



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION NO. 4 OF 2014

GEOFFREY MAKANA ASANYO.....PETITIONER

v

NAKURU WATER & SANITATION SERVICES COMPANY LTD.....1ST RESPONDENT

JOHN CHERUIYOT.....2ND RESPONDENT

RIFT VALLEY WATER SERVICES BOARD.....3RD RESPONDENT

JAPHETH MUTAI.....4TH RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU.....5TH RESPONDENT

H.E. KINUTHIA MBUGUA.....6TH RESPONDENT

ATTORNEY GENERAL.....7TH RESPONDENT

AND

NATIONAL UNION OF WATER & SEWERAGE EMPLOYEESINTERESTED PARTY

RULING

1. On 30 May 2014, Ongaya J delivered judgment in which he issued declarations to the effect

1. THAT the pretentious decision and process of advertising and intended filling of the positions of 6 directors of the 1st Respondent was opaque, egregious, clandestine, capricious, whimsical, and contrary to Articles 41 and 47 of the Constitution of Kenya hence unconstitutional, and the decision and process of advertising and consequential processes are null and void.

2. A Declaration that in realigning the organisation and operations of the 1st Respondent to the Constitution of Kenya, 2010 and to good governance, the 1st to 6th Respondents by themselves and their respective agents shall institute just transitional measures that respect the Petitioner's accrued Constitutional and other rights and obligation as the appointed serving directors of the 1st Respondent representing the Local Business Community. 3. THAT the Respondents to pay the Petitioner's costs of the Petition.

2. Pursuant to the costs order, the Petitioner filed a Bill of Costs on 3 June 2014 in the amount of Kshs 33,531,048/-, and which bill was taxed on 7 August 2014, in the sum of Kshs 14,270,772/-.
3. After the taxation, the parties went on an offensive of filing various applications and counter applications. But of materiality at present are two applications.
4. The first application was a summons by the 3rd to 6th Respondents filed in Court on 20 August 2014. The relevant prayers in the summons were

1.
2.

3. THAT the Honourable Court be pleased to set aside the Taxing Master's decision delivered on the 7th August, 2014 and

4. THAT this Honourable Court be pleased to reassess the fees due to items No. 1,2,4,9,11,12,13,16,18,19,23,32,35 and 38 in respect of the bill of costs and make a finding of the same.

5. THAT in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to remit items No. 1,2,4,9,11,12,13,16,18,19,23,32,35 and 38 in respect of the bill of costs dated 3rd June 2014 for review and reconsideration with direction on the taxation.

5. The second application was also a summons by the 1st Respondent and filed in Court on 27 October 2014 and seeking

1....

2. THAT the Honourable court be pleased to set aside the taxing officer's ruling on 7th August, 2014 as it relates to the reasoning and determination of item 1,2,6,11,12 and 13 of the Petitioner's bill of costs dated 3rd June, 2014.

3. THAT this Honourable Court be pleased to adjust the figures and reassess the fees due to the Petitioner and/or in the alternative the matter be remitted to such other Taxing master as the court may direct for re-assessment ab initio.

6. It is these 2 applications that are the subject of this ruling.
7. Both applications stated the grounds relied on and were supported by affidavits.
8. The 3rd to 6th Respondents filed written submissions on 17 November 2014.
9. The Petitioner filed written submissions on 14 November 2014 and a replying affidavit to the summons on 17 November 2014.

3rd to 6th Respondents case/submissions

10. The 3rd to 6th Respondents case is that the Taxing Master misdirected herself and acted contrary to established principles on taxation of party to party Bill of Costs; failed to provide the principles/reasons used in arriving at the instruction fees; failed to consider that only one out of three declarations in the Petition were allowed; considered the Advocate's (Remuneration) (Amendment) Order, 2014 instead of Advocates (Remuneration) Order 2009 and that the Petition did not raise any novel or complex issues of law.
11. During submissions, Prof. Ojienda SC for these Respondents stated that he was seeking prayers 3 and 4 of the summons.
12. He submitted that the applicable order was the Advocates (Remuneration) Order 2009 (Legal Notice No. 50 of 2009)
13. Senior Counsel urged that the Petition did not disclose any monetary value and that it was not complex. Further, he submitted that no witnesses were prepared or called and the Petition was

- determined on the basis of submissions.
14. According to Senior Counsel, there was no basis to tax instruction fees at Kshs 10,000,000/- and the same should have been taxed at Kshs 49,000/- as per applicable scale.
 15. Prof. Ojienda also attacked the Taxing Officer's decision to allow Kshs 1,000,000/- for a preliminary objection relating to jurisdiction. He argued the same should have been allowed at Kshs 6,300/-.
 16. Senior Counsel also attacked the getting up fees which was allowed at 1/3 of the instruction fees.
 17. The Senior Counsel cited the case of *Joreth Ltd v Kigano & Associates* to buttress his submissions and urged the Court to reassess the fees instead of remitting the bill back to the Taxing Officer.

1st Respondent's case/submissions

18. The 1st Respondent's contentions are that the Petition was heard expeditiously and determined on affidavit evidence; that the Taxing Officer did not state the complexity involved and that the Petitioner had only sought declaratory orders which were simple and straight forward and that the Taxing Officer failed to consider established legal principles of taxation.
19. Mr. Ombui for the 1st Respondent associated himself with the submissions by Prof. Ojienda. He submitted that the Taxing Officer misapprehended the principles applicable such as importance of the case and urged that the Petition was not complex.
20. Counsel also urged the Court to adopt a comparative approach in award of costs/taxation and that fees should be reasonable.
21. In a parting shot he submitted that the costs should be apportioned equally between all the Respondents.

Petitioner's case/response

22. The Petitioner's case as can be gleaned from his replying affidavit are that the Taxing Officer applied the relevant legal principles, the instructions fees as awarded was not unreasonable or exaggerated.
23. Mr. Kipkoech for the Petitioner right from the outset of his submissions admitted that the applicable order was the Advocates (Remuneration) Order, 2009, and also partly the 2014 Order.
24. Counsel posited that the Court should reassess the costs instead of referring the matter back to the Taxing Officer.
25. He agreed that the correct principles were set out in the case of *Joreth Ltd v Kigano & Associates* and submitted that the Petition raised important questions and declarations which related to fundamental rights, leadership and integrity, and this was reflected in the caliber of advocates involved.
26. On getting up fees, Mr. Kipkoech submitted that it was awardable even in situations where no witnesses were prepared provided that the matter was confirmed for hearing.
27. On the preliminary objection, counsel submitted that it was no ordinary objection because authorities were cited and written submissions filed.

3rd to 6th Respondents rejoinder

28. In a rejoinder, Prof. Ojienda contended that the trend in the Supreme Court had been to level costs and the massive and voluminous documents were not prepared and or filed by the Petitioner but by the Respondents.

Evaluation

29. The Court has considered all the other authorities cited by the parties even though no specific reference has been made to them.
30. Before discussing the merits of the two references, a few words about the alleged non-giving of reasons by the Taxing Officer and costs in the Employment and Labour Relations Court.
31. The 1st Respondent had sought an order that the reasons for the taxation be deemed to be those

- given in the Taxing Officer's ruling.
32. The Petitioner had, relying on the authority of Nairobi HCCC No. 658 of 2004 (OS), *Postal Corporation v Donald Kipkorir & 3 ors*, contended that the reasons in the ruling were sufficient.
33. In my view, the position as submitted by the Petitioner is sound in law and is supported by many decided cases. A few words on costs.

The primary source of the Court's power to award costs is located in section 12(4) of the Employment and Labour Relations Act. The section provides that

In proceedings under this Act, the Court *may*, subject to the rules, make such orders as to costs as the Court considers *just (emphasis mine)*.

34. My understanding of the section is that an order of costs is discretionary and should be made after evaluating what is just in the circumstances of each case. *Just* has been defined in the Concise Oxford English Dictionary, 12th edition as, *morally right and fair, appropriate or deserved.. well founded...*
35. In my view, the Employment and Labour Relations Judge has been given a more wider discretion and latitude in awarding costs and in making that determination he may consider factors which the High Court judge may not consider. Such factors may include the relationship between the litigants and even the financial position of the parties.
36. And flowing from that understanding, my take is that costs do not follow the event, unlike the situation obtaining under the Civil Procedure Act, where section 27 (1) provides that

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or other issue shall follow the event unless the court or judge shall for good reason otherwise order (emphasis mine).

37. The Employment and Labour Relations judge is under an obligation to consider what is *just* or what the justice of each case demands in making a costs order. A successful party therefore would not be entitled to costs as a matter of course.

Applicability of Advocates Remuneration Order in the Employment Court

38. One of the issues raised related to which of the Advocates (Remuneration) Order was applicable. All the parties ideally agreed that the relevant and applicable Order is the Advocates Remuneration Order, 2009. But is that the correct legal position?
39. It is not in doubt that the Petition traversed two different regimes of Advocates (Remuneration) Orders.
40. In my view, the Advocates (Remuneration) Order, 2009 was majorly applicable save for those attendances, filings and processes taken after the commencement of the Advocates (Remuneration) (Amendment) Order, 2014 on 11 April 2014.
41. The cited Advocates (Remuneration) Orders have among other provisions provided for remuneration in proceedings before the High Court. There is no mention of the Employment and Labour Relations Court (or for that matter the Industrial Court).
42. The record bears out that Prof. Ojienda while arguing the preliminary objection on jurisdiction on 7 July 2014, had advanced an argument that although this Court had the status of the High Court the similarities or status related only to salaries and dignity of the Court but not jurisdiction.
43. Were the argument advanced by Prof. Ojienda be taken to its logical conclusion, it would mean that schedule 6 of the Advocates (Remuneration) Order would not apply to proceedings before this Court. But for now, that is a side issue for no which proper legal arguments have been advanced.

44. For myself, I am ready and do accept that the various Advocate (Remuneration) Orders and more so schedule 6 is applicable to proceedings in this Court, though with a rider that considering the types of disputes presented before the Court, a more specific and tailored schedule should be prepared. Most of the disputes before the Court relate to employment disputes which by nature are not commercial relationships.

Fees on the preliminary objection (Item 13)

45. The Taxing Officer allowed Kshs 1,000,000/- on account of a preliminary objection.
46. The preliminary objection related to jurisdiction. For consideration was, whether the Petitioner had an employer/employee relationship with the Respondents to confer jurisdiction on the Court as apart from the High Court. In the typed records, the arguments traverse roughly some 10 pages.
47. The objection must have turned on the definition of employee in the Employment Act and jurisdiction of the Court under the Employment and Labour Relations Court Act. It was a matter of statutory interpretation.
48. The law reports are now replete with decisions of this Court on who is an employee and the legal distinction on employment status as well as decisions of the High Court on the proper and correct extent of the jurisdiction of this Court vis a vis the High Court.
49. There was nothing complex or novel in relation to the preliminary objection.
50. Under schedule 6 paragraph 2(j) the prescribed fees for taking instructions to present or oppose applications for constitutional orders is set at Kshs 100,000/- where there is opposition.
51. In allowing Kshs 1,000,000/- for the preliminary objection, the Taxing Officer's decision was so high as to be unreasonable and arbitrary.
52. I would set aside the same and substitute thereof Kshs 100,000/-.

Instruction fees (item 1)

53. Now to the most challenged item, as to whether the Taxing Officer, misdirected herself or misapprehended the legal principles applicable in taxation of instruction fees.
54. The starting point is that the Advocates (Remuneration) Order, 2009. The Order sets the minimum fees where the monetary value of a claim or subject matter can be ascertained.
55. The Petition as presented here had no monetary value. The Petitioner was seeking various declarations, three to be exact, and they were all hinged on alleged violation of fundamental rights or breach of Constitutional provisions.
56. In determining the appropriate fees, the Taxing Officer is obligated to consider the *nature and importance* of the Petition, *complexity of issues raised, difficulty or novelty of questions raised, time expended* by the advocates and *value of subject matter (see the Joreth case)*.
57. After considering the factors, then the Taxing Officer can adjust the minimum fees upwards.
58. In the Petition herein, the Petitioner was seeking a declaration that the advertisement for the position he then held as director of the 1st Respondent was in breach of the right to fair labour practices and the right to fair administrative action and hence unconstitutional. He further sought a declaration that the Respondents had contravened the national values and principles of governance and responsibilities of leadership.
59. The Petitioner was in effect asserting violation of his rights as a person and the Respondents non compliance with constitutional provisions. The 1st Respondent and indeed all the Respondents were bound in their conduct and actions to uphold the Constitution and respect the Petitioner's rights.
60. The Petition in my view raised important issues in respect of adherence to Constitutional values, principles and norms, but these questions were not complex or novel. The issues required application of constitutional standards to what appeared not to be very contentious facts as raised by the Petitioner.
61. In his submissions, the Petitioner had only alluded to the complexity of the Petition and nothing more.
62. The Taxing Officer, in her ruling deduced the complexity of the Petition from the volume of documentation filed. The Petitioner did not make any reference to the voluminous nature of documents filed in his submissions.

63. To my mind, the voluminous nature of documents filed by a party alone cannot be a pointer as to the complexity of a question arising for determination. The complexity and difficulty should be weighed and measured against the issues presented for determination. There were no difficult or complex documents to be discerned or interpreted by the Court. The record does not bear that there were complex questions of law.
64. In my view, the Taxing Master misdirected herself by holding that the documentation filed made the issues for determination complex. The documentation should have been considered under perusal.
65. Further, the Taxing Officer considered the long hours spent by the Petitioner's counsel. I have looked at the record and the Bill of Costs as filed, however, I have not been able to decipher where the Petitioner or his counsel disclosed the time expended in attending to the Petitioner, the Petition or Court.
66. For a litigant to justify a bill under this head, some form of proof such as dates, duration of attendance should be laid before the Court. Call logs and such should meticulously be kept and produced during taxation. A mere assertion would not do.
67. In taxation the Taxing Master should consider the interest of the parties as well.
68. In my view, the Taxing Officer misapprehended and misdirected herself on this item as well. In her ruling at page 2 last paragraph, she alluded to *the long hours that could have been spent by counsel to his client a director...* without evidence of the long hours.
69. I would therefore set aside the Kshs 10,000,000/- allowed by the Taxing Officer and substitute in lieu thereof Kshs 300,000/- as instruction fees.

Getting up fees (item 2)

70. Another disputed item was getting up fees. The Taxing Officer allowed Kshs 3,333,333/- as getting up fees, this being 1/3 of the instruction fees of Kshs 10,000,000/- she had allowed.
71. For the Respondents, it was urged that because the Petition was concluded on the basis of the record and submissions, getting up fees was not allowable.
72. For the Petitioner, it was contended that getting up fees was correctly allowed.
73. Getting up fees is allowable where issues for trial are joined on the pleadings and where the Advocate prepares the case for trial.
74. Petitions are ordinarily determined on the basis of the papers filed which means that rarely will a counsel sit with witnesses to prepare for trial through oral hearing. The parties herein themselves agreed to proceed based on the papers.
75. But it cannot be gainsaid that there was no preparation for trial. I would therefore set aside the fees allowed under this item and substitute thereof 1/3 of the reassessed instruction fees, which I reassess at Kshs 100,000/-.
76. The challenged items which are not discussed in this ruling are left undisturbed.

Conclusion and Orders

77. From the foregoing, the summons filed by the 3rd to 6th Respondents and 1st Respondent are allowed and the Court sets aside the decision of the Taxing Officer on items no. 1, 2 and 13 ? and substitute therefore
 - i. Instruction fees Kshs 300,000/-
 - ii. Instruction fee on preliminary objection Kshs 100,000/-
 - iii. Getting up fees Kshs 100,000/-
78. As the 1st and 3rd to 6th Respondents agreed, the costs to be borne equally amongst themselves or as the Respondents may indicate presently.
79. Each party to bear own costs of the references.
80. The Deputy Registrar to issue a fresh certificate of costs in conformity with this ruling within the next 5 days.

Delivered, dated and signed in Nakuru on this 23rd day of January 2015.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates

For 1st Respondent Mr. Ombui instructed by E.M. Juma & Ombui Advocates

For 3rd to 6th Respondents Prof. Ojienda, SC, instructed by Odhiambo & Odhiambo Advocates