



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ouko, SCJ in Chambers)

PETITION NO. 6 OF 2014

— BETWEEN —

FREDRICK OTIENO OUTA.....APPELLANT

-AND-

JARED OTIENO ODOTO.....1ST RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES

COMMISSION.....2ND RESPONDENT

RETURNING OFFICER

NYANDO CONSTITUENCY.....3RD RESPONDENT

ODM PARTY.....4TH RESPONDENT

(Being a Reference seeking to vary the decision of the Hon. Kasavuli, Deputy Registrar, dated and delivered on 9th June 2023)

Representation:

Otieno, Yogo, Ojuro & Co. Advocates for the Appellant

Ben Aduol Nyanga & Co. Advocates for the 1st Respondent

RULING OF THE COURT

[1] UPON perusing this application brought pursuant to the provisions of Sections 3A and 23(2)(e) and (i) of the Supreme Court Act and Rule 62 of the Supreme Court Rules 2020 in which the only relief now left is for the single Judge to consider reviewing the decision of the Deputy Registrar dated 9th June 2023 on

the Bill of Costs with respect to items Nos. 1, 2, 3, 5, 13, 14, 19, 20, 25, 26, 35, 36, 37 and 40 and;

[2] BEARING IN MIND that the taxation in dispute arises from an election petition in which Fredrick Otieno Outa, the appellant was found to have been properly elected Member of the Parliament for Nyando Constituency in the 2013 general elections, and the appellant's costs in the High Court, Court of Appeal and the Supreme Court were to be borne by Jared Odoyo Okelo, the 1st respondent; and

[3] UPON perusing the three affidavits sworn by the 1st respondent on 16th June 2023, 3rd July 2023, and 7th July 2023 as well as the affidavit sworn by Bruce Odiwor Odeny on 3rd July 2023 in support of the Motion as well as the submissions and supplementary submissions by the 1st respondent filed on 22nd June 2023 and 4th July 2023, respectively, wherein he explains that the imminent execution will diminish his political career and cause him irreparable loss incapable of being compensated in monetary terms; that he had raised an objection to the Bill of Cost dated 20th August 2014, and sought for its dismissal because it was not served within the mandatory seven days as provided for under clause 2(1) of the Third Schedule of the Supreme Court Rules 2012; that the Deputy Registrar, however, noted that the Supreme Court Rules 2012 did not provide for any sanctions therein and in any event, the issue had been overtaken by events; that the Deputy Registrar deliberately failed to apply the sanctions under Rule 55(a) and (b); and

[4] UPON further considering the 1st respondent's submissions to the effect that pertaining to item No. 1, the Deputy Registrar disregarded the ratio enunciated by the Court of Appeal sitting in Nyeri in *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 Others*; CA No. 12 of 2018; [2018] eKLR to the effect that an award of costs is not a punishment or a deterrent measure to scare away litigants from the doors of justice; that the Deputy Registrar misdirected himself by failing to take into account all the conditions set out under clause 9(2) of the Third Schedule in awarding instruction fees; that with regard to item No. 2, the scale provides for Kshs. 1000; that with regard to items

Nos. 3, 13, 14, 19, 20, 25, and 26, the advocate did not sign a certificate that the number of folios in respect of any item charged was correct and the Deputy Registrar confirmed the same and found 51 folios as opposed to 2671 folios but allowed the costs anyway; and that on item No. 5, the only air ticket produced had a figure of Kshs. 4,800 but the Deputy Registrar awarded Kshs. 12,460 instead; and

[5] NOTING that the appellant in his preliminary objection, replying affidavit, and written submissions all filed on 3rd July 2023 is opposed to the application on grounds that counsel for the 1st respondent lacks audience before this Court for want of leave pursuant to Order 9 Rule 9 of the Civil Procedure Rules; that the 1st respondent has failed to demonstrate the conditions for grant of an order for stay pursuant to Order 42 Rule 6 of the Civil Procedure Rules; that Rule 55(a) and (b) is discretionary and the Deputy Registrar exercised this discretion judiciously in issuing directions with respect to the appellant's Bill of Costs; that the notice of objection having been filed way after compliance of the said directions had been overtaken by events; that in any event, the 1st respondent was represented by counsel on 13th March 2023 and 11th April 2023 when the said directions were issued and failure by counsel on record to raise an objection on the said dates cannot be visited on the Deputy Registrar; and

[6] FURTHER NOTING the appellant's argument that pursuant to clause 9(2) of the Third Schedule of the Supreme Court Rules 2012, the Deputy Registrar found that indeed the appeal raised complex questions of law and facts, taking into account that this was the second appeal before this Court following the promulgation of the Constitution in 2010 and a lot of research and industry was employed by the appellant's team to ensure success, hence the instruction fees awarded by the Deputy Registrar was reasonable; that item No. 2 of the Bill of Costs was awarded according to scale in the Third Schedule to the Supreme Court Rules 2012, that is Kshs. 2000; that pertaining to item Nos. 3, 13, 14, 19, 20, 25, and 26, clause 3(2)(c) of the Third Schedule relied on by the 1st respondent, allows

the Deputy Registrar to exercise discretion which discretion was duly and properly exercised.

In view of the foregoing, **I, NOW THEREFORE OPINE AS FOLLOWS:**

[7] In the first place, the appellant filed his Bill of Costs on 21st August 2014. For some unknown reasons, it has taken more than 9 years and two election cycles for the Bill to be taxed. The second thing to note is that the appellant has in his arguments as reflected in paragraph 5 above, repeatedly referred to provisions of the Civil Procedure Rules for the arguments that counsel for the 1st respondent lacked audience before the Court for want of leave pursuant to *Order 9 Rule 9 of the Civil Procedure Rules*; that the 1st respondent has failed to demonstrate the conditions for grant of an order for stay pursuant to *Order 42 Rule 6 of the Civil Procedure Rules*. By the provision of Section 1 (2) of the Civil Procedure Act and the Rules made pursuant to it, these provisions have no application before this Court. Civil proceedings in this Court are regulated by the Supreme Court Rules.

[8] The Registrar, as the taxing officer, has the power to tax costs arising out of any proceedings before this Court, between the parties in accordance with the scale set out in the Third Schedule to the Rules and the jurisdiction of a single Judge to entertain a reference made within seven days by a person who is dissatisfied with a decision of the Registrar in the taxing of costs. The applicable law at the time of filing the Bill of Costs in 2014 was the Supreme Court Rules 2012 and the Third Schedule thereunder which, in contrast with the 2020 Rules, permitted any person dissatisfied with the decision of a single judge to apply to the Court to vary, discharge or reverse the decision. However, following the promulgation of the 2020 Rules, this has changed so that the decision of a single judge in a reference on taxation, just like in the case of review of any decision of the Registrar under Rule 6, is final.

[9] In the exercise of that function the taxing officer, in his ruling of 9th June 2023 taxed the bill at Kshs. 6,184,590, the main bone of contention being instruction fees. While the appellant had sought Kshs. 10,000,000 under this item, the taxing

officer awarded Kshs. 6,000,000, based, first on the complexity of the question the appeal raised and secondly, guided by previously decided cases, all of which appear to have taxed the bills presented at half the amount sought.

[10] The principles of setting aside the decision of a Taxing Officer are now old hat, going by the numerous decisions of the superior courts below. As early as 1972 these principles were propounded by *Spry VP*, in the leading case of ***Premchand Raichand Limited & Another v. Quarry Services of East Africa Limited and Another***; [1972] EA 162, which has been approved in a long line of subsequent rulings, for example, ***First American Bank of Kenya v. Shah and Others***; (2002) EA 64 and ***Joreth Ltd v. Kigano and Associates*** (2002); 1 EA 92, to name but two.

[11] A certificate of taxation will be set aside and a single Judge can only interfere with the taxing officer's decision on taxation if;

- a. *there is an error of principle committed by the taxing officer;*
- b. *the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy; (and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).*
- c. *the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and*
- d. *the award proposed is so far as practicable, consistent with previous awards in similar cases.*

To these general principles, I may add that;

- i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,

- ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,
- iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes.

[12] Starting with item No. 1 and guided by Rule 9 (2) of the Third Schedule to the effect that the fees allowed for instructions to appeal or to oppose an appeal is in the discretion of the taxing officer and shall be such sum as he shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the person to bear the costs and all other relevant circumstances; and shall include all the work done in connection with the appeal, including attendances, correspondence, perusals, and consulting authorities. The absolute least is that fees must be commensurate to work done, and it will amount to unjust enrichment if it is not awarded for this purpose.

[13] Before applying these principles to the facts in this reference, it has to be restated that the genesis of this reference is an election petition that transcended the High Court through the Court of Appeal up to this Court; and that at every stage the appellant was successful and awarded costs. Whereas the main issue in contestation was whether the appellant committed an electoral offence of bribery, this Court also determined issues of constitutionality of Section 85A of the Elections Act on the restriction of the jurisdiction of the Court of Appeal to '*matters of law only*' in election-dispute appeals, as well as whether members of Constituency Development Fund are "*public officers*" under the Constitution. In our judgment of 3rd July 2014, we declared at paragraph 211 that the appeal raised complex questions of law and fact and awarded the appellant costs against the 1st respondent from the High Court, Court of Appeal, and in this Court.

[14] The taxing officer rendered himself as follows in his consideration of item No. 1. (Instruction fees);

“I have on my part been guided by the decision of the Superior courts in such matters and the decision of my predecessors in this court and I am satisfied that the instruction fees sought for herein is excessive. For instance, in SC PETITION NO. 24 OF 2018 HON. CLEMENT KUNGU WAIBARA VS HON. ANNIE WANJIKU KIBEH & ANOTHER where the Petitioner had sought for instruction fees of Kshs. 1,000,000.00, my predecessor taxed it at Kshs.600,000.00. In SCK PETITION NO. 23 OF 2018 SAMMY KEMBOI KIPKEU VS BOWEN DAVID KANGOGO the petitioner had sought for instruction fees of Kshs. 1,000,000.00 but it was taxed at Kshs. 500,000.00.

[17] It is evident from the two decisions referred to by the 1st respondent that; my predecessor reduced instruction fees by half or thereabouts”

With that, the taxing officer proceeded to tax item No.1 at Kshs. 6,000,000.00 (Kenya shillings six million only).

[15] Although taxation is not a mathematical exercise but a discretionary process the taxing officer merely purported to mechanically reduce to half the instruction fees claimed because that is what his predecessors had done previously. There has to be some justification for doing so. Even looking at some of the authorities relied upon, the principle adopted here by the taxing officer was still flawed and the amount taxed was manifestly excessive as to amount to an injustice. The taxing officer, after properly setting out the criteria of taxation in Rule 9(2) of the Third Schedule, and stressing the complexity of the appeal, put undue consideration on reducing the amount claimed into half and ignored the fact that in the High Court appellant was awarded an all-inclusive cost of Kshs. 750,000, and Kshs. 350,000 as instruction fees by the Court of Appeal. The taxing officer ought to have also been guided by a legion of decisions of the superior courts on costs in election petitions. Those decisions emphasize that costs are not meant to be punitive but to

compensate a successful litigant; that high costs are an impediment to the right to access to justice and; that in awarding costs, courts must be guided by the principles of fairness, justice, and access to justice. See *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others*; [2013] eKLR, *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* (*supra*); *Dennis Magare Makori & Another v IEBC & 3 Others*, Kisumu Election Petition Appeal No. 22 of 2018; and *Philip Kyalo Kaloki v IEBC & 2 Others*, Election Petition Appeal 25 of 2018.

[16] It was as a result of concerns over high awards of costs in election petitions that in 2017, Elections (Parliamentary and County Elections) Petitions Rules were promulgated, introducing a mechanism for capping costs in election petitions, whose rationale is to extend a fair and consistent compensation of costs incurred by the successful litigants and to deter unjust enrichment through inflated bills of costs. Rule 30 thereof enjoined election courts, at the conclusion of a petition or appeal, to make an order specifying-

- “(a) the total amount of costs payable;
- (b) the maximum amount of costs payable;
- (c) the person who shall pay the costs under paragraph (a) or (b); and
- (d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid”.

[17] In many election petitions today which have been heard fully and decided on merit, costs have been capped by courts at no more than Kshs. 2.5 million or 3 million. Going by these trends, an award of Kshs. 6 million is a new record high. In *Esposito Franco v Amason Kingi Jeffah & 2 Others* [2014] eKLR, costs were capped at a total of Kshs. 3 million to be shared equally by all the 3 respondents. In *Marble Muruli v Wycliffe Oparanya & 3 others* [2013] eKLR, costs were capped at Kshs.5 million to be shared between the petitioner, 1st

respondent and the 2nd respondent. In ***Ferdinand Ndungu Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others*** [2013] eKLR the court capped the total costs at Kshs.5 million, payable to all the 5 respondents jointly. In ***Jackton Ranguma v IEBC & others*** [2017] Kshs.2.5 million was awarded to the 1st and 2nd respondents, in ***Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others*** (supra), the Court of Appeal capped the total costs at Kshs.2.6 million for 3 respondents. Owino Paul Ongili Babu, the 1st respondent in ***Francis Wambugu v Owino Paul Ongili Babu***; SC Petition No. 15 of 2018, had sought Kshs. 30 million as instruction fees but the taxing officer in this Court awarded Kshs. 2 million. Similarly and finally, in ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others*** (supra), the Court of Appeal reduced costs of Kshs.10 million awarded by the High Court to Kshs.2 million.

[18] In the circumstances, I come to the conclusion that the taxing officer committed an error of principle in awarding Kshs. 6 million as instruction fees. This, as I have shown was manifestly excessive, and did not take into account the consistent levels of awards given for instruction fees in previous similar cases. Of course, on the other hand, the amount of Kshs. 500,000 proposed by the 1st respondent, is manifestly deficient.

[19] Taking into account everything else stated in the preceding paragraphs, it is my considered opinion that an award of Kshs. 1,000,000 is sufficient recompense to the appellant in the circumstances of this reference. While there is no gain in saying that the appeal was of some substance and import, as reflected in the length of the judgment running into 211 paragraphs, I reiterate what I stated at the beginning of this ruling that the only (main) question in the petition was simply whether the appellant had committed the election offence of bribery, for which the High Court awarded an all-inclusive costs Kshs. 750,000, and the Court of Appeal Kshs. 350,000. Of course, the question of the constitutionality of Section 85A of the Elections Act and whether Constituency Development Fund (CDF) Members are “public officers” was also resolved.

[20] Finally, regarding items Nos. 2, 3, 13, 14, 19, 20, 25, 26, 35, 36, 37, and 40, I am satisfied they were all properly taxed to scale, and therefore attract no further consideration.

[21] Consequently, this reference succeeds only to the extent that Item No. 1 taxed at Kshs.6 million is set aside and substituted with a sum of Kshs. 1 million.

[22] **ACCORDINGLY**, I partially allow the reference dated 16th June 2023 and order that:

(i) Item No. 1 on the instruction fees is now taxed at Kshs. 1,000,000.

(ii) Items Nos. 2, 3, 5, 13, 14, 19, 20, 25, 26, 35, 36, 37 and 40 taxed to scale are upheld.

(ii) As costs are awarded at the discretion of the Court, parties shall bear their own costs.

DATED and DELIVERED at NAIROBI this 22nd Day of September, 2023.

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true copy
of the original**

REGISTRAR
SUPREME COURT OF KENYA