



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**MISCELLANEOUS CIVIL APPLICATION NO. E022 OF 2021**

**KCB BANK LIMITED.....1<sup>ST</sup> APPLICANT**

**JAMES ONYANGO JOSIAH T/A NYALUOYO AUCTIONEERS.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**YESWA ANTONNY JOSEPH.....RESPONDENT**

**RULING**

1. This ruling determines the Chamber Summons dated 27.8.2021 and filed on the 20.9.2021 brought under the provisions of Rule 11 of the Advocates Remuneration Order. The applicants seek the following orders:

- i. That this Honourable Court be pleased to review, vary and or set aside the order made by the Learned Magistrate in his ruling delivered on the 30<sup>th</sup> July 2021 on the taxation of the respondent's Bill of costs dated 18<sup>th</sup> May 2021 and that the Bill of Costs be taxed on merit.***
- ii. That in the alternative, the Respondent's Bill of Costs dated 18<sup>th</sup> May 2021 be remitted back for taxation before another Taxing Officer.***
- iii. That the costs of the Reference be awarded to the applicants.***

2. The Chamber Summons is grounded on the grounds among others that the taxing master failed to appreciate that the prayers sought by the plaintiff/respondent in his plaint dated 22.11.2019 were declaratory in nature and as such were to be assessed on instruction fees as provided in paragraph 2 of the 7th Schedule of the Remuneration Order, 2014 that required such fees to be charged at between Kshs. 20,000 – 50,000 instead of paragraph 1 of the said Remuneration Order which ought only to have been applied where specific sums had been sued for or found due.

3. The Chamber Summons was further grounded on the fact that the taxing master erred in fact and in law by assessing item 1, the instruction fees, in the sum of Kshs. 225,000 and the entire bill in the sum of Kshs. 250,175.

4. That Chamber Summons was supported by an affidavit sworn by one Sharon Achieng Omollo whose depositions are that following the filing of the Bill of Costs dated 18<sup>th</sup> May 2021 and the rendering of the decision by the Taxing Officer delivered on the 30<sup>th</sup> July 2021, the applicants had sought for reasons for the decision vide their letter dated 9<sup>th</sup> August 2021, which decision they were aggrieved by and objected to, but that the applicants had received no response thus necessitating the instant Summons.

5. It was further deposed that the Chamber Summons subject of this ruling was commenced in good faith and in the interest of justice.

6. Opposing the chamber summons application, the respondent filed its Grounds of Opposition dated 5<sup>th</sup> October 2021 on the 6<sup>th</sup> October 2021 which Grounds were listed as follows:

- i. The application is fatally defective.***
- ii. The application is incompetent and otherwise an abuse of the court process.***
- iii. The application offends paragraph 11(2) of the Advocates Remuneration Order.***

iv. *The Applicants have not demonstrated any sufficient grounds to impugn exercise of judicial discretion by the Taxing Master to warrant the Honourable Court's interference.*

v. *The Applicants are not deserving of the orders sought.*

7. The Chamber summons was canvassed by way of written submissions.

### **The Applicant's Submissions**

8. It was submitted that the respondent in his plaint in Bondo CMCCC No. 164 of 2019 did not sue for any specific sum as the prayers sought therein were declaratory in nature. The applicants further submitted that even if the case was to proceed to its conclusion and the respondent secured judgement against the applicants herein, judgement would strictly be within the prayers sought in the plaint as parties are bound by their pleadings. Reliance was placed on the Court of Appeal case of **Evans Gundo v Naftali Sule [2002] eKLR** where the Court of Appeal set aside a judgement where the court granted relief on the basis of a matter that was not pleaded.

9. Relying on the provisions of Paragraph 2 of Schedule 7 of the Advocates Remuneration Order 2014, the applicants submitted that the taxing officer ought to have assessed instructions fees in line with paragraph 2 that provides that such fees should range from Kshs. 20,000 – 50,000. Reliance was placed on the case of **N.O. Sumba 7 Co. Advocates v Piero Cannobio [2017] eKLR** where it was held that for an unquantifiable claim, part 2 of Schedule 7 of the Remuneration Order applied as it gave discretion to the court.

10. The applicants further submitted that the discretion referred to in paragraph 2 of Schedule 7 of the 2014 Advocates Remuneration Order must be within the set parameters of Kshs. 20,000 – 50,000 and that the Court of Appeal in the case of **Joreth Ltd v Kigano & Associates [2002] eKLR** set out the factors for determination of how much to be awarded and stated that the taxing officer in exercising his discretion must consider amongst other matters, the nature and importance of the cause of the matter, interest of the parties, the general conduct of the proceedings, any direction given by the trial judge and all other relevant circumstances.

11. The applicants submitted that this was not a complex suit as it never proceeded to trial and was only compromised when the applicants conceded to costs and as such, the taxing master ought to have awarded instructions fees in the sum of Kshs. 20,000 failure of which, he thus misdirected himself.

12. The applicants therefore sought to have the Bill of Costs dated 18<sup>th</sup> May 2021 remitted before another taxing master for taxation. Reliance was placed on the Court of Appeal case of **Joreth (supra)** where the Court held that it was not for a judge to retax a bill where he concluded that the taxing master erred in principle but that he should refer the same to another taxing master with appropriate directions on how taxation should be done.

### **The Respondent's Submissions**

13. It was submitted that the present application was incompetent and offended the provisions of paragraph 11(2) of the Advocates Remuneration Order that provided that there is no need to seek further reasons as was held in the case of **Ahmed Nassir v National Bank of Kenya Limited [2006] eKLR** and reiterated in the case of **Evans Thiga Gaturu v Kenya Commercial Bank Limited [2012] eKLR**. Further, that the application was filed on 15<sup>th</sup> September 2021, one and a half months after delivery of the ruling and a month outside the stipulated time without any reasons for the delay by the applicants.

14. It was further submitted that in this case, the taxing master did not have an obligation to give further explanation other than that contained in the ruling supplied and as such the applicants were supposed to file the present application on or before the 13<sup>th</sup> August 2021 as the ruling on taxation was delivered on 30<sup>th</sup> July 2021 and immediately sent to the counsel's emails.

15. It was submitted that the taxing officer applied the correct principle in assessing the instruction fees as Kshs. 225,000, relying on the valuation report on record, which was not disputed by both parties, and which valued the land at Kshs. 9,200,000 thus attracting instructions fees of Kshs. 300,000 which when subjected to the 75% provided in paragraph 1 (b) of the 7th schedule, came to Kshs. 225,000.

16. It was submitted that the taxing officer considered relevant matters when assessing the instruction fees as he took into consideration the documents filed by the parties. Reliance was placed on the case of **Masore Nyang'au & Co. Advocates v Kensalt Limited [2019] eKLR** where the Court on a reference held that there was nothing barring the court from making reference to documents tendered in the file pointing to the value of the subject matter for purposes of ascertaining the payable instruction fees.

### **Analysis & Determination**

17. I have read and carefully considered the pleadings, affidavits, material before the taxing officer and written submissions by the respective parties to this Reference application. In my view, the issues for determination are:

a) *Whether the reference herein lacks merit for offending paragraph 11(2) of the Advocates Remuneration Order and*

b) *Whether the Taxing Master erred in principle in the assessment of the instruction fees.*

18. The background of this Reference is that the respondent instituted suit in Bondo PMCC No. 164 of 2019 against the applicants seeking injunctive relief over land parcel No. North Sakwa/Nyawita/4660 valued at Kshs. 9,200,000. The trial court granted a temporary injunction pending determination of the main suit which suit was compromised with the applicants conceding to costs. The respondent then prepared

and filed his Bill of Costs dated 18<sup>th</sup> May 2021 and the court proceeded to tax the same at Kshs. 250,175 vide a ruling of 30<sup>th</sup> July 2021.

***Whether the reference herein lacks merit for offending paragraph 11(2) of the Advocates Remuneration Order***

19. It is the respondent's contention that the applicants' reference lacks merit as it was filed more than a month and a half after the taxing master gave his ruling and further that the reasons for the delay have not been explained by the applicants. The respondent further submitted that there was no reason for the applicants to seek reasons for the taxing master's decision as the same were contained in the decision delivered on the 30<sup>th</sup> July 2021.

20. Paragraph 11 of the Advocates (Remuneration) Order provides a detailed process of objection to taxation of costs as follows:

***"11. Objection to decision on taxation and appeal to Court of Appeal.***

***(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.***

***(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.***

***(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***(4) The High court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."***

21. In the instant case, the decision by the taxing master was made on the 30<sup>th</sup> July 2021. The respondent deposed that vide a letter dated 9<sup>th</sup> August 2021, the applicants gave notice of their objection to the taxing master's decisions and sought reasons for the same. The instant proceedings were subsequently commenced on the 20<sup>th</sup> September 2021 when the applicants allege that there was no response from the taxing master.

22. I have perused the taxing master's decision in this case, on the instruction fees which is in contention in this reference, the taxing master stated:

***"...On item 1 (a) on the instruction fees, the matter did not proceed to full hearing. Thus the applicable rule is Rule 1 (b) of schedule 7 which provides that: "To sue or defend in a suit in which the suit is determined in any summary manner whatsoever without going to full trial the fee shall be 75% of the fee chargeable under item 1(b) of this schedule". The value of the suit property was given as Kshs. 9,200,000 by the valuer. Which attracts instruction fees of Kshs. 120,000/= plus 2.5% of 7,200,000 which is Kshs. 180,000/= making a total of Kshs. 300,000/= which amount is subjected to the 75% which brings the amount to Kshs. 225,000/= which I hereby award under the item. Item 1 (b) being instruction fee for the application dated 22/11/2019 is taxed off as the court ordered each party to bear own costs."***

23. In the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board Civil Appeal No. 220 of 2004; (2005) eKLR**, the Court of Appeal held:

***"...It is true that the taxing officer did not record the reasons of the decision on the items objected to after the receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling of taxation dated 24<sup>th</sup> February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instruction fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing master totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference."***

24. Considering the ruling by the Taxing master aforementioned and taking into account the Court of Appeal decision above, it is my view that the taxing officer addressed the reasons, in strict compliance with Order 11 (2), on how he arrived at his Ruling.

25. In **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5** Ochieng, J, similarly, held as follows:

***"Although rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling...Therefore the reference having***

***been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance, the same dismissed.***”

26. In the circumstances, taking into consideration the authorities cited above, I find that the reasons for the Taxing Master’s decision were contained in the decision. It follows that the applicants herein had no reason to delay the filing of this Reference and more so, in filing the same after the elapse of more than 14 days after the delivery of the same, contrary to the stipulations in Rule 11 of the Advocates Remuneration Order. Accordingly, the Reference as filed out of time without leave of court enlarging or extending time for filing of the same is incompetent.

27. By filing this Reference application on 20<sup>th</sup> September 2021, the applicants waited for a month and a half for the taxing master to provide reasons for his ruling. The applicants no doubt failed to comply with Paragraph II of the Advocates Remuneration Order. In ***Evans Thiga Gaturu (supra)***, ***Odunga J*** observed that:

***“In most cases the court is aware that the taxing officers in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances, it would be fool hardy to expect the taxing officer to redraft another “ruling” containing reasons.”***

28. The Applicants herein have not advanced any reasons for the delay in bringing this reference. In any event, they had the opportunity to seek leave of court to enlarge the time for filing of the application. They did not utilize that opportunity. In ***Twiga Motor Limited v Hon. Dalmas Otieno Onyango [2015] eKLR***, the Court stated that:

***“The limits in Rule II of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the first instance.”***

29. For reasons that the reference herein was filed out of time without leave of court in accordance with the provisions of paragraph 11 (4) of the Advocates Remuneration Order, I find and hold that it is incompetent and amenable for striking out. It is hereby struck out.

30. I shall however deal with the issue of whether ***the Taxing Master erred in principle in assessment of the instruction fees, just in case I am wrong in my above finding and determination.***

31. Thus, notwithstanding the above finding, I will proceed to consider the merits of the present Reference. As a general rule, the High Court will not interfere with the decision of a Taxing Officer unless there exists an error in law or in principle. In ***Kipkorir Titoo & Kiara Advocates (supra)***, the Court of Appeal held that:

***“On reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”***

32. It is the applicants’ case that the taxing master erred and ought to have assessed instructions fees in line with paragraph 2 that provided that fees in unquantifiable claims should range from Kshs. 20,000 – 50,000. The applicants relied on the case of ***N.O. Sumba (supra)*** where the court-Korir J held that for an unquantifiable claim, part 2 of Schedule 7 of the Remuneration Order applied as it gave discretion to the court.

33. I have perused that case as cited and I note that the reference therein arose from a claim of malicious prosecution and unlawful arrest. The only quantifiable claim therein was a claim for special damages of Kshs. 400,000. Korir J. noted that the claim was unquantifiable as it involved a person’s reputation.

34. The authority relied on by the applicants was in my opinion not applicable to the instant Reference. As was noted by the court therein, the cited case involved someone’s reputation, whereas in this case, the claim that was compromised by the parties herein involved monetary claims. The same is quantifiable. Further it was alleged that there was a valuation report on record and this was not disputed by the applicant herein, the valuation report that valued the suit land at Kshs. 9,200,000. That averment on oath has not been controverted by any other evidence.

35. In ***Joreth Ltd (supra)*** the Court of Appeal held that:

***“The value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking in account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”***

36. Accordingly, I find that the applicable Order to be applied was that used by the trial court, Schedule 7 Rule 1 (b). In ***Kagwimi Kang'ethe & Company Advocates v O-Kerai Nurseries Limited, Agnes Kasyoka & Shedrack Munyalo Nzenge***, the Court of Appeal reiterated the decision of its predecessor Court in the case of ***Thomas James Arthur v Nyeri Electricity Undertaking [1961] EA 492*** that:

***“Where there has been an error in principle, the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will interfere only in exceptional cases.”***

37. In the circumstances, I find that the taxing master did not err in principle in assessing the instructions fees awarded in its ruling of 30th July 2021 and therefore I find no reason to interfere with the same.

38. The upshot of the above is that the Chamber Summons dated 27.8.2021 and filed on the 20.9.2021 is incompetent. It also lacks merit. The same is hereby dismissed. Each party to bear their own costs of the Reference.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF JANUARY, 2022 (VIRTUALLY FROM MOMBASA WHILE ATTENDING A HIGH COURT LEADERS CONFERENCE)**

**R.E. ABURILI**

**JUDGE**

**In the presence of**

Omollo Ochieng Advocate for the applicants virtually

Imbaya Advocate for the Respondent virtually

CA: Mboya and Modestar virtually in open court at Siaya High Court