting that the matter was concluded on the first day that hearing commenced because the respondent conceded to the lifting of the Agency notice. I did not come across any voluminous or numerous documents that the advocate had to synthesize and prepare for hearing. In my opinion**, **the sum of Kshs. 1,000,000/= awarded to the applicant was not in the circumstances of this case unreasonable as claimed by the applicant."**

46. I have also reviewed several other references in respect of judicial review matters with a view of determining what the trend in awards in such matter is. Some of the cases I reviewed are:

> **i. Truth Justice and Reconciliation Commission v. Chief Justice of the Republic of Kenya & Another** (2014) e KLR where an award of Kshs. 200,000/= was upheld in respect of a judicial review matter that terminated at the leave stage;
>
> **ii. Kenya Union of Commercial Food & Allied Workers (K) v. Banking Insurance & Finance Union (K)** Civil Appeal No.60 of 1988 where an award of Kshs.150,000/= was upheld in respect of a judicial review matter that terminated at leave stage;
>
> **iii. Nyangito & Co. Advocates v. Doinyo Lessos Creameries** Ltd (2014) eKLR where Kshs. 424, 774/= was awarded for defending a judicial review matter.

47. In the circumstances of this case, I note that the taxing master did not account for basing the award on the lower scale. Despite the matter having been fairly straight forward, given the trend in award in respect of such matters, I am of the considered view that the award for instruction fees should have been based on the upper scale as opposed to the lower scale because it was defended. Advocates also put some time in research in order to come up with the submissions used in determination of the matter. In the circumstances, am inclined to set aside the award assessed by the taxing master and based on the trend in awards in such matters, substitute the award with Kshs. 150,000/= which in the circumstances of this case, I consider to be reasonable on that item.

48. As to whether the applicant was entitled to fees for getting up or for preparing for trial, based on the principles espoused in Kuloba's judicial Hints in Civil Procedure and the case of **Shamshudin Khosla as Chairman, Abdul Gafur Pasta as Honorary Secretary & Mohamed Bayusuf as Treasurer (On their own behalf and on behalf of) the Members of Kenya Transport Association v. Kenya Revenue Authority** [2011] e KLR, I entertain no doubt that the applicant, in the circumstances of this case was entitled to fees for getting up.

49. In the former, the words getting up or preparing for trial are defined as follows:

> **"The words "getting up or preparing for trial' refer to going into battle on the hearing of a cause…"**

50. In the latter, **Ojwang J.**, (as he then was), observed:

> "…**getting-up fees relate to the first step (and possibly, later, equally-significant steps) which the Advocate takes, in preparing the pleadings and other vital process-documents, for lodgment and service**…. **It is obvious that after counsel took instructions from the applicant/respondent, counsel moved on to the next stage of formulating, lodging and serving the cause papers; so in this regard, there was an element of getting-up fees…"**

51. The battle contemplated on the hearing need not be by oral arguments only. Where a matter is disposed of by way of written submissions, as happened in this matter, any party who filed written submissions in respect of the matter, in my view, satisfied the concept of going into battle as contemplated by law.

52. The above exposition of the law is in tandem with the observation in the case of **Cyril Herbert Mayers and Hazel Margaret Mayers v. Akira Ranch Ltd Nairobi High Court Civil Case No. 682 of 1970** where it was held:

> "**The amount of getting-up must inevitably be less in a case which is disposed of one way or another without an appearance before court.**"

53. As counsel for the respondent took the next step of preparing a response to the judicial review hereto and filed written submissions on the basis of which the matter was determined, on the basis of the above cited authorities, I find and hold that he was entitled to fees for getting up or preparing for trial, which I assess at Kshs**.** 50,000/= being one third of the assessed instruction fees.

54. With regard to items 26, 27, 28, 29, 31, 32, 36 and 39 I agree with counsel for applicant/respondent that the respondent has not made up a case for interference with the awards. I say so because the respondent did not lead any evidence in support of the claim for court attendances on the basis of half-day. The respondent/applicant also failed to discharge the duty imposed on it of tying the costs to the particular document photocopied and producing receipts in respect of the costs incurred.

55. With regard to item 8 being a pleading, I allow Kshs. 2,300/= as claimed.

56. With respect to item 25, being of the view that the respondent's counsel did not have to prove that he personally attended court to be entitled to court attendance fee, I allow that item at Kshs. 500/= as pleaded.

57. Having determined that the taxing master committed an error of principle on the above cited items, I hereby set aside those items and in their place substitute the awards assessed herein above.

58. The upshot of the foregoing is that the reference has merit and is allowed in the extent contemplated herein above.

Dated, signed and delivered in open court at Nyeri this 15th day of June, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kiminda h/b for Mr. Wahome for the respondent

Ms Macharia for the applicant

Court assistant - Esther