



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 3 OF 2015

SHADRACK WANG'OMBE MUBEA.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF NYERI.....1ST RESPONDENT

THE GOVERNOR, NYERI COUNTY.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 23rd June, 2017)

RULING

The costs of the petition were awarded for the respondents against the petitioner and taxed accordingly. The respondents filed on 13.01.2017, and through Wahome Gikonyo Advocates, a chamber summons under rule 11(2) of the Advocates (Remuneration) Order. They prayed for orders:

- a) That the Taxing Master's order dated 2nd December, 2016 taxing the Bill of Costs dated 18.10.2015 be set aside and the bill be taxed afresh.
- b) That the costs of the application be provided for.

The application was supported with the affidavit of Charles Wahome Gikonyo Advocate attached thereto and urged upon the following grounds:

- a) The Bill of Costs dated 18.10.2015 was not taxed in accordance with the Advocates Remuneration(Amendment) Order,2014, Schedule 6 and specifically paragraph 1(i) (ii) and other applicable paragraphs especially with regard to items number 1, 2, 3, 27, 32, 35, 36, 41, 42, 46, 47, 48, 49, 50, 51, 73, 74, 78, 86, and 87.
- b) The applicants have filed an objection to the illegal taxation.
- c) The bill was taxed at Kshs. 198, 653.00 on 02.12.2016 which was grossly low and failed to take into account the nature and importance of the matter.

The application was opposed by the petitioner through the replying affidavit of Humphrey Karoki Ndirangu Advocate filed on 28.02.2017. It was stated that the respondents had failed to demonstrate an error of principal made on the decision of the Taxing Master in assessment of the Bill of Costs. Further, it was submitted that costs should not be allowed to rise to such level as to confine access of courts to the wealthy. Thus, it was urged for the petitioner that the Judge should not interfere with the decision by the Taxing Master.

The respondents rely on **Green Hills Investment Ltd – Versus- China National Complete Plant Export Corporation (Complainat) T/A Covac [2004]eKLR** where Ibrahim J held that as a matter of principle, discretion ought to be exercised within reason, fairly and judiciously and the Taxing Master ought to take time to look at issues of complexity of facts and the law and the industry and time put in the matter. Further, the amount awarded should not be outside reasonable limits so as to be manifestly inadequate to such extent that it could be deemed to be a mockery of legal representation.

The court considers that the issue for determination is whether the Taxing Master exercised her discretion reasonably, fairly and judiciously in taxing items 1 and 2 of the Bill of Costs and the other cited items of the Bill.

The respondents submitted before the Taxing Master on item 1 to the effect that the matter was a complex constitutional dispute with lengthy pleadings, affidavits and bulky exhibits comprising over 2900 folios on the part of the respondents. That the case entailed application of the numerous and cited provisions of the constitution and was novel in so far as it related the interpretation of public service law as it related to employment of the petitioner in the nascent devolved system of government with the related statutory provisions. In taxing item 1 the Taxing Master invoked paragraph 1 (j) (iii) of the Advocates (Remuneration Order), 2006. For not complex or not opposed constitutional or judicial review matters a reasonable sum is to be awarded but not less than 45, 000.00. 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.

For item 2, the Taxing Master invoked paragraph 2 of the schedule of the Order, 2006 that where a denial of liability is filed or issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of instruction fees allowed on taxation. Accordingly, the Taxing Master allowed the item at Kshs.33, 333.00 being one third of the amount allowed for instruction fees.

The Court has considered the Taxing Master's decision and finds that it would be within the prescribed principles but for invoking the 2006 Order instead of the 2014 Order. The same would therefore be amenable to interference. While making that finding, the Court has considered the nature and importance of the petition that sought to interpret the constitutional and statutory provisions about public service employment in the nascent county governments. The Court returns that the matter was invariably complex, difficulty, and novel. Nevertheless, the Court has also considered the need to promote access to justice and the courts generally as envisaged in Article 48 of the Constitution. In furtherance of that provision and taking into account that the Taxing Master's decision would be expected to be within the prescribed provisions while at the same time safeguarding the principles of access to justice, the Bill should be taxed afresh accordingly. Thus, the court considers that the Bill of Costs should be taxed bearing in mind the nature of the matters in dispute and despite the novelty and complexity involved, the taxation should also take into account and promote access to justice as the proceedings generally developed jurisprudence in the new area of devolved system of government – that the petitioner's action in initiating the proceedings was partly in good effort to advance the law.

As the applicable Advocates Remuneration (Amendment) Order, 2014 was not applied the Bill of Costs will be submitted to the Taxing Master for fresh taxation in accordance with the applicable Order.

In conclusion, the application filed for the respondents by the chamber summons dated 12.01.2017 and filed on 13.01.2017 is hereby allowed in terms of prayer (a) and each party to bear own costs of the application.

Signed, dated and delivered in court at Nyeri this **Friday, 23rd June, 2017.**

BYRAM ONGAYA

JUDGE