



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 21 OF 2020**

(Before Hon. Lady Justice Maureen Onyango)

**REPUBLIC.....APPLICANT**

**VERSUS**

**COMMUNICATIONS AUTHORITY OF KENYA...RESPONDENT**

**EX PARTE APPLICANT: INFORMATION COMMUNICATION TECHNOLOGY ASSOCIATION OF KENYA (ICTAK)**

**(Being a Reference from the Decision of the Taxing Officer dated 2nd November 2021)**

**RULING**

1. A ruling on taxation on the Party and Party Bill of Costs in this matter was delivered on 2<sup>nd</sup> November 2021 by the Taxing Master. Aggrieved by the same, Counsel for the Ex Parte Applicant filed the instant application by way of chamber summons dated 5<sup>th</sup> December 2021 being a reference under Rule 11 of the Advocates (Remuneration) Order 1962. The application seeks the following orders:

- i. THAT the decision of the Learned Taxing Officer, Hon. N. M. Kyany'a dated 2<sup>nd</sup> November 2021 with respect to items 1, 14, 15, 22, 23, 24, 26, 27 and 38 be set aside.
- ii. THAT the Honorable Court be pleased to issue directions for re-taxation, or to tax afresh the objected items as may be just and appropriate in the circumstances.
- iii. THAT costs of and incidental to this application be provided for.
- iv. THAT the Honorable Court be pleased to grant such further and other relief that may deem just and expedient to grant.

2. In support of the application, the Applicant cites the following grounds –

- a. THAT the taxation award herein is extremely low, oppressive and contrary to binding legal principles of taxation.
- b. THAT the Learned Taxing officer erroneously held that the matter herein “was a simple matter that had a speedy conclusion” thereby failing to consider relevant circumstances and established judicial tenets that govern taxation.
- c. THAT the Learned Taxing Officer blatantly disregarded the ex-parte applicant's submissions on the Bill of Costs.
- d. THAT the Learned Taxing Officer failed to appreciate the complexity of the matter, industry involved, time taken and the vicious nature of defence attendant to the matter.
- e. THAT the Learned Taxing Officer failed to apply judicially established principles of taxation thereby arriving at a glaringly wrong decision.
- f. THAT the award by the Learned Taxing Officer is 700% lower than the average award made in similar judicial review matters by other Taxing Officers in courts of equal status, in proper exercise of discretion.

g. THAT the Employment and Labour Relations Court is equal in status to the High Court and therefore taxation awards in ELRC judicial review matters should prima facie be at par with those at the High Court.

h. THAT the award herein runs counter to the spirit of the Advocates Remuneration Order, with regard to fair, realistic and reasonable remuneration of advocates.

i. THAT should the decision be allowed to stand, advocates will continue to be agonize over unsustainable remuneration, leading to depressed capacity to offer excellent legal services in court.

3. The application is further supported by the affidavit of Adrian Kamotho Njenga, Counsel for the Applicant wherein he restates the grounds in support of the application.

4. The application is opposed by the Respondent vide a replying affidavit of FAITH WAMUYU, Counsel for the Respondent sworn on 18<sup>th</sup> January 2020.

5. In the affidavit Ms. Wamuyu states that the reference lacks merit and should be dismissed with costs. The grounds for stating so are that the objection was not filed within 14 days as provided in Rule 11 of the Advocates (Remuneration) Order, as the ruling was delivered on 2<sup>nd</sup> November 2021 while the reference was filed on 7<sup>th</sup> December 2021, after a lapse of 35 days without leave of the Court. That no reason has been advanced by the Applicant to explain the delay.

6. Ms. Wamuyu further deposes that contrary to the averments that the Taxing Master misdirected herself by failing to consider various interlocutory interventions, relevant circumstances and established judicial tenets including the Ex Parte Applicant's submissions, the Taxing Master in her ruling states that she had duly considered the parties submissions. She further deposes that the Ex Parte Applicant failed to demonstrate the complexity of the proceedings.

7. She deposes that the Taxing Master was justified in rejecting the Ex Parte Applicant's averments that the matter was complex, having verified from the pleadings that the matter was simple and was speedily concluded, therefore not warranting an increase a sprayed in the bill.

8. It is Ms. Wamuyu's position that it is settled law that a court will not interfere with a ruling of a Taxing Master in every case merely because the Court holds a different view on the matter from the Taxing Master, and would only interfere if satisfied that the Taxing Master was clearly wrong. That this has not been demonstrated in the application.

9. Ms. Wamuyu further deposes that it is a well-established principle of law that the Taxing Master's discretion will not be interfered with unless it is found that he/she has not exercised discretion properly, for example where his decision is actuated by some improper motive, has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider, or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted the rules of law, or gave a ruling which no reasonable man would have given. That none of these tests are satisfied in the instant Reference.

10. She deposes that this Court sitting over a reference has no power to "*interrogate actual work done*" as prayed; nor has the Court any discretion to substitute its own finding (at the whim of the Ex-Parte Applicant herein) merely because it could have reached a different conclusion from that of the Taxing Master in the taxation ruling,

11. She prays that the reference be dismissed with costs.

12. In a supplementary affidavit of Adrian Kamotho Njenga, he deposes that the Applicant fully complied with Order 11 of the Advocates Remuneration order as the Taxing Master's reasons were supplied on 25<sup>th</sup> November 2021 and the reference was filed on 7<sup>th</sup> December 2021.

13. The application was disposed of by way of written submissions. The Applicant filed submissions on 22<sup>nd</sup> January 2022 while the Respondent filed on 31<sup>st</sup> January 2022.

14. The issues arising for determination are whether the award of the Taxing Master was too low as to constitute an error in principle to justify interference by this Court.

15. The Ex Parte Applicant contends that the amount awarded was too low and constitutes an error in principle and therefore is an ideal case for this Court to intervene to ensure that the successful litigant is fairly remunerated.

16. The Applicant relies on the principles of taxation of advocates bills as set out in the case of **Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] EA 162**, 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.

17. The Applicant further relies on the case of **Joreth Limited v Kigano & another [2002] E.A. 92**, where the Court set out various factors that are to be considered in determining the instruction fee namely; 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.

18. The Applicant further relies on the case of **Republic v Nyeri County Government Exparte Central Kenya Coffee Mill Ltd [2017] eKLR** where the Court held that:

“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 [2012] eKLR**, an award of Kshs.1,000,000/= was upheld as instruction fee for a judicial review application which was determined preliminarily.”

19. It is further submitted for the Applicant that the matter herein having been in the domain of judicial review, the instruction fee of Kshs.1,000,000/= which was upheld in the year 2017 as instruction fee for a judicial review application which was determined preliminarily should apply herein. He submits that. The matter herein was viciously litigated. That it would therefore be paradoxical and against laid down legal principles to award lower amounts than those that courts across the judicial landscape have adjudged to be appropriate. That had the taxing officer considered the foregoing legal position, she would not have arrived at the inordinately low award as was the case. That taxation awards from judicial review matters attract amounts that are way beyond what the taxing officer awarded in this case. That this Court ranks *pari passu* with the High Court and must never be perceived as lagging behind in matters of advocate remuneration.

20. It is submitted that this Court has discretion to enhance the current award by pondering over among others, the complexity of the matter, diligence involved, time spent, research done and skill deployed by counsel. That this Court is mandated to ensure that the advocates' fee translates to reasonable compensation for professional work done.

21. For the Respondent it is submitted that whereas the Ex- Parte Applicant opposes the amounts awarded in items 1, 14, 15, 22, 23, 24, 26, 27 and 38, the Ex-Parte Applicant only submits on Item No. 1 being the instruction fees and as such, the other items should remain as taxed.

22. The Respondent submits that in the ruling, the Taxing Master states that she duly considered the submissions of the parties before taxing the bill, that the case is a simple matter that was resolved speedily. That there is therefore no basis for the Applicant's averment that the Taxing Master failed to consider various interlocutory interventions, relevant circumstances and established judicial tenets including Exparte Applicant's submissions.

23. The Respondent submits that it is settled law that this Court will not interfere with a ruling made by a Taxing Master in every case merely because the Court happens to hold a different view of the matter from that of the Taxing Officer. Rather, the Court is required to satisfy itself that the Taxing Master was clearly wrong before interfering with his decision. No such wrong decision by the Taxing Master is demonstrated. The Respondent relies on the decision in **First American Bank v Shah [2002] 1 EA 64**, where Ringera J. laid down the principles applicable in a reference filed in the High Court.

24. The Respondent further relies on the case of on the case of **Republic v University of Nairobi & another Ex parte Nasibwa Wakenya Moses [2018] eKLR** where the Judge cited the case of **Republic v Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, [2006] eKLR**. In that decision the following guidelines were provided by Ojwang J. (as he then was)

“it is trite that where complexity of proceedings is a relevant factor, the specific elements have to be demonstrated and judged on the basis of the express or implied recognition and mode of treatment by the trial judge”.

25. It is submitted that in the instant case, the Ex-parte Applicant having failed to demonstrate the complexity of the matter as required and the same be disallowed.

26. That no credible reason is given in the Reference for disturbing the Taxation Ruling, hence the Reference lacks merit and should be dismissed with costs to the Respondent. The Respondent relies on the following decisions: **Green Hills Investments Ltd v China National Complete Plant Export Corporation t/a Covac Civil Case No. 572 of 2000** citing the decision by Buckley U in the case of **Estate of Ogilvie: Ogilvie v Massey (1910) P 243**. The thread in the decision is that no particular circumstances were raised showing that the taxing master was wrong in his assessment of instruction fees.

27. The Respondent prayed that Court upholds the decision of the taxing master awarding the Exparte Applicant Kshs.190,070/=.

28. I have gone through both the Bill of Costs and the ruling of the Taxing Master. I do agree with the Taxing Master that the suit herein was a simple matter that was concluded speedily having been filed on 23<sup>rd</sup> June 2020 and judgment delivered on 9<sup>th</sup> April 2021. The same was never set down for hearing as it was disposed of by way of written submissions and parties attended Court only for mentions, directions and judgment, all of which were done virtually due to COVID 19 pandemic protocols.

29. The issue in dispute was also a straight forward issue as is verifiable from the pleadings, proceedings, judgment and the number of Court

attendances.

30. Again, as was observed in **Republic v University of Nairobi & another Ex parte Nasibwa Wakenya Moses (supra)**, the proceedings in question are purely public law proceedings. The Ex Parte Applicant is a public body while the Respondent is a state corporation. The Ex Parte Applicant was indeed lucky to get an order for costs at all.

31. I also agree with the submissions of the Respondent that whereas the Applicant has objected to items 1, 14, 15, 22, 23, 24, 26, 27 and 38 being all the items that were taxed off, the submissions only relate to item 1; instructions fees. The Applicant did not make any attempt to justify his demand for Kshs.6,987,000.00 in instructions fees, or Kshs.3,493,500.00 as getting up fees.

32. From the foregoing, I find no basis to interfere with the decision of the Taxing Master with the result that the reference is accordingly dismissed with costs.

33. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF APRIL 2022**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**