



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**ELRC PETITION NO.11 OF 2020**

**(as consolidated with ELRC Petition No.12 of 2020.)**

***(Before D.K.N.Marete)***

**PROF.GERALD KANYAGO MUTHAKIA.....PETITIONER**

**VERSUS**

**DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY.....RESPONDENT**

**RULING**

This is an application dated 26th February, 2021 and comes out as follows;

- a) The ruling and orders issued by the taxing master on 9<sup>th</sup> February, 2021 in respect to the items on instruction fees and getting up fees in the petitioner's Bill of Costs dated 27<sup>th</sup> November, 2020 be set aside in entirety.*
- b) This Honourable Court do assess the appropriate instruction fee as well as the corresponding getting up see which will substitute the sums awarded by the Deputy Registrar for the two items in the Petitioner's Bill of Costs dated 27<sup>th</sup> November, 2020.*
- c) Costs of this application be provided for.*

It is grounded as follows;

- 1. That the Chamber Summons Application by the Respondents is defective for not complying with the mandatory provision of section 5 of the Oaths and Statutory Declarations Act and Order 19 Rule 4 of the Civil Procedure Rules, 2010.*
- 2. That the Chamber Summons Application dated 6<sup>th</sup> November, 2020 as filed and canvassed is fatally and incurably defective in law and as such cannot stand and/or be ventilated before this Honourable Court.*
- 3. That the continued pendency of the application is an abuse of this Honourable Court's process and should be dismissed before this Honourable Court.*

The Respondent in a Replying Affidavit sworn on 12th March, 2021 avers that the application lacks merit and should be dismissed with costs.

This application is similar in nature and intent to the one in ELRC 12/2020 and shall therefore abide as such.

The Respondent/Applicants case is that she is aggrieved by the decision of the taxing master made on 9th February, 2021 amounting KShs.200,000.00 as instruction fee against the petitioner's party to party costs.

It is her further case that the taxing master failed to exercise her discretion thereby awarding the Petitioner a manifestly low amount as instruction fees, an inference that the decision was based on an error of law and fact. This comes out thus;

- ii) The taxing master failed to exercise her discretion judicially and thereby awarded the Petitioner a manifestly low amount as instruction fees justifying an inference that the decision was based on an error of law and fact.*

He amplifies the application as follows;

15. That I am advised by counsel on record, which advice I verily believe to be true that the taxing master failed to consider *inter alia* the undernoted factors thereby awarding an ordinally low amount in respect of instruction fees and getting up fees;

a) The Respondent's unlawful decision sought to reduce my earnings which reduction would have a detrimental effect on my livelihood. As a consequence, the Petition was of tremendous importance to me hence the responsibility bestowed upon counsel to ensure that judgment was entered in my favour was enormous. The suit called for thorough preparation and in-depth research of judicial precedence which was quite time consuming.

b) Due to the implications that the reduction in the Petitioner's earnings would have on my livelihood, an application seeking conservatory orders was made under certificate of urgency seeking to stay the decision of the Respondent contained in the letter dated 26<sup>th</sup> May, 2020. Extensive research was conducted so as to identify judicial authorities in support of the orders sought in the stay motion.

c) The instruction fees of Shs.1,500,000/= sought is justified and is commensurate with the work involved, the importance of the matter to me and the responsibility bestowed upon counsel to ensure that judgment was entered in my favour.

To him, these were weighty matters calling for a consideration of the bill of costs on a higher scale.

The Petitioner/Respondent's case is that the Taxing Master's decision is based on the law and should be left undisturbed. This is as follows;

3.0 It is well settled that whenever a taxing master is called upon to exercise discretion in the taxation of a bill of costs, the taxing master ought to exercise such discretion judiciously and not in a capricious manner. This was the holding by the Court of Appeal in the case of *Peter Muthoka & Another vs Ochieng & 3 Others* (2019)eKLR as follows;

“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion is to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, then the decision though discretionary may properly be interfered with”

3.1 As demonstrated hereunder, the taxing master failed to exercise her discretion judicially by declining to consider relevant factors in assessment of instruction fees and thereby awarded the petitioner a manifestly low amount justifying an inference that the decision was based on an error of principle.

Further, this being a constitutional petition, the instruction fees is governed by Schedule 6 A (1) (j) Advocates (Remuneration) (Amendment) Order, 2014, which is headed as follows;

“(J) Constitutional Petitions and prerogative orders”

It provides;

“To present or oppose an application for constitutional and prerogative Order 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-

i) Where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000.00

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 100,000.00”

The Applicant/Respondent further seeks to answer the issue of error in principle by the taxing master by relying on the following authorities;

8. Was there an error of principle in the exercise of this discretion?

*In the case of Manyonge Wanyama & Associates vs County Government of Nyeri & Another* (2020)eKLR

*In paragraph 38, 39 and 40 of this authority Lady Justice Mary C.Oundo held;*

“38.The issue for determination herein is whether the taxing officer had committed any errors of principle while taxing the bill of costs.

39. The often cited case of *First American Bank of Kenya vs. Shah and Others* (2002) 1EA 64 sets out the circumstances under which a judge of the High Court (read Environment and Land Court) can interfere with the taxing officer's exercise of discretion.

These principles are also to be found in the old court of Appeal decisions in *Premchand Raichand Limited v Another vs Quarry Services of East Africa Limited and Another* (1972) E.A 162 and *Arthur vs Nyeri Electricity Undertaking* (1961) E.A 492. The said principles were also re-affirmed by the Court of Appeal in *Joreth Limited vs Kigano and Associates* (2002) 1 E.A 92. These principles include;

i) That the court cannot interfere with the taxing officer's discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;

ii) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

iii) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

iv) It is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary."

40. From the above, it can be discerned that there is thus a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low as to lead to an injustice, see *Premchand's case* (supra)"

13. We refer your lordship to *Gathinga Mwangi & Company Advocates vs Jane Mumbi Kiano* (HC MISC Application No.318 of 2013 (NYERI) (unreported)

This authority number 2 in the Respondent's list of authorities dated 10<sup>th</sup> March 2021.

In paragraph 34 of this judgment, Lady Justice Teresiah Matheka held;

"It is upon the party seeking the costs to really justify them. It was the duty of the applicant to specify cogently and with conviction the complex elements in the proceedings, to specify the responsibilities he had in dealing with the matter to demonstrate the industry and time involved, the weight of documentation. There is nothing to stop the applicant from placing every available piece of evidence in support of the bill of costs. No such submissions are on the record from the applicant. It is not enough to file the bill of costs and expect the taxing officer to find all the supporting evidence by themselves from the record. Ojwang (as he then was) put it clearly it is up to the applicant to prove what they are asking for is what they are entitled to. I found no submissions as envisaged in the foregoing authority."

Again, in the authority of **Shadrack Wang'ombe Mubea vs County Government of Nyeri & Another (2017) eKLR** the court observed thus;

"For matters that are complex and opposed, taking into consideration the nature and importance of the petition or application, complexity, difficulty or novelty of the question raised, value of subject matter, and time expended by the advocate, the Taxing Master will exercise the discretion to award such sum as may be reasonable but not less than Kshs.100,000.00. In this case the Taxing Master found that the respondents had not demonstrated the novelty or complexity of the matter or amount of time the advocate had expended. Further, it was found by the Taxing Master that the value of the dispute which the respondents put at Kshs.9,000,000.00 had been unjustified. The item was then taxed at Kshs.100,000.00 for instruction fee."

This application comes out in favour of the claimant/ respondent. This is a mere case of termination of employment coaxed in a constitutional petition. The Respondent/Applicant has not demonstrated due complexity as would shift the taxing master to move way beyond schedule 6A (i) (J) (ii). This court does not feel compelled to intervene and disturb the finding of the taxing master.

This being the cause, I do not see any unreasonable or improper exercise of the taxing master's discretion on the matter. The application therefore fails.

I am therefore inclined to disallow the application with orders that each party bears their costs of the same.

**DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JUNE, 2021.**

**D.K.NJAGI MARETE**

**JUDGE**

Appearances

1. Miss Nyaga instructed by Ngatia & Associates Advocates for the Respondent/Applicant

2. Mr. Wahome Gikonyo instructed by Wahome Gikonyo & Company Advocates for the Claimant/Respondent.