Buyu v Independent Electoral and Boundaries Commission & 2 others (Civil Appeal (Application) 40 of 2013) [2024] KECA 693 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 693 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL (APPLICATION) 40 OF 2013

JM NGUGI, JA

JUNE 21, 2024

BETWEEN

ROZAAH AKINYI BUYU .... APPELLANT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1ST RESPONDENT

HANSON NJUKI MUGO .... 2ND RESPONDENT

JOHN OLAGO ALUOCH .... 3RD RESPONDENT

(In the matter of the Reference on the Ruling of the Deputy Registrar of the Court of Appeal at Kisumu (Adika, DR) dated 10th September, 2015. in Civil Appeal No. 40 of 2013)

RULING

1. At the conclusion of the General elections held in 2013, the Independent Electoral and Boundaries Commission, the 1st respondent herein, declared the 3rd respondent the duly elected member of the National Assembly for Kisumu West Constituency. The appellant was dissatisfied with the declaration and challenged it at the High Court. In a judgment delivered on 4th September, 2013, the High Court (Chemitei, J.) found the election petition meritless and dismissed it with costs to the three respondents. Still dissatisfied, the appellant filed a second appeal to this Court. It was equally dismissed with costs to the respondents in a judgment dated 21st February, 2014. The respondents had also cross-appealed on some aspects of the judgment. They succeeded in their cross-appeals.

2. The substantive dispute determined, since then, the parties have been embroiled in a disagreement over what costs should be paid to the respondents. The 1st and 2nd respondents, who were represented by the firm of Otieno Ragot & Co. Advocates, filed their Bill of Costs dated 9th May, 2014. The 3rd

respondent, represented by Olago Aluoch & Co. Advocates, filed theirs dated 27th May, 2014. The two Bills of Costs were contemporaneously heard by Hon. Adika, Deputy Registrar. The learned Taxing

3. None of the three parties are happy with the learned Taxing Master's decision and each preferred a reference under the then Rule 112(1) of the *Court of Appeal Rules*, 2010. The substance of the Rule is now found in Rule 117 of the *Court of Appeal Rules*, 2020. The appellant's reference is dated 18th February, 2016 (and was filed pursuant to the Court's order extending time). The 1st and 2nd respondents' reference is dated 17th September, 2016.

4. The 3rd respondent filed written submissions in which it implied that it had filed a cross-reference and that it was adopting wholesale the submissions of the 1st and 2nd respondents in support of its cross-reference. The 1st and 2nd respondents' similarly referred to the 3rd respondent's cross-reference in their submissions and indicated that the 3rd respondent's cross- reference was identical to theirs. However, I have been unable to locate the 3rd respondent's cross-reference in the court file or in the registry. All attempts to get a copy from the 3rd respondent's lawyers as well as the other counsel in the matter – including through a formal letter by the Honourable Deputy Registrar of the Court dated 22nd May, 2024 and numerous phone calls by the Honourable Deputy Registrar and the Court Registry staff have been successful. In the end, in this ruling, I have taken the position that the 3rd respondent never filed any cross-reference and rendered myself on the appellant's reference

5. The references – especially that of the appellant – are rather prolix so I do not propose to set them out in detail in this ruling. Suffice it to say that the appellant complains primarily about the instruction fees awarded by the Taxing Master on two scores. First, the appellant argues that the learned Taxing Master failed to take into consideration the principles of taxation generally and specifically in respect to public interest litigation in election petitions and, thereby, acted irrationally. Second, the appellant complains that it was not open, as a matter of legal principle, for the learned Taxing Master to award costs that far exceed the capped costs at the High Court in view of the fact that the most arduous part of election petition's litigation process is at the trial court. The appellant also argues that it was an error for the learned Taxing Master to award interests on the taxed amounts.

6. On the other hand, the cross-reference by the 1st and 2nd respondents raises four issues:

   a. That amount awarded by the Taxing Master with respect to instruction fees, to wit, Kshs 2,500,000 is manifestly inadequate in the circumstances of the appeal.

   b. That the learned Taxing Master failed to compute the amounts awarded for VAT in the ultimate aggregate figures awarded.

   c. That the learned Taxing Master erred in law and in principle when he concluded that the respondents are not entitled to costs of their cross-appeals yet their cross- appeals were heard and allowed by the Court.

   d. That the learned Taxing Master erred in law and in principle in declining to award all the disbursements on the basis that no receipts were availed despite the fact that the disbursements were for court fees and the receipts were reasonable and were in the court file.

7. Consequently, the two references under consideration raised six issues for determination – the question whether the instruction fees awarded to the respondents were either manifestly excessive or manifestly inadequate – and the four questions outlined in paragraph *6* above. The sixth issue is the one raised by the appellants whether interests were awardable on the taxed amounts in the circumstances of this case. I will consider the six issues in seriatim.

8. The learned Taxing Master awarded Kshs 2,500,000 each to the 1st and 2nd respondents on the one hand, and to the 3rd respondent on the other hand, as instruction fees. For diametrically opposed reasons, the appellant and the respondents find the amount awarded to be either manifestly excessive or manifestly inadequate. The appellants argue that the learned Taxing Master should not have awarded anything more than Kshs 500,000 as instruction fees. On the other hand, the 1st and 2nd respondent argue that an award of Kshs 8,000,000 for each of the respondents would have been more appropriate.

9. Even though the parties differ wildly on the appropriate figure that should have been awarded as instruction fees, they all agree on the fundamental principles applicable.

10. The starting point for determining the issue is Paragraph 9(2) of the Third Schedule of the *Court of Appeal Rules, 2010*. It provides that:

> "The fees to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interests of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to be the costs and all other relevant circumstances."

11. This paragraph, in essence, codifies the judicially developed principle enunciated in the famous *Joreth Ltd v Kigano & Associates* Civil Appeal No 66 of 1999. In that case, the Court of Appeal stated:

> "The value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case), but if the same is not so ascertained, 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 importance of the cause of matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

12. The question is whether the learned Taxing Master, in awarding the instruction fee, misapprehended this prime directive to such an extent that one can objectively say that the award was so manifestly excessive or grossly inadequate. In doing so, this Court must recall the exhortation in the famous *Premchand Raischand Limited & another v Quarry Services of East Africa Limited & another*, which was re-affirmed in the *Joreth Ltd Case* (*supra*) thus:

> "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, and 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."

13. Differently put, this Court can only interfere with the award by the learned Taxing Master if it can be shown that his decision was based on an error in principle or the fee awarded was manifestly excessive or inadequate to justify an inference that it was based on an error of principle.

14. In the present case, the appellant argues that the appeal giving rise to the impugned taxation was an election petition appeal limited to points of law only. The necessary corollary, the appellant argues, is that the substance of the work that would ordinarily require counsel to do the heavy lifting in applying his mind and resources is at the High Court – not at the Court of Appeal. It is at the High Court, the appellant argues, where witnesses are examined, evidence led, factual issues thrashed and analysed, scrutiny of election materials conducted, interlocutories dealt with and so forth – all labourious and

painstaking work. The appellant, then, argues that since at the High Court the costs were capped at Kshs 1,500,000 for all that work, it follows that it is manifestly irrational for the learned Taxing Master to award more than that figure for each of the respondents for what is eminently much less work at the Court of Appeal.

15. Secondly, the appellant argues that the irrationality of the decision of the learned Taxing Master is made evident if one considers that an election petition is a form of public interest litigation for which the courts have an interest in not creating a disincentive for parties to approach the court as a matter of access to justice.

16. On the other hand, the respondents argue that the instruction fee was manifestly inadequate given the nature of the appeal, the importance and difficulty of the appeal, the interests of the parties, and all other allowable factors. They complain that in reaching his decision the learned Taxing Master did not refer to, or deliberate on any issue or factor "subsisting in the appeal at all, nor did he explain why he felt that the sum of Kshs 8,000,000 claimed by each of the respondents ....was too high..."

17. The respondents argue that the failure to give reasons or the pathway to his conclusion was an error in principle for which the instruction fees should be set aside. They, then, argue that the error was consequential because it led the learned Taxing Master to award instruction fees which were too low. They insist that Kshs 8,000,000 for each of the respondents would have been more commensurate given the nature of the case, and in particular taking into consideration: the nature and the strict rules governing the timelines within which the appeal must be filed and determined in accordance with various constitutional and statutory provisions and the attendant pressure that puts on the parties and their advocates. The respondents argue that the election appeal in question involved complex and weighty matters which required elaborate and time-consuming research. The respondents place reliance on several decisions of the High Court which have described election petitions as complex litigation including *Titus Kiondo Muya v Peter Njoroge Baiya & 2 others* [2009] eKLR; and *Ntoitha M'Mithiaru v Richard Maoka Maore & others* [2012] eKLR. Unwittingly, though, the cases cited would tend to fortify the appellant's argument that election petitions are a lot more complex, laborious, and complex at the trial stage rather than at the appeal stage!

18. I have considered the duelling submissions by the parties; the authorities cited and the legal principles applicable. At the bottom, the legal standard of review to be deployed is an abuse of discretion standard. A Taxing Master exercises discretion whose outer limits are moored by the factors set down in paragraph 9(2) of the Third Schedule. Under this standard, the Court will only review a discretionary decision if it was made capriciously, arbitrarily, in plain error, or otherwise not in accordance with the law or logic. A reversal under this standard can only happen where this Court is persuaded that the reviewed decision lies beyond the pale of reasonable justification or range of permissible outcomes under the circumstances.

19. In the present case, the learned Taxing Master had the following to say about instruction fees:

> "I, then, move to the most critical item which is item 1. Here, I am guided by the celebrated case of *Premchand Ltd v Quarry Ltd & another*. I am also guided by *Joreth Ltd v Kigano & Associates*. The figure I award is Kshs 2.5 million for instruction fees."

20. In the next paragraph, the learned Taxing Master, awards the 3rd respondent the same amount for the same reason.

21. It is fairly obvious that the learned Taxing Master did not give reasons for selecting this figure. Rather than citing the two famous cases rather obliquely, he did not explain why he awarded a figure lower

than the respondents requested; and higher than the figure the appellants had suggested. Neither did he explain which principles he applied to come up with the figure. This, in my view, is a reversible error.

22. As all the parties suggest, the appropriate way to deal with a reversible error in taxation is to remit the matter to the Taxing Master for reconsideration. In this case, given the issues raised by the parties regarding instruction fees, it is imperative to give the following guidelines to the Taxing Master – not as a fetter on his or her discretion but as knowable legal principles applicable in exercising the discretion to set the instruction fees in election appeals:

    a. There is a judicial and statutory policy in keeping costs of election petitions and appeals arising therefrom reasonably low as a matter of public interest. Hence, in *Cyprian Awiti & another v IEBC & 3 others* [2018] eKLR, the Supreme Court held as follows:

    > ...[H]igh costs were an impediment to the right of access to justice. The guiding principles for the award of costs in electoral matters, were as follows:-
    >
    > a. in setting a ceiling to the award of costs, the election Court was to be guided by certain considerations, namely:-
    >
    > i. costs were not to be prohibitive, debarring legitimate litigants from moving the judicial process;
    >
    > ii. inordinately high costs were likely to compromise the constitutional right of access to processes of justice;
    >
    > iii. costs should not to bear a punitive profile;
    >
    > iv. Courts, in awarding costs, were to be guided by principles of fairness, and ready access to motions of justice;
    >
    > v. costs were intended for decent and realistic compensation for the initiatives of the successful litigant;
    >
    > vi. costs were not an avenue to wealth, and were not for enriching the successful litigants;
    >
    > vii. the award of costs should not defer to any makings of opulence or profligacy in the mode of conduct of the successful party's cause.

    Martha Wangare Karua v IEBC & 3 others [2018] eKLR, a decision by this Court, is in accord.

    b. While each case will depend on its own circumstances, absent exceptional circumstances which must be particularly demonstrated by the party who has been awarded costs, the costs awarded on appeal should not exceed the costs capped at the High Court in election petitions.

    c. Where a party asks for enhanced costs in an election appeal on account that the appeal was unusually difficult, complex and involving, the party must specifically demonstrate such unusual difficulty or complexity. A statement that election petitions and appeals are generically "arduously involving and complex" will not suffice. The difficulty or complexity is tested having regard to the usual run of civil cases or appeals.

23. I will now turn to the related second question: were the respondents entitled to an award of separate instruction fees on account of their success in the cross-appeals? In the present case, the learned Taxing Master ruled that they were not so entitled. I agree. As a general matter, unless the Court specifically rules that a party is entitled to separate instruction fees to oppose the appeal and to argue a cross-appeal, such a party is entitled to one, globally awarded instruction fees. This is more so in election petitions appeals given the policy goal enunciated above to keep litigation costs reasonably low for these species of cases. The rationale for this is that except in unusual cases which a party must demonstrate, the material and arguments that a party marshals in support of the cross- appeal are the same ones that the party marshals to oppose his opponent's appeal. Consequently, when the Court dismisses the appeal by his opponent while allowing his cross-appeal, the assumption is that the party is allowed contemporaneous costs. Of course, there may be circumstances where the appeal and cross-appeal are substantially dissimilar as to attract disparate instruction fees. However, a party would have to persuade the Court at the time of determination of the appeal – not Taxing Master -- to award the instruction fees separately. In the present case, the respondents neither requested for, nor were they awarded separate instruction fees for their cross-appeal. It was, therefore, not an error for the learned Taxing Master to decline to award them separate instruction fees for the cross- appeals.

24. The next issue is whether it was an error for the learned Taxing Master to fail to compute the amounts awarded for VAT in the ultimate aggregate amount awarded. It most obviously was; and it was probably a product of venial inattention at the point of adding up the number; a scrivener's error. The learned Taxing Master accepted that VAT was applicable; the appellant did not contest that at all either before the learned Taxing Master or before me. I, therefore, rule that it was an error which the next Taxing Master will correct upon remand for reconsideration.

25. The penultimate issue is whether the respondents were allowed to recover costs for disbursements over which they did not produce receipts but the receipts were on record in the court file. They give the example of a court filing fees receipt. The appellants argue that it is always incumbent upon the person alleging to prove – a veritable function of section 107 of the *Evidence Act*, they, almost sardonically, point out. If the respondents did not provide proof of the disbursements, the appellants remind the Court, they cannot benefit from an order that they should be reimbursed.

26. The appellant is surely right that a party who alleges that they spent some money as costs bear the burden of proving it by a balance of probabilities – and providing receipts of payments is obviously one way of doing so. However, the respondents are also correct when they say that when the alleged disbursement can be proved by simply perusing the court record, it would be root canal formalism – the kind abhorred by Article 159(2)(c) of the *Constitution* – to claim that such a disbursement has not been proved. If a party makes a payment and a receipt is issued and is available in the court file, to insist that the payment has not been proved because the person who made the payment did not include their copy of the receipt in the legal form demanding repayment, would be the height of sacrificing substance for legal form; the ultimate fetishism of form over substance. Differently put, if the respondents can find proof of the disbursements in the court file, they would be entitled to reimbursement.

27. The final issue for resolution is whether the respondents are entitled to interest on the taxed costs. The appellant complains that interests were awarded on costs un-procedurally since the court did not award interests on costs. It is a complaint that the respondents did not respond to – perhaps because they

concede to it. Section 27(2) of the *Civil Procedure Act* settles the question whether the respondents were entitled to interests on the taxed amounts. The section stipulates as follows:

> " 2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

28. The statutory provision is quite clear that interest on costs can only be awarded by the Court in the exercise of its discretion.

    This did not happen in this case. The respondents were simply awarded costs. The Court did not award interest on costs. The respondents cannot, therefore, claim the same at the point of taxation.

29. The upshot is that each of the references filed herein succeed partly. The result is that the matter remanded back to the Taxing Master for reconsideration as guided by this ruling on instruction fees on the appeal; instruction fees on cross-appeal; VAT payable; disbursements payable; and interest on costs.

30. Since each party partially succeeded, each of them shall bear their own costs.

31. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2024.

JOEL NGUGI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR