REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO E 971 OF 2020

AND

MISCELLANEOUS CIVIL APPLICATION Nos. 972, 973 AND 974 OF 2020

HAMILTON HARRISON & MATHEWS.....APPLICANT

VS

KEROCHE BREWERIES LIMITED.....RESPONDENT

RULING

Introduction

1. This ruling determines **8** applications filed in Miscellaneous Civil Application Nos. **971** of 2020, **972** of 2020**, 973** of 2020 and **974** of 2020. On **26th** January 2020, counsel for both parties requested that the applications be heard together and urged the court to render one determination.

2. The common thread between the **8** applications is that the applicant in all the files is the firm of **Hamilton Harrison & Mathews** (the advocate) while the Respondent in the files is **Keroche Breweries Limited** (the client). Another common factor is that the advocate's Bills of Costs in each file were taxed and allowed as against the client as more particularly explained later and Certificate of Costs issued for the taxed amounts. Another common denominator is that in each file, the advocate prays for entry of judgment against the client on the strength of the Certificates of Taxation plus interests and costs.

3. The other discernible commonality in the **8** applications is the striking similarity in the grounds cited by each party in support of their respective applications, the supporting affidavits and the submissions tendered which are essentially a replica of each other. This resemblance is understandable considering that the Bill of Costs which triggered these proceedings emanated from essentially identical cases before the Tax Appeals Tribunal. It is this resemblance which informed the parties preference that that the **8** applications be heard together and the court writes one ruling. As was held in *Korean United Church of Kenya & 3 Others v Seng Ha Sang,*[1] consolidation of suits (or hearing identical applications together) is done for the purposes of achieving the overriding objective of expeditious and proportionate disposal of civil disputes. It saves costs, time and effort and makes the conduct of several actions more convenient by treating them as one action. The rationale behind is to avoid conflicting judgments, save time and money by clubbing together matters involving common questions of fact and law.

4. However, the point of divergence is that whereas the advocate seeks entry of judgment as aforesaid, vide separate but identical applications filed in each file, the client *inter alia* prays that the all the taxations be set aside and the Bills be remitted to the Taxing Master for fresh taxation.

The advocate's applications

5. In Misc. No. **971** of 2020, vide an application dated **30th** October 2020, the advocate prays for judgment against the client for **Kshs. 14,576,048/=** being the costs taxed and allowed as against the client on **2nd** October 2020 as per the Certificate of Taxation dated **22nd** February 2021. The advocate prays for interests at court rates from the date of taxation plus costs of the application.

6. In No. **E 972** of 2020, the advocate, vide an application dated **24th** November 2020 prays for judgment against the client **in the sum of**

Kshs. 28,101,411/= together with interest thereon at court rates from **20th** November 2020 until payment in full being costs taxed and allowed as against the client. The advocate also prays for costs of the application. The **Certificate of Taxation was issued on 22nd February 2021.**

7. In No. E 973 of 2020, vide an application dated 24th November 2020, the advocate prays for judgment against the client for Kshs. 149, 872, 664 /= together with interests thereon at court rates from **20th** November 2020 until payment in full plus costs of the application.

8. In E 974 of 2020, vide an application dated 24th November 2020, the advocate prays for judgment against the client for Kshs. 1,469, 457.46 together with interest thereon at court rate from **20th** November 2020 until payment in full plus costs of the application.

9. **All the advocate's applications are anchored on** section **51 (2)** of the Advocates Act,[2] Section **3A** of the Civil Procedure Act[3] and the inherent jurisdiction of the court. **The core grounds in support of the applications are the** Bill of Costs were taxed and allowed as against the client and Certificate of Costs issued but payment has not been made.

Clients' grounds of opposition to the advocates applications

10. The client filed identical grounds of opposition to each application stating that it has challenged the Certificate of Taxations in the **4** files by way of references filed in each file, and, that, the Certificates were issued notwithstanding a fees agreement between the parties.

The client's applications

11. The client filed references in each file premised on substantially if not wholly identical grounds seeking similar orders. In particular, the client prays for an order that this court extends time within which it to be can file its references in each file such extension to include the time of filing the applications. It also prays that this court sets aside the taxations and remit the Bills of Costs in each file back for taxation afresh. Lastly, the client prays for costs of the applications. The prayers seeking stay are overtaken by events.

12. For the sake of brevity, the client's reference are dated : - **E971** of 2020--- **6th** January 2021, E **972** of 2020---**4th** January 2021, **E 973** of 2020--**4th** January 2021 and **E974** of 2021—**24th** January 2021.

13. The grounds in support of the application are identical. The core grounds that the Taxing Officer erroneously relied on paragraphs **1(a)** to **(d)** of Schedule **6** of the Advocates Remuneration Order in assessing instruction fees which provisions were inapplicable to the Taxations. The client argues that the Taxing Officer erred in law in assessing and awarding the instruction fees in the **4** files. The client faults the Taxing Master for basing the instruction fees of the subject matter stated in the various rulings what was before the Tax Appeals Tribunal was not a monetary claim but an appeal against an erroneous assessment of tax demanded from the client. It content's that the Taxing Officer erred in law in awarding an excessive and exorbitant amount on account of instruction fees not commensurate to the complexity of the brief. It was the client's position that the minimum reasonable fee provided for the appeals is **Kshs 25,200/=**.

14. The grounds relied upon by the client in support of the said applications are explicated in the supporting affidavits of Tabitha Mukami Karanja, its Chief Executive Officer filed in support of each application. It will serve no purpose to rehash them here. The client prays that the rulings on Taxation be set aside and the Bill be remitted back for fresh taxation. It is the client's position that it is lawful and just that the decision of the said rulings on taxation be set aside.

Advocate's Response to the client's applications

15. The advocates opposition to the client's applications is elucidated in the identical Replying affidavits of Mr. Nicholas Ruto, advocate filed in response to each application. The nub of the opposition is that the client was served with the Bill of Costs and the Taxation Notice; that the client was aware of the taxation date; that the Bill of Costs were taxed and Certificates of Taxation issued on the strength of which the advocate has applied for judgment under section **51 (2)** of the Advocates Act.[4]

16. Also, the advocates states that the taxation rulings were delivered in the presence of the client's advocate. The advocate also states that the client has not complied with paragraph **11** of the Advocates (Remuneration) Order, and that the Bill of Costs were drawn in accordance with Schedule **11** of the Advocates Remuneration Order which provides for work done at the tribunal. The advocate maintains that the Taxing Master did not apply Schedule **6** of the Advocates Remuneration Order nor did she err in ascertaining the value of the subject matter. Further, that the amount taxed is not manifestly excessive to justify court's interference.

17. In addition to the Replying affidavit, the advocate filed identical grounds of opposition in each file stating that the applications are incompetent for want of compliance with paragraph **11** of the Advocates (Remuneration) Order; that Bill of Costs were drawn to scale; that there is no error of principle; that the taxing officer considered relevant matters including the value of the subject matter in each file and taxed the Bills in accordance with the Advocates remuneration Order. Lastly, the application is an abuse of the court process.

The advocate's submissions

18. Mr. Kiragu & Mr. Ruto, counsel for the advocate filed identical submissions arguing that the rulings were delivered in the presence of both parties including the client's advocate and also, they were e-mailed to the parties. They argued that the client's applications were filed outside the period prescribed by the law, hence, they ought to be dismissed.

19. Mr. Kiragu & Mr. Ruto submitted that whereas Rule **11** gives the court jurisdiction to entertain a reference, the rule sets out pre-conditions which must be complied with before filing a reference. *First*, they argued that a party should give a notice in writing to the taxing

officer stating the items he objects. They submitted that the client did not comply with this requirement. *Second*, they argued that Rule **11(2)** requires the taxing officer to provide reasons for the decision after receipt of a notice. They argued that the client has not shown that he received any such communication from the taxing officer. *Third*, they argued that there is an exception where the reasons are contained in the ruling. They cited *Evans Thiga Gaturu v Kenya Commercial Bank Limited[5]* and *Ahmednasir Abdikadir & Company Advocates v National Bank of Kenya Limited[6]* for the holding that where reasons are contained in the decision, it is not necessary to request the taxing officer for reasons.

20. Mr. Kiragu & Mr. Ruto submitted that Rule **11(2)** requires a reference be filed within **14** days from the date of receiving the reasons for the decision. They submitted that the client's application completely falls short of this timeline. They submitted that there is no evidence to show that the client gave the notice contemplated under Rule **11(1)**. Further, they submitted that under Rule **11(2)**, the client ought to have filed the reference within **14** days from the date of the taxations which is **2nd** October 2020 for **E971** of 2020 and **20th** November 2020 for the rest of the files. They submitted that all the four applications were filed outside the permitted period. On this ground, Mr. Kiragu & Mr. Ruto submitted that the applications are incompetent. They cited *Evans Thiga Gaturu v Kenya Commercial Bank Limited[7]* which held that filing a reference **14** days after the ruling on taxation renders the reference incompetent.

21. Mr. Kiragu & Mr. Ruto also cited *Twiga Motors Limited v Dalmas Otieno Onyango[8]* which held that a reference filed out of time and without complying with Rule **11** is bad in law and ought to be struck out. They cited *Tom Ojienda & Associates v National Land Commission* for the holding that having failed to meet the requirements of Rule **11 (i)** & **(ii)** there is no valid reference before the court. They relied on *Purity Gathoni Githae & Another v Excelo Structures Limited & Another[9]* which held that no valid reference can be filed outside the prescribed time without first obtaining an order enlarging time.

22. In their supplementary submissions, Mr. Kiragu & Mr. Ruto submitted that the client has not sought an extension of time in its application. They submitted that the extension of time for the first time is sought in the advocate's submissions. They argued that a party cannot seek extension of time in its submissions and even if the extension had been sought, the law is clear that an applicant will not be granted extension of time merely because he has asked for it because there are tests to be met and extension is not granted as a matter of cause. They submitted that an applicant must give good reasons for delay and show that his reference is not frivolous. They submitted that the court will not extend time where the delay has not been explained and added that in the instant case the client has not explained the reasons for the delay. (citing *Republic v Kenyatta University & Another ex-parte Willington Kihato Wamburu[10]).*

23. Mr. Kiragu and Mr. Ruto submitted that this court can only disturb the taxing officer's ruling only if it is shown that she committed an error of principle. To buttress their argument they cited *Republic v Kenyatta University & Another ex-parte Wellington Kihato Wamburu[11]* which held that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he has not exercised his discretion properly, or has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider, or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted the law, or gave a ruling which no reasonable man would have given. They submitted that the client has not shown that the taxing officer committed an error of principle, or he was guided by improper motive or failed to properly exercise her discretion. They argued that the complaints cited by the client are baseless and fall below the threshold to warrant this court's interference with the decision. Responding to the submission that the taxing officer relied on Schedule **6** of the Advocates Remuneration Order to assess instruction fees, they argued that the Bill of Costs clearly shows that it was drawn in accordance with Schedule **11** which is the schedule applicable for work done at tribunals. They argued that the impugned ruling shows that the taxing officer applied schedule **11**.

24. Regarding the instruction fees, they submitted that the taxing officer did not err in considering that the value of the subject matter in the **4** files because had the appeal either failed or succeeded, the amount payable or not payable justifies the amounts awarded. They cited *Joreth Limited v Kigano & Associates[12]* for the proposition that in assessing instruction fees, the taxing officer should consider the value of the subject matter which must be determined from the pleadings or judgment or settlement or any papers filed in court.

25. On the submission that the instruction fees awarded is exorbitant, they submitted that the full instruction fees are earned once action is commenced and relied on *First American Bank of Kenya v Shah & Others[13]*which held that full instruction fees are earned upon originating pleadings and that the subsequent progress of the matter is irrelevant. They dismissed the suggestion that the **Kshs. 25,000/=** was adequate as instruction fees citing the Court of Appeal in *Premchand Raichand v Quarry Services of East Africa Limited & Others[14]*which held that the general level of remuneration of advocates must be such as to attract worthy recruits to an honorable profession.

26. Addressing the client's argument that there was an agreement for fees which militated against taxation, Mr. Kiragu & Mr. Ruto submitted that there was no such agreement and that the issue was never raised before the taxing officer, and, that, a party cannot raise a new issue in a reference. They submitted that Section **45 (1)** of the Advocates Act provides that a retainer agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized on that behalf. They submitted that no agreement was placed before the taxing officer. They also cited Section **45 (6)** which provides that costs of an advocate shall not be subject to taxation in any case where there is an agreement contemplated under section **45 (1)** of the Advocates Act and submitted that the only question is whether there was such an agreement in the instant case.

27. To fortify their agreement, they relied on the Court of Appeal holding in *Omulele & Tollo Advocates v Mount Holdings Limited* [15]that a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including the fees payable and that where there is no written and signed agreement as contemplated under section **45 (1)** of the Advocates Act, the advocate is entitled to tax his bill of costs.

28. Regarding the advocates applications for entry of judgment, they submitted that it is merited and ought to be allowed. They cited Section **51(2)** of the Advocates Act[16] and *Evans Thiga Gaturu v Kenya Commercial Bank Limited*[17] in which the court was emphatic that when an advocate's costs have been taxed and the certificate issued, the only impediment to entry of judgment is if there is a dispute as to retainer. They submitted that in the instant case there is no dispute that the advocate's Bills were taxed and that a Certificate of Taxation was issued for the taxed. They also argued that the client has not settled the taxed fees and urged the court to allow the application with costs.

The client's advocates Submissions

29. Mr. Havi, the counsel for the client also filed substantially identical submissions in the **4** files. He underscored this courts power to extend time for lodging a reference and cited *Addax Kenya Limited v National Environmental Management Authority & another**[18]*** in which the court saw no reason why it could not extend time under paragraph **11 (1)** of the Advocates Remuneration Order describing it as a procedural technicality which the court should ignore and prefer substantive justice. He cited *Andrew Shisala Angalushi v Zephenia K Yego & Aginga Asiligwa Chanzu**[19]*** which held that Article **159 (2) (d)** of the Constitution enjoins the court to dispense justice without undue regard to procedural technicalities and argued that the Respondent will not suffer any prejudice if time is extended.

30. Mr. Havi also submitted that before the Tax Appeals Tribunal was not monetary claim to warrant assessment of instruction fees as happened in these files. Citing *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board**[20]*** he argued that an excessive and exorbitant fee is a ground for setting aside a taxation. He argued that failure to arrive at a reasonable fee amounts to abuse of discretion entitling the High Court to intervene. He cited *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others**[21]*** which held that taxation of costs should be conducted on the basis of rational criteria clearly expressed for the parties to perceive with ease and cited *Keziah Gathoni Supeyo v Yano t/a Yano & Co. Advocates**[22]*** which underscored the need to adhere to the principles governing taxation.

31. Additionally, Mr. Havi argued that the advocate was only retained as a legal consultant to file submissions and attend the hearing of the appeals at an agreed fee of **Kshs 1,061,400/=** which was paid in full. He relied on *Rachuonyo & Rachuonyo Advocate v National Bank of Kenya Limited**[23]*** in which the High Court precluded an advocate from demanding more from a client, in a brief in which there was an agreement on fees. He urged the court to allow the reference and decline the application for entry of judgment.

Determination

32. I will first address the question of extension of time. A reading of the client's **4** applications shows that unlike in file Nos. **E 972** of 2020**, E 973** of 2020 **& E974** of 2020, there is no prayer for extension of time in the application filed in **E 971** of 2020. The prayer for extension of time in this particular file was introduced in the client's advocate's submissions. Reliefs flow from the pleadings. The core issue here is to understand the function of and purpose of pleadings.

33. The function of a pleading in civil proceedings is to alert the other party case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made. Issues for determination in civil cases should be raised in the pleadings and if an issue arises which does not appear in the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely on, or treat un pleaded issues as having been fully investigated.

34. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[24] There is no direct prayer in **E971** of 2020 praying for extension of time or for the reference to be admitted out of time. The said prayer was only introduced by way of submissions. I find no basis upon which I can entertain such a prayer in this particular application. On this ground alone, the client's application In **E971** of 2020 collapses on grounds that it was filed out of time and without leave.

35. Regarding **E 972** of 2020, **E 973** of 2020 and **E 974** of 2020, the client specifically prayed for extension of time. However, must surmount several highly dispositive legal hurdles. *First,* Paragraph **11** of the Advocates Remuneration Order stipulates the procedure to be followed while filing references objecting to the decision of the Taxing Officer. It provides that: -

> **"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 which he objects.*
>
> *2) The Taxing Officer shall forthwith record and forward to the objector the reasons or 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 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 expired."

36. A reading of the above provision leaves no doubt that the objection procedure is in three stages. *First*, the objecting party is required to give notice to the taxing officer to the items in the taxed Bill of Costs he objects to. There is nothing to show that the client gave the Notice as contemplated in the above provision. The Taxing Master is obliged to forthwith give reasons for taxing of the items objected to. The objector within **14** days of receipt of the taxing officers' reasons must file a reference before a judge. As correctly held in the decisions cited by Mr. Kiragu & Mr. Ruto, where the reasons are contained in the ruling, the reference must be filed within **14** days from the date of the ruling.

37. *Second*, the delay has not been explained. As was held in *Mbogo Gatuiku v A.G.**[25]* 'even a delay of a day or two calls for an explanation.' The common practice in our legal system is that the applicant must explain the cause of delay as precisely as possible in the affidavit supporting the application. The delay may be condoned if sufficient cause is shown. However, condonation of delay may be refused when there is exceptionally inordinate delay. The Supreme Court in *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others* laid out some general principles in matters extension of time thus: -

"As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held: -

"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

... we derive the following as the underlying principles that a Court should consider in exercising such discretion: -

i. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;

ii. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;

iii. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;

iv. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;

v. whether there will be any prejudice suffered by the respondents, if extension is granted;

vi. whether the application has been brought without undue delay; and

vii. whether in certain cases, like election petitions, public interest should be a consideration for extending time."

38. The doctrine of "Every day's delay must be explained" has to be applied in a rational, common-sensical and pragmatic manner, and a pedantic approach should not be adopted. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. There cannot be a presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of *mala fides*.

39. In order to have the advantage of the courts exercise of discretion, an applicant must show that he was prevented by sufficient cause from preferring application or appeal within the prescribed period of limitation. Sufficient cause means something beyond the control of the party. The words "sufficient cause" should be liberally construed. The applicant must satisfy the court that he was not negligent and inactive. It must be considered that when the time for filing the application or an appeal lapses a valuable right accrues to the successful litigant.

40. I am aware of the fact that refusal to condone delay would result in foreclosing the suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. In fact, it is always just, fair and appropriate that matters should be heard on merits rather than shutting the doors of justice at the threshold. Since sufficient cause has not been defined, thus, the courts are left to exercise a discretion to come to the conclusion whether circumstances exist establishing sufficient cause. The only guiding principle to be seen is whether a party has acted with reasonable diligence and had not been negligent and callous in the prosecution of the matter.

41. Condonation is not for the mere asking. It is incumbent upon an applicant in an application for condonation to prove that (s)he / it did not willfully disregard the timeframes provided for in the Rules. Furthermore, that there are reasonable prospects of success on appeal. In *Melane v Southern Insurance Co Ltd* [26]the following is stated about the factors that will be taken into account when considering a condonation application: -

"*In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success*

which not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."(Emphasis added)

42. In *S v Mantsha* [27]the following is stated:

> "*[5] … As the appellant was seeking an indulgence, he was required to show good cause for condonation to be granted. Good (or sufficient) cause has two requirements. The first is that the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that he or she has reasonable prospects of success on the merits of the appeal.*
>
> *[11] In considering an application for condonation a court must take into account a number of considerations. These include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court and the avoidance of unnecessary delay in the administration of justice."*

43. In *Uitenhage Transitional Local Council v South African Revenue Service**[28]*** the following in stated:

> "**…***condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out"*

44. In order to succeed in application for extension of time, an applicant must show good cause. Authorities emphasize that it is unwise to give a precise meaning to the term *good cause*. When dealing with words such as "good cause" and "sufficient cause" courts have refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words.[29] The court's discretion must be exercised after a proper consideration of all the relevant circumstances.

45. With the foregoing as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success or in the instance case by showing that the reference is made in good faith and has prospects of success.[30]

46. The client never explained the delay. By failing to explain the delay, the client deprived this court the opportunity to consider the reasons for the delay and to consider whether or not to the client was prevented by *sufficient cause* from filing the application within time. The client deprived the court the basis upon which to exercise its discretion in granting the extension. Discretion is exercised on sound evidence and the law otherwise it would be arbitrary and capricious.

47. The client assaults the assessment of the instruction fees on grounds that the Taxing Master applied the wrong schedule, a reading of the Ruling under the title "analysis" shows that the Taxing Master wrote "the bill will be taxed using schedule **11** of the Advocates Remuneration Order, 2014" hence the argument that the Taxing Master erroneously relied on paragraphs **1(a)** to **(d)** of Schedule **6** fails. This position is supported by her assessment which falls within Schedule **11.**

48. Regarding the contention that the the amount awarded is excessive, the general principles governing interference with the exercise of the Taxing Master's discretion are elucidated in the following passage: -

> "*The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."*[31]

49. The court must be satisfied that the Taxing Master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the Taxing Master was wrong. The court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the Taxing Master. It only interferes when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate the ruling.[32]

50. When a court reviews a taxation, it is vested with the power to exercise the wider degree of supervision.[33] This means: -

> *" . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.**[34]***

51. The Taxing Master is required to consider the time taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The definitive question is whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case. This requires this court to be satisfied that the Taxing Master was clearly wrong before interfering with her decision.[35]The quantum of such costs is to be what was reasonable fees and must be

within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles.

52. The exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.'[36]

53. In principle, costs are awarded, having regard to such factors as:- ***(a)*** *the difficulty and complexity of the issues;* ***(b)*** *the length of the trial;* ***(c)*** *value of the subject matter and* ***(d)*** *other factors which may affect the fairness of an award of costs.* As the Ugandan Supreme court put it: [37]

> *"Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.*
>
> ***Secondly****, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.*
>
> ***Thirdly****, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."*

54. In *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others*[38] it was held :-

> *"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…. The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment… A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved… Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for….The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs…"*

55. The discretion vested in Taxing Master is to allow fees, costs, charges and expenses as appear to him to have been necessary or proper, and not those which may objectively attain such qualities, and that such opinion must relate to fees and all costs reasonably incurred, but also imports a value judgment as to what is reasonable. The discretion to decide is given to the Taxing Master and not to this court. This discretion must be exercised judicially in the sense that the Taxing Master must act reasonably, justly and on the basis of sound principles with due regard to the circumstances of the case. The taxing master is also enjoined to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case.

56. This court will not interfere with the exercise of the taxing master's discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper, or failing to bring his/her mind to bear on the question in issue, or acting on wrong principles. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue. The court must be of the view that the taxing master was clearly wrong i.e. its conviction on a review that he or she was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.

57. In *Phemchand Raichand Ltd Another v Quarry services of East Africa Ltd and Another*[39] it was held: -

> *i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.*

ii. The taxing master was expected to tax each bill on its merits;

iii. The value of the subject matter had to be taken into account;

iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;

v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.

vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.[40]

58. The court will not normally interfere with the taxing master's ruling simply because it thinks it would have awarded a different figure had it been the one taxing the bill. The court can interfere if it is proved that the amount taxed was manifestly excessive or low, or if there is proof that the taxing officer followed a wrong principle in reaching his decision.

59. A reading of the impugned ruling shows that the Taxing Mater properly considered all the material before him and properly exercised his discretion in arriving at the decision and he was not only alive to the law and principles governing taxation, but also, he took into account the applicable principles and fully understood the task before him. I am persuaded that he applied the applicable schedule in taxing the bill. On the whole, the client failed to demonstrate that the Taxing Master misdirected himself or improperly exercised his discretion or arrived at an inordinately high or unreasonable awards to warrant this courts intervention. In view of my conclusions arrived at above, it is my finding that the client's application fails.

60. Lastly, the argument regarding the existence of fees agreement between the parties is unsupported by evidence. This in my view disposes the said argument. It will suffice to add that the submissions rendered by Mr. Kiragu & Mr Ruto on this position represents the correct proposition of the law.

61. I now turn to the advocates applications seeking entry of judgment as per the Certificates of Taxation. The applications are expressed under section **51(2)** of the Advocates Act which stipulates the law in applications of this nature as follows: -

> *"The certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the court, be final as to the amount of the costs recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."*

62. The section in peremptory terms provides that the certificate unless set aside shall be final. Parliament in its wisdom used the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[41]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[42] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

63. The duty of the courts of justice is to try to get the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

64. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[43] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[44] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

65. The import of the above provision is that unless a Certificate of Taxation is set aside, it is final. In *Lubulellah & Associates Advocates v N K Brothers Limited*[45] the court observed that the law is very clear that once a taxing master has taxed the costs, issued a Certificate of Costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the applicant against the Respondent for the taxed sum indicated in the Certificate of Taxation.

66. In *Musyoka & Wambua Advocates v Rustam Hira Advocate*[46] it was held that section **51** of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has discretion to enter Judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This is a mode of recovery of taxed costs provided by law, in addition to filing of suit.

67. I have already declined the client's application seeking to set aside the Taxation. The import of my finding is that the Certificate of Taxation dated **22nd** November 2021 still stands. Consistent with the provisions of section **51(2)** of the Advocates Act, the said Certificate is final. In line with the said provision, the advocate is entitled to judgment in terms of the Certificate of Taxation. Also, there is no bar legal or equitable to stop the entry of the judgment.

68. Flowing from my analysis and conclusions arrived at herein above, I find that the following orders are merited in the circumstances of this case: -

*a. **That** the client's applications filed in- **E971** of 2020 **6th** January 2021, in E **972** of 2020 dated **4th** January 2021, in **E 973** of 2020 dated **4th** January 2021 and in **E974** of 2021 dated **24th** January 2021 are hereby dismissed with costs to the advocate.*

*b. **That** the advocates application filed in **E 971** of 2020 dated **30th** October 2020 is allowed, and, judgment is hereby entered in favour of the firm of Hamilton Harrison & Mathews in the sum of **Kshs. 14,576,048/=** against the client Keroche Breweries Limited being the certified costs as per the Certificate of Costs issued pursuant to the said taxation.*

*c. **That** the advocates application filed in **E 972** of 2020 dated **24th** November 2020 is allowed, and, judgment is hereby entered in favour of the firm of Hamilton Harrison & Mathews in the sum of **Kshs. 28, 101,411/=** against the client Keroche Breweries Limited being the certified costs as per the Certificate of Costs issued pursuant to the said taxation.*

*d. **That** the advocates application filed in **E 973** of 2020 dated **24th** November 2020 is allowed, and, judgment is hereby entered in favour of the firm of Hamilton Harrison & Mathews in the sum of **Kshs. 149,872,664/=** against the client Keroche Breweries Limited being the certified costs as per the Certificate of Costs issued pursuant to the said taxation.*

*e. **That** the advocates application dated **24th** November 2020 filed in **E 974** of 2020 dated **24th** November 2020 is allowed, and, judgment is hereby entered in favour of the firm of Hamilton Harrison & Mathews in the sum of **Kshs. 149, 469,457.46** against the client Keroche Breweries Limited being the Certified costs as per the Certificate of Costs issued pursuant to the said taxation.*

*f. **That** the sums in paragraphs (b), (c) (d) & (e)shall attract interests at court rates from the dates of their respective taxations.*

*g. **That** the client shall pay to the advocates costs of the applications.*

Orders accordingly

SIGNED, DELIVERED AND DATED AT NAIROBI THIS 25TH DAY OF MARCH, 2021

John M. Mativo

Judge

Delivered electronically via e-mail

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[1] {2014} eKLR.

[2] Cap 16, Laws of Kenya.

[3] Cap 21, Laws of Kenya.

[4] Cap 16, Laws of Kenya.

[5] {2012} e KLR.

[6] (2) {2006} 1 EA

[7] {2012} e KLR.

[8] {2015} e KLR.

[9] {2018} e KLR.

[10] {2018} e KLR

[11] {2018} e KLR.

[12] {2002} 1 EA 92.

[13] {2002} 1 EA 64

[14] {1972} EA 163.

[15] {2016} e KLR

[16] Cap 16, Laws of Kenya.

[17] {2012} e KLR.

[18] {2017} e KLR

[19] {2020} e KLR.

[20] {2005} e KLR.

[21] {2006} e KLR.

[22] {2019} e KLR.

[23] {2020} e KLR.

[24] See *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others* Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

[25] HCCC 1983 of 1980, High Court, Nairobi.

[26] 1962 (4) SA 531 (AD) at page 532 B-E'

[27] 2009 (1) SACR 414 (SCA).

[28] 2004 (1) SA 292 (SCA).

[29] Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352-3).

[30] Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal.

[31] In *Visser v Gubb* 1981 (3) SA 753 (C) 754H – 755C.

[32] See *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* [1984] ZASCA 2; 1984 (3) SA 15 (A) and *Legal and General Insurance Society Ltd vs Lieberum NO and Another* 1968 (1) SA 473 (A) at 478G.

[33]*Johannesburg Consolidated Investment Co. vs Johannesburg Town Council* 1903 TS 111.

[34]*Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18F C G.

See also the discussion by Botha J in *Noel Lancaster Sands (Pty.) Ltd. vs Theron and Others 1975* (2) SA 280 (T) at 282D C 283D for a discussion of the nature and limits of the judicial function in this context.

[35] (See: *Ocean Commodities Inc vs Standard Bank of SA Ltd* [1984] ZASCA 2; 1984 (3) SA 15 (A) at 18E-G).

[36] Per *SMIT AJP in Preller vs S Jordaan and Another* 1957 (3) SA 201 (O) at 203C - E.

[37]*Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC).*

[38]{2006} e KLR).

[39] {1972} EA 162. Their lordships also cited with approval the decisions in the cases of *Attorney General vs Uganda blanket Manufacturers* CA No. 17 of 1993 (SCU); *Bashiri vs Vitafoam (u) Ltd* civil application No. 13 of 1995.

[40] See Steel construction and Petroleum Engineering (EA) Ltd versus Uganda Sugar Factory Limited [EA] 141; Kabanda versus Kananura Melvin Consulting Engineers, supreme court civil application No. 24 of 1993; Makumbi and Another versus sole electrics (U) Ltd [1990-1994] 1 EA 306 (SCU).

[41]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[42] Ibid.

[43] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[44] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[45] {2014} e KLR.

[46] {2006} eKLR.