Murgor & Murgor Advocates v Kenya Airports Authority (Miscellaneous Application 36 of 2020) [2023] KEELC 18458 (KLR) (22 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18458 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION 36 OF 2020

JO MBOYA, J

MAY 22, 2023

BETWEEN

MURGOR & MURGOR ADVOCATES ..... ADVOCATE

AND

KENYA AIRPORTS AUTHORITY ..... CLIENT

(Being a Reference from the Ruling of the Honourable Learned Taxing Master, Honourable Isabellah Barasa (DR) dated 3rd October, 2022)

RULING

Introduction and Background:

1. The Applicant/Advocate has approached the court vide Chamber Summons Application dated the 31st October 2022; and in respect of which same seeks the following reliefs;

    i. That the Decision delivered by the Honourable Learned Taxing Master, Hon. Isabellah Barasa (DR) in the ruling dated 3rd October, 2022 with respect to items 1, 6, 7, 8, 11, 12, 14, 16, 17, 18, 23, 27, 28, 30, 31, 32, 34, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 60, 61, 62, 63, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88 and 89 in the Applicant's Bill of Costs dated 15th May, 2020, be set aside and taxed afresh by this Honourable Court.

    ii. That in the alternative, the Honourable Court be pleased to order that items 1, 6, 7, 8, 11, 12, 14, 16, 17, 18, 23, 27, 28, 30, 31, 32, 34, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 60, 61, 62, 63, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88 and 89 of the Applicant's Bill of Costs dated 15th May, 2020 be taxed afresh by another Taxing Officer.

    iii. That the costs of this Application be provided for.

2. The Reference by way of Chamber summons Application herein is premised and anchored on a plethora of grounds amounting to 66 paragraphs and which comprise of a total of 20 pages. Furthermore, the Reference herein is similarly supported by a lengthy affidavit amounting to 68 paragraphs, but which paragraphs constitute a complete reproduction and rehash of the grounds which have been enumerated at the foot of the Reference.

3. Be that as it may, upon being served with the Reference herein, the Respondent/Client filed a document titled; Client/Respondent Replying affidavit; but which document is curiously signed as hereunder;

> J.M Njenga & Company, Advocates LLP
>
> for the Respondent/Client

4. Whereas from the title, one may mistake the document as a Replying affidavit, but without a Deponent and a Jurat, in the manner prescribed by the provisions of *Oath and Statutory Declaration Act*, Chapter 15, Laws of Kenya, clearly the impugned document is not a Replying affidavit.

5. Notwithstanding the foregoing, it is instructive to state that the Advocates for the Parties agreed to canvass and dispose of the Reference by way of written submission. Consequently and in this regard, the Honourable Court proceeded to and issued directions pertaining to the timelines for the filing and exchange of the Written Submissions.

6. For good measure and in compliance with the directions of the Court, the advocate/Applicant filed written submissions dated the 22nd March 2023, whilst the client/Respondent filed written submission dated the 27th March 2023.

Submissions by the Parties:

a. Applicant's Submissions:

7. The Applicant filed written submissions dated the 22nd March 2023; and in respect of which, the Applicant has raised, highlighted and canvassed two pertinent issues for determination by the Honourable Court.

8. Firstly, Learned counsel for the Applicant has submitted that the Client/Respondent herein duly issued instructions to the Applicant to take up and defend same (Respondent) in ELC Petition No. 21 of 2018, which had been filed against, inter-alia, the Respondent herein.

9. Furthermore, Learned counsel has added that upon receipt of the instructions, same (Applicant); proceeded to craft the requisite pleadings, which were thereafter duly filed on behalf of the Respondent.

10. Nevertheless, Learned counsel has submitted that even though the Applicant duly and promptly acted on instructions of the Respondents and filed the requisite pleadings, the Respondent however failed and neglected to pay the Legal fees that was raised by the Applicant.

11. In addition, Learned counsel has submitted that arising from the failure and/or neglect by the Respondent to pay/liquidate the professional fees raised by the Applicant, the relationship between the Applicant and the Respondent broke down, culminating into the Respondent terminating the instruction.

12. On the other hand, Learned counsel has thereafter contended that upon the termination of the instructions by the Respondent, the Applicant proceeded to and filed Advocate Client Bill of Cost, which Bill of Cost was ultimately taxed vide ruling rendered on the 3rd October 2022.

13. Be that as it may, Learned counsel has contended that the learned taxing master misapprehended and misapplied the various provisions of the *Advocate Remuneration Order* 2014, in the course of taxation and thereby arrived at an erroneous taxation and conclusions.

14. In respect of the taxation pertaining to the Instruction fees, Learned counsel for the Applicant has submitted that the taxing master failed to take into account the monetary value of the suit property, which was the subject of the Petition before the Environment and Land Court. In this regard, Learned counsel has added that had the taxing master taken account of the monetary value which was discernable from the face of the pleadings and which amounted to Kes.410, 621, 429.20/= only, then the taxing master would have arrived at the correct Instruction fees.

15. Owing to the foregoing, Learned counsel has therefore submitted that the taxation as pertains to the Instruction fees was manifestly erroneous and thus constitutes an error in principle.

16. Additionally, Learned counsel has also submitted that the learned taxing master also failed to apply the correct principle, in determining the amounts relating to attendance, folio, drawing of Pleadings and perusals and correspondence exchange between the advocate and the client.

17. Consequently, Learned Counsel has submitted that the learning taxing master therefore did not exercise her discretion in accordance with the law or at all.

18. In a nutshell, Learned counsel for the Applicant has therefore submitted that the amount contained at the foot of the Certificate of taxation is therefore inordinately low and erroneous and thus deserving of being quashed by the Court.

19. In support of the foregoing submissions and more particular the submissions touching on the Instruction fees, Learned counsel for the Applicant has cited and relied on, inter-alia, the decision in the case of *Jovet (k) Ltd v Savaria N. V* (2020)eKLR, *First American Bank of Kenya v Shah & Others* (2001) 1EA 64, *Otieno Ragot & Company Advocates v Kenya Airport Authority* (2021)eKLR and *Joreth Ltd v Kigano & Associate* (2002)eKLR.

20. Secondly, Learned counsel has submitted that immediately upon the delivery of the Ruling on taxation, which was delivered on the 3rd October 2022, the Applicant herein applied for a copy of the Ruling vide letter dated the 7th October 2022.

21. Additionally, Learned counsel has submitted that despite the application for a copy of the Ruling on taxation, none was availed to the Applicant and hence the Applicant was constrained to follow up on the issue of the Ruling vide letter dated the 14th October 2022.

22. Be that as it may, Counsel has conceded that a copy of the Ruling on taxation was ultimately availed to the Applicant on the 18th October 2022; and thereafter the Applicant filed the Reference within the statutory 14 days period.

23. In view of the foregoing, Learned counsel for the Applicant has therefore contended that the Reference before the Honourable court is meritorious; and thus ought to be allowed and that the impugned certificate of taxation be set aside and varied.

b. Respondent's Submissions

24. The Respondent herein filed written submission dated the 27th march 2023; and in respect of which same has similarly raised two salient issues for consideration by the Honourable Court.

25. First and foremost, Learned counsel for the Respondent has submitted that the primary matter in respect of which the Applicant herein was instructed was a Constitutional Petition and not a Commercial dispute.

26. To the extent that the matter in which the Applicant was instructed was a Constitutional Petition, Learned counsel for the Respondent has submitted that the learned taxing master was therefore obligated to apply and adhere to the provisions of Schedule 6 of the Advocate Remuneration Order 2014; in ascertaining the appropriate and relevant instruction fees.

27. Instructively, Learned counsel for the Respondent has submitted that what was relevant was Schedule 6 paragraph (j) of The *Advocates Remuneration Order*, 2014.

28. Further and in addition, Learned counsel has submitted that whilst assessing and taxing instruction fees relating to Constitutional Petitions and Judicial Review Proceedings, the monetary value of the property at the foot of the dispute, is irrelevant and does not influence the Quantum of instruction fees.

29. As a result of the foregoing, Learned counsel has submitted that that the learned taxing master therefore correctly applied the law in arriving at and taxing the instruction fees, which was due and payable to the Applicant herein. In this regard, Learned Counsel has pointed out that the taxing master did not commit any error, either as alleged or at all.

30. To buttress the foregoing submissions, Learned counsel for the Respondent has cited and relied on, inter-alia, the case of *Lubelella & Associate v N. K Brothers* (Nairobi Misc. Application No. 52 of 2012), *Mohanson Food Distributors Ltd & Another v Kenya Commercial bank Ltd & Another* (2021)eKLR and *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 Others* (2014)eKLR, *Lalji Meghji Pate & Co Ltd v PCEA Foundation & Another* (2020)eKLR and *Peter Muthoka & Another v Ochieng & 3 Others* (2019)eKLR.

31. Secondly, Learned counsel for the Respondent has further submitted that the learned taxing officer exercised her discretion in taxing all the rest of the items in accordance with the law.

32. Nevertheless, Learned counsel has further submitted that it was incumbent upon the Applicant herein to establish and demonstrate in what manner the learned taxing master misapplied her discretion. However, Learned counsel has added that the Applicant has failed to discharge the burden of proof in showing the failure to exercise discretion in an appropriate manner.

33. Premised on the foregoing, Learned counsel for the Respondent has therefore submitted that the learned taxing master exercised her discretion judiciously and in accordance with the provisions of the Advocates Remuneration Order, 2014.

Issues for Determination

34. Having reviewed the Chamber Summons, as well as the Response thereto and upon considering the written submissions on the behalf of the Parties, I opine that the following issues are pertinent and thus worthy of determination by the Honourable Court;

i. Whether the Reference vide Chamber Summons Application herein accords and comply with the provisions of Rule 11(1) and (2) of the *Advocates Remuneration Order*; and if not, whether the Reference is legally tenable.

ii. Whether the Applicant has established and demonstrated Evidence of improper exercise of Discretion by the taxing master.

Analysis and Determination

Issue Number 1; Whether the Reference vide Chamber Summons Application herein accords and comply with the provisions of Rule 11(1) and (2) of the Advocates Remuneration Order; and if not, whether the Reference is Legally tenable.

35. It is common ground that the Reference herein arises from the ruling on taxation of Advocate/Client Bill of Cost, which was filed by the Applicant herein and in respect of which the Applicant sought to recover professional fees for services rendered to the Respondent.

36. Instructively, upon the delivery of the ruling on taxation, the Applicant herein felt aggrieved and thus sought to exercise his constitutional right to challenge and impugn the taxation by way of Reference.

37. Notably and in this respect, the Applicant generated and lodged the Letter dated the 7th October 2022 and in respect of which same sought to be supplied with a copy of the ruling on taxation. For good measure, the letter dated 7th October 2022 has been annexed as exhibit EMK1 to the supporting affidavit.

38. Other than the foregoing, the Applicant herein has further contended that despite issuing the letter bespeaking the ruling, the ruling sought was not supplied. Consequently, the Applicant was obliged to and indeed issued a second letter dated the 14th October 2022.

39. More importantly, it is imperative to state and observe that even though the Applicant wrote and lodge the two letters, whose details have been alluded to in the preceding paragraphs, the Applicant herein did not file the Notice of Objection to Taxation, either as envisaged by Rule 11(1) of The *Advocates Remuneration Order* or otherwise.

40. In addition, it is also crystal clear that the two letters, which were generated by the Applicant herein did not contain or enumerate (sic) the items of the Bill of Cost, whose taxation was intended to challenged vide the intended Reference. For the avoidance of doubt, the Applicant herein indeed acknowledged that because same had not been availed a copy of the ruling, same (Applicant) was unable to signify the items being objected to.

41. For good measure, the Letter dated 14th October 2022 states as hereunder;

> " We refer to the matter above and our letter dated 7th October 2022, requesting for a copy of the ruling delivered by Hon. Barassa on the 3rd October 2022, taxing the Bill of Cost dated the 15th May 2020 in the sum of kes.2, 757, 704.40/= only.
>
> We note that we have yet to be issued wit the ruling. We are however mindful of the provision of Rule 11(1) of The *Advocates Remuneration Order*, which requires a party who wishes to object the decision of the taxing master to give written notice of the taxation to which the party objects, within 14 days of the decision on taxation.
>
> In the absence of the said ruling and/or particulars of the items taxed off, we are unable to particularize the items we wish to object to. However, we are of the preliminary view that the

bill as taxed is manifestly low. In the premises, this letter together with our earlier letter dated 7th October 2022, constitutes notice under paragraph 11 of the Advocates remuneration Order.

Kindly, but urgently, let us have a copy of the ruling dated 3rd October 2022 containing the reasons for the decision on each item.

We undertake to pay your requisite fees.

Yours faithfully

Murgor & Murgor Advocate

42. From the contents of the letter, whose details have been reproduced in the preceding paragraphs, there is no gainsaying that the Applicant was conceding that same had not provided details of the items that are being objected to and in respect of which reasons are being sought. Clearly, the Letter under reference was omnibus and ambiguous.

43. Nevertheless and taking into account the contents of the Letter alluded to, the question that now needs to be addressed is whether the impugned letters can be construed to amount to a Notice of objection to taxation in terms and in accordance with the provisions of Rule 11(1) of the *Advocates Remuneration Order*.

44. Before venturing to answer the foregoing question, it is instructive and pertinent to take cognizance of the provisions of Rule 11(1) of The *Advocates Remuneration Order*.

45. Same provides as hereunder;

> " 11
>
> (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.
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> (3) Any person aggrieved by the decision of the Judge upon any objection referred to such Judge under subparagraph (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."

46. Notably, the provisions of Rule 11(1) of The *Advocate Remuneration Order*, stipulates that any Notice of Objection to Taxation, irrespective of the form in which same is filed, no doubt, the said notice must

indicate and reflect the impugned items in respect of which reasons are being sought and by extension, which are intended to be challenged vide the anticipated Reference.

47. From the foregoing, there is no gainsaying that the provision/ identification of the impugned items, which are sought to be challenged, is critical and essential. In any event, it is the itemization, of the items that forms the foundation of the intended reference. Simply put, a proper and valid Notice of objection to Taxation anchors the Jurisdiction of the court while dealing with a Reference.

48. Can an omnibus notice of objection to taxation, whether by letter or otherwise suffice? I am afraid that an omnibus notice, like the ones exhibited at the foot of the letters dated the 7th October 2022 and 14th October 2022, respectively, cannot be deemed to constitute the requisite Notice of objection to taxation, in the manner known to law.

49. In this regard and to underscore the importance of a Notice of objection to taxation, it is imperative to take cognizance of and reiterate the holding of the Court of Appeal in the case of *Machira & Co Advocates v Arthur K Magugu & Another* (2012)eKLR, where the Court of Appeal stated and observed as hereunder;

> 12. Sub-rule (1) requires the party objecting to give notice in writing within 14 days "of the items of taxation to which he objects." As the trial judge correctly found, the Respondents notice of 1st August 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.
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> 13. As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.
>
> 14. Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master's decision was received is immaterial and does not avail the Respondents. Under sub-rule (2), time stops running from the date a proper notice is filed, which of course must be within 14 days of taxation, until receipt of the taxing master's reasons for his decision.

50. Having found that the impugned letters, which were issued by the Applicant do not constitute and/ or amount to the requisite Notice of objection to taxation, the other question that does arise is whether the failure to comply with the statutory requirements of Rule 11(1) of The Advocate Remuneration Order, can be circumvented and/or evaded.

51. To my mind, where there exist express statutory provision to deal with and address a particular situation, then it behooves the Parties to comply with and adhere to such provisions, more particularly where the provisions go to the root of the Jurisdiction of the court.

52. In the case of *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR , the Supreme Court of Kenya underscored the importance of complying with statutory provisions which anchor Jurisdiction in the following terms;

> "(65) For the proper conduct of administration of justice, the statutory form is generally employed to confer jurisdiction, prescribe form, substance, process and procedure, governing the administration and dispensation of claims. A statute in this category may prescribe how to formulate a right of action – for instance, by petition, plaint, notice, or originating motion. On procedural aspects, the statute or the rules (as the case may be), may regulate timelines, and other facets of case- management. It may also regulate the confines within which a Court may exercise its adjudicatory powers, by prescribing the category of jurisdictional issues; or questions upon which a Court may make a determination of the case before it. This is the context in which the conduct of proceedings before our Courts is governed by the *Civil Procedure Act*, the *Criminal Procedure Code*, the *Appellate Jurisdiction Act*, the *Supreme Court Act*, 2011 and the Rules made pursuant thereto, and by many other Acts of special character.

53. Additionally, the importance of Procedural Rules, which are interwoven with substance of the case and thus go to the root of Jurisdiction was also addressed and highlighted by the Supreme Court in the case *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR, where the court held as hereunder;

> (65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

54. Consequently and in view of the foregoing observations, I come to the conclusion that the Reference beforehand, which is premised on numerous grounds contained at the foot of the Chamber Summons, is misconceived, bad in law and otherwise legally untenable.

Issue Number 2

Whether the Applicant has established and demonstrated Evidence of improper exercise of discretion by the taxing master.

55. Other than the procedural issue, which is albeit interwoven with the substance of the case and which issue has been canvased and addressed in terms of the preceding paragraphs, the Applicant herein had essentially complained that the learned taxing master did not undertake the impugned taxation in accordance with the provisions of The Advocates Remuneration Order 2014.

56. Instructively, Learned counsel for the Applicant contended that whereas the constitutional Petition which had been filed against the Respondent Client contained inter-alia, a claim for monetary compensation in the sum of kes.410, 621, 429.20/= only, the Learned taxing master however failed to factor in the explicit value which was evident on the face of the pleadings.

57. Further and in addition, Learned counsel for the Applicant has submitted that it was incumbent upon the learning taxing master to take into account the value of the suit property, which was disputed at the foot of the Constitutional Petition, which gave rise to the current proceedings.

58. Insofar as the learned taxing master failed to take into account the disclosed monetary value, which was reflected in the body of the Constitutional Petition, Learned counsel has therefore contended that the failure to do so constitutes an error in principle and thus improper exercise of discretion.

59. In a rejoinder, Learned counsel for the Respondent has submitted that the brief in respect of which the Applicant was instructed to act for the Respondent herein, namely, ELC Petition No. 21 of 2018, was a Constitutional Petition and no a commercial dispute. In this regard, Learned counsel has contended that wherever a taxing officer is called upon to tax either Party and Party cost or Advocate/ clients costs, arising from a constitution Petition, the taxing officer must apply the provisions of Schedule 6 paragraph (j) of The *Advocate Remuneration Order* 2014.

60. Furthermore, Learned counsel for the Respondent also contended that in ascertaining the Instruction fees arising out of a Constitutional Petition or Judicial review, the monetary value of the suit property, is not one of the factors to be taken into account and/or applied.

61. Contrarily, Learned counsel for the Respondent has added that what needs to be taken into account is whether the Petition/Judicial Review has been opposed or whether same is complex. In this regard, Learned counsel contended that a taxing officer would then take the benchmark provided on account of instruction fees for prosecuting/opposing a Constitutional Petition and thereafter exercise discretion in increasing the instruction fees, taking into account various factors, inter-alia, the complexity of the matter.

62. I have anxiously reviewed the parallel submissions ventilated by the respective Parties and I beg to state that the answer to the conflicting submissions is well prescribed by the provisions of Schedule 6 Paragraph (j) of The *Advocates Remuneration Order* 2014.

63. For ease of reference, the named provisions of the *Advocates Remuneration Order* is reproduced as hereunder;

> (j) Constitutional petitions and prerogative orders
>
> To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—
>
> i. where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
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> ii. where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000
>
> iii. to present or oppose application for setting aside arbitral award 50,000.

64. My reading of the said provisions, drives me to the conclusion that in ascertaining or taxing the instructions fees arising out of a constitutional petition, the taxing officer is called upon to take into account, inter-alia, the nature and importance of the Petition; the complexity of the matter; the difficulty or novelty of the questions raised and the amount of value of the subject matter and finally the time spent by the Advocate.

65. Having perused the Ruling of the Learned taxing master, which is the subject of the reference herein, I have discerned that the learned taxing master properly took into account the various factors prescribed and alluded to by the relevant provisions of the Advocate Remuneration Order, 2014.

66. As pertains to the complaint by the Applicant that the Learned taxing master ignored and or disregarded the issue of the amount of value of the disputed property, I beg to state that even though the petition at the onset contained a claim in the sum of Kes.410, 621, 429.20/= only, however, it is not lost on this court that ultimately the petition was dismissed by the Honourable court and hence no monetary award was issued.

67. It is also important to underscore that where the taxation is carried out and/or undertaken after the conclusion of the primary suit, giving rise to the taxation, the monetary value or amount if any, to be taken into account and considered by the taxing master should be what was found due by the court in the Judgment. Consequently and in this regard, the figures which were reflected and contained in the primary pleadings, would thus have no relevance in the ascertainment of the instruction fees.

68. Instructively and for good measure, the Advocate -Client bill of cost herein was taxed on the 3rd October 2022; long after the primary suit had been Dismissed on the 5th May 2020.

69. To the extent that the primary suit, namely, the Petition was dismissed by the court and hence no monetary award was made, the guiding factor in ascertainment of the Instruction fees can therefore not be hinged on the amount which was stated in the pleadings. For clarity, the Judgment of the court shall be deemed to supersede the pleadings and henceforth shall provide the benchmark/ yardstick for ascertaining the instruction fees.

70. Notably and in this respect, it is appropriate to take cognizance of the decision of the Court of Appeal in the case of *Peter Muthoka & Another v Ochieng & 3 Others* (2019)eKLR, where the court succinctly observed and held as hereunder;

> "It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.
>
> Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.
>
> It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them

in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.

71. From the exposition of the law by the Honourable Court of Appeal in terms of the preceding paragraphs, it is crystal clear that even though the amount or value of the property at the foot of a Constitution Petition can be taken into account for purposes of taxation, however, the moment there is a Judgment in the matter; the amount if any, proclaimed by the Honourable court shall therefore provide the benchmark for ascertaining of Instruction fees.

72. Arising from the foregoing, the complaint by counsel for the Applicant that the learned taxing master erred in not taking into account the monetary value contained in the body of the Petition, whilst assessing instruction fees, is therefore misconceived and Legally untenable.

73. To my mind, by the time the learned taxing master was taxing the instruction fees, the primary suit that anchored the claim for taxation for instruction fees had been determined vide Judgment and wherein same was dismissed. Consequently, there was no monetary award alluded to and/or contained in the Judgment capable of being relied upon or otherwise.

74. Clearly and in simple terms, I come to the conclusion that the learned taxing master correctly appreciated the factors to be considered and thereafter duly applied same in ascertaining and awarding the requisite Instruction fees.

75. Other than the foregoing, the other complaint relates to the assessment and award of fees on account of attendance, drawing of pleadings and documents; ascertainment of folios and award in respect of perusal. However, I have reviewed the ruling of the taxing master and I am inclined to and do hereby state that sane properly exercised her discretion.

76. Suffice it to point out that the Petition in respect of which the Applicant herein had hitherto been instructed was never canvassed by way of viva voce evidence. To the contrary, same was terminated on the basis of an Application, which was itself canvassed by way of written submissions.

77. Notably, the Applicant herein would not have been entitled to raise a claim for attendance either for half day or full day, yet the attendances made on behalf of the Respondent were merely mentions for further directions and compliance. In this respect, the award of fees on the basis of one-hour attendance was indeed just and reasonable.

78. Having come to the foregoing conclusion, it is imperative to state and observe that an Appellate court ought to be slow in interfering or upsetting the decision of the lower court and particularly where the decision relates to exercise of discretion.

79. Nevertheless, should the appellate be inclined to upset the exercise of discretion by the lower court, then it is incumbent upon the appellate court to satisfy itself that indeed circumstances do exist to warrant such interference.

80. Before departing from the issue herein, it is appropriate to cite and reiterate the holding in the case of *Price & another v Hilder* [1984] eKLR, were the court succinctly stated and held as hereunder;

> " The law on the matter is now settled. The English case of *The El Amria* [1981] 2 Lloyds Law Reports page 119 at page 123 as per Brandon LJ, which has been applied in Kenya, has comprehensive principles that are accepted as applying to an application concerning the exercise of a judge's discretion. The leading local decision is the case of *Mbogo v Shah* [1968] EA page 93 in which De Lestang VP (as he then was) observed at page 94:

> "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."
>
> It would be wrong for this Court to interfere with the exercise of the trial judge's discretion merely because this Court's decision would have been different.

81. In a nutshell, I have been unable to discern any scintilla of improper exercise of discretion by the learned taxing master, either as contended by the Applicant or at all. Contrarily, what is evident is that the Learned taxing master was abreast of the relevant factors to take into account in ascertaining the instruction fees and the rest of the charges that were contained at the foot of the Advocate Client Bill.

Final Disposition

82. From the foregoing discourse, it is evident and apparent that the Reference vide Chamber Summons dated 31st October 2022, was filed without due regard to the relevant and applicable provisions of the law, and especially; the peremptory provision of Rule 11(1) of The *Advocate Remuneration Order*.

83. Consequently and in the premises, the Reference beforehand was not only premature and misconceived, but same was stillborn. In a nutshell, the reference be and is hereby struck out.

84. Nevertheless, this court has a discretion on the issue of costs and taking into account the totality of the issues and coupled with the fact that the Jurisdictional question, which has led to the reference being struck out was raised by the court, the proper and just order is to decree that each Party do bear own costs. See the decision of the Supreme court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR.

85. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MAY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant

Ms. Kala h/b for Mr. Philip Murgor for the Applicant

N/A for the Respondent