



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL CASE NO. 339 OF 2012

FAIRLANDS INVESTMENTS LIMITED ..... APPLICANT

-VERSUS-

KENYA POWER AND LIGHTING COMPANY LIMITED ..... RESPONDENT

R U L I N G

1. The Notice of motion before this Court is the one dated **17<sup>th</sup> December 2012** and filed in Court on **19<sup>th</sup> December 2012**. It is taken out under **Rule 11 (2)** of the **Advocates Remuneration Order, Sections 1A, 1B** and **3A** of the **Civil Procedure Act** as well as **Order 51, Rule 1** of the **Civil Procedure Rules**.
2. The application is seeking for orders that the decision of the Deputy Registrar dated **24<sup>th</sup> October 2012** be set aside and the Applicant's Party and Party Bill of costs dated **5<sup>th</sup> June, 2012** be taxed afresh. It is based on the grounds stated on the face of the application and is supported by the affidavit of MANISH SHAH sworn on **17<sup>th</sup> December 2012**.
3. It is averred by Mr. Manish Shah that on 3<sup>rd</sup> May 2007, the Applicant filed a complaint with the Energy Regulatory Commission (ERC) on account of damages suffered as a result of frequent power interruptions by the Respondent. The Applicant sought the sum of Kshs. 1,888,948.10 being damages suffered. On 1<sup>st</sup> April 2011, the ERC awarded the applicant Kshs. 570,100.55 as damages together with costs of the dispute. The Respondent lodged an appeal with the Energy tribunal by filing a memorandum of appeal dated 19<sup>th</sup> April 2011. Subsequently, the tribunal dismissed the Respondent's appeal and awarded costs to the Applicant.
4. Thereafter, as is stated by the deponent, the Applicant filed its bill of costs dated 5<sup>th</sup> June 2012. In the said Bill, the Applicant sought instruction fees of Kshs. 500,000. The Bill of Costs was not opposed. Therefore on 24<sup>th</sup> October 2012 the Deputy Registrar delivered the ruling and awarded the applicant costs of Kshs. 123,760= . The Applicant being dissatisfied with the ruling notified the Deputy Registrar of its intention to object to the taxation of bill of costs. The Applicant also sought for reasons of the Deputy Registrar's Decision.
5. It is the Applicant's case that the Learned Deputy Registrar erred in law and in fact in assessing the instruction fees at Kshs. 100,000/= . The Applicant has enumerated the reasons for the error at paragraph 16 of the supporting affidavit. The deponent avers that the Deputy registrar failed to

consider the complexity of the matter and did not take into account the general conduct of the proceedings. He further avers that the Deputy registrar failed to take into account the fact that the subject matter of the dispute (Kshs. 1,889,948.10) could be ascertained from the pleadings. He also averred that the Deputy Registrar relied on an erroneous principle that the instruction fees ought not to exceed 25% of the amount awarded.

6. It is therefore the Applicant's case that the instruction fees awarded is not reflective of the value of the work done. In the circumstances, the Applicant argues that the taxation was irregular and the decision of the Deputy registrar ought to be set aside. Subsequently, the Bill of costs dated 5<sup>th</sup> June 2012 be taxed afresh.
7. The Respondent opposed the application vide the Replying affidavit of FREDRICK OTIENO OKEYO sworn on **28<sup>th</sup> February 2013**. The deponent is an Advocate of the High Court of Kenya. He avers that the Respondent is in support of the application to the extent that the decision by the Deputy Registrar dated 24<sup>th</sup> October 2012 should be set aside. However, the Respondent opposes the prayer that the Bill be taxed again.
8. Mr. Okeyo avers that the Respondent was not aware that the Applicant had filed a Bill of costs until 14<sup>th</sup> January 2013 when they were served with the current application.
9. The deponent states that the Respondent objects to the taxation of the subject bill on the ground that there is no provision within the Advocates Remuneration Order for the taxation of matters arising from the decisions of the Energy Regulatory Commission and the Energy Tribunal as between the parties to such disputes. He further states that the decision of the commission dated 1<sup>st</sup> April 2011 clearly stated that the Applicant's costs were to be determined by the Commission upon presentation of a Bill of Costs. To date, the Applicant has not presented a Bill of Costs to the commission neither has it appealed the decision of the commission.
10. The deponent avers that in the event that the Taxing master had jurisdiction to tax the Bill of Costs, such taxation could only be limited to the award by the Commission which was Kshs. 570, 100.55 and not Kshs. 1,888,948.10. He further avers that the matter was not complex but was straight forward and involved only two (2) witnesses. It is for the foregoing reasons that the Respondent urges this Court to dismiss the application with costs to the Respondent.
11. The application was prosecuted by way of written submissions. The Applicant filed their submissions on 28<sup>th</sup> May 2014 while the Respondent filed their reply on 2<sup>nd</sup> July 2014.
12. Having considered the application, the affidavits on record as well as the written submissions by Counsel, I take the following view of the matter. There are two main issues for determination in this matter. Firstly, whether the Taxing master had jurisdiction to tax the Bill of costs emanating from a matter in the Tribunal in question. Secondly, whether the Taxing master erred in law and in fact in allowing the instruction fees at Kshs. 100,000.
13. On the issue of jurisdiction, the taxing master acknowledged that the Advocates Remuneration Order did not have a specific schedule for taxing matters arising from the Electricity Regulatory Tribunal. On that premise, she proceeded to tax the Bill under Schedule V of the Advocates Remuneration Order, 2006.
14. The Application of the Advocates Remuneration Order is provided for under Section 2 of the Order which provides as follows:-

***“This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and in a Tribunal established under the Rent Restriction Act.”***  
***Underlining supplied***

The above provision is couched in mandatory terms. It is discernible that the application of the Advocates Remuneration Order is in respect to matters arising from the High Court, Subordinate Courts and the named Tribunals. It is therefore clear that the Remuneration Order does not provide for taxation of matters arising from the Electricity Regulatory Commission.

15. In the current case, it is also clear that the tribunal's decision indicated that the Applicant's costs were to be determined by the Commission upon presentation of a Bill of Costs. This was in the event that the parties did not agree on costs. It is therefore not clear why the Applicant chose to present the Bill of Costs before the Deputy Registrar of the High Court. I do not for a moment doubt that the taxing master had the capacity to tax the Bill of Costs. However, the issue of jurisdiction is important. The same has to be provided for in law and cannot just be donated freely.
16. If the Applicant was dissatisfied with the decision of the Commission, they ought to have appealed to the High Court. The Applicant did not do so and therefore the Applicant has no recourse in the High Court and as already established the Deputy registrar does not have jurisdiction to tax the Bill of Costs from the Energy regulatory Commission. It is only prudent that orders of the Commission herein or in any case the tribunals should be obeyed and enforced to the letter. If the Commission wanted the Bill to be taxed in the High Court nothing would have been easier than to indicate the same in their ruling.
17. It is only rational that the Energy Commission is better placed in determining the costs incurred by the parties herein.
18. In view of the foregoing, the order that commends itself to this Court is to dismiss the Applicant's Notice of motion dated 17<sup>th</sup> December 2012 and filed in Court on 19<sup>th</sup> December 2012 in the following terms;
  - a. ***The Decision of the Deputy Registrar dated 24<sup>th</sup> October, 2012 be set aside and the Applicant's Party and Party Bill of Costs be taxed afresh before the Energy Regulatory Commission.***
  - b. ***There shall be no order as to costs.***

**DATED, READ AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Weru holding brief for Gitonga for the Applicant

No appearance for the Defendant

Teresia – Court Clerk



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