REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS APPLICATION NO.75 OF 2018

PROF TOM OJIENDA.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MERU..... RESPONDENT

(As Consolidated With Misc Civil Application No. E003 OF 2020)

COUNTY GOVERNMENT OF MERU..... APPLICANT

VERSUS

PROF.TOM OJIENDA.....RESPONDENT

RULING

1. This court is called upon to determine chamber summons brought under certificate of urgency by the applicant herein, County Government of Meru, (hereinafter referred to as the client) dated 30/09/2020 pursuant to ***Rule 11 (2) of the Advocates (Remuneration) Order, 2014*** *and filed afresh as* ***Misc. Application No e003 of 2020.***

2. Before I embark on the application, I wish to point out that any application to the court and made subsequent to taxation, be it for reference or indeed an application for judgment upon a certificate of costs, ought to be filed in the matter the taxation was undertaken and not in a separate file. In my view, such proceedings attack the decision on taxation and reference not being an appeal but a supervision of the powers of the court delegated to the taxing master, to open a new file does no good at all because the court would as of necessity need the file to make its determination. The other less said result of such practice is to unfairly duplicate a cause and thus bludgeon the statistics of pending cased to inaccurate levels.

3. Taking the scenario at hand as a good example, the dispute between the two parties has proceeded and progressed to the level that certificates of costs were issued, in four files being; Meru Misc. Applications Numbers 75/2018, 76/2018, 77/2018 and 78/2021. It was in those files in which taxation was undertake and certificates of costs issued. When the clients sought to challenge the taxation, the counsel opted to imitate new proceedings in Misc. Applications Numbers E003/2020, E004/2020, E005/2020 & E006/2020. The truth is that the latter files could not proceed without recourse to the former files hence the need to have both consolidated. The tidy and proper thing to do was to file the applications in the former files for that is where they genuinely belong. By that decision to initiate new proceeding, the statistics of cases filed at the registry have been improperly exaggerated by four. That is not desirable at all because it distorts due statistics as well as planning for efficient execution of the mandate of the judiciary. It is a practice that must discouraged and stopped.

4. Back to the application, in it, the client seeks inter; alia stay of execution of the certificate of taxation dated 23/07/2020 in **Meru H.C MISC APPL. NO.75 OF 2018**, the setting aside of the ruling on taxation delivered by the taxing master on 16/07/2020 with respect to **Items Nos. 1, 5 and 18** of the Bill of Costs dated 19/03/2018 and that the said items in the bill of Costs dated 19/03/2018 be taxed by this honourable court in such other sums as may appear to be reasonable and in the alternative, that the matter be remitted back to the taxing master to re-tax the three items. In brief, the client prays that the decision to tax the three identified items be set aside and interfered with and the court awards what it considers just and reasonable.

5. The grounds upon which the application is founded are set out in the body of the application and echoed in supporting affidavit of Irah K. Nkuubi, the client's Acting Chief Legal Officer, sworn on 30/09/2020.

6. It is contended in that affidavit that the respondent, (hereinafter referred to as the advocate) filed an Advocate-Client Bill of Costs dated 19/03/2018 vide H.C Misc Appl.No.75 of 2018 pursuant to instructions from the client to act for it in Meru H.C Constitutional Petition No.8 of 2015. That the taxing master vide a ruling delivered on 16/07/2020 taxed the said Bill of costs at **Ksh. 10,505,441.40**. That upon receipt of the said ruling, the client wrote two letters dated 29/07/2020 and 16/09/2020 asking for the taxing master's reasons of taxation which reasons were sent via email on 16/09/2020 at 4.16 P.M. That the client, being aggrieved by the decision of the taxing master on items Nos.1, 5 & 18

in the advocate's Bill of Costs filed this application for determination by this court. The client contends that the sum of Ksh.6,000,000 awarded under item 1 for instruction fees is colossal and excessive and that items 5 & 18 are unnecessary expenses which ought not to be passed on to the client. The taxing master is faulted for not factoring in the amounts already paid to the advocate despite having been furnished with proof of payment.

7. The application was opposed by the advocate by the affidavit sworn on the 29/10/2020 and filed in court on 04.11.2020. In that Replying Affidavit, it is contended by the advocate that there is no valid reason to fault the taxing master for his decision in taxing the three items, 1, 5 and 18, as he did. He urged that the application lacks merit and a good candidate of dismissal.

8. In the submissions filed on behalf of the client, submissions were made to the effect that the amount of Kshs 6,000,000 awarded under item 1 for instruction fees was excessive and based on an error of principle. It faults the taxing master for importing an assumption to this matter that two vouchers of Ksh.6,000,000 found in an objection filed by the advocate in H.C Misc Appl. No.76 of 2018 were payments of instruction fees in that matter. The taxing master is further faulted for disregarding the provisions of the Advocates Remuneration Order, 2014 by awarding the advocate Kshs 6,000,000 on the basis of **novelty** of the matter.

9. It was maintained that there was nothing novel about H.C Pet No.8 of 2015 from which the said costs emanated. It was concluded that the award of Kshs 6,000,000 was excessive in the matter at hand and the same should be taxed downwards as per the objection and submissions filed against the bill of costs herein. It was contended that public law litigation should not be treated like matters touching on business and profit calculations. The court was urged to direct that any payments to be made must be less what the advocate had already received since the advocate had refused to disclose payments already made to him by the client. The client relied on **Republic v Kenyatta University & Anor, Exparte Wellington Kihito Wambura (2018) eKLR, Brampton Investment Ltd v Attorney General & 2 others [2013] eKLR, Republic v Commissioner of Domestic Taxes Exparte Ukwala Supermarket Ltd & 2 others (2018) eKLR** to support its position that in public interest litigation the costs should be watched so that access to justice in such matter is not impeded. In the cited cases, the sum awarded for instructions fees was Kshs 1,000,000, 500,000 and 1,000,000 respectively. On the basis of those decisions, the client urged that the court finds a justification and reversed the sum awarded by the taxing master.

10. For the advocate, submissions were offered to the effect that items Nos. 1, for instructions fees and items, 5 & 18, in respect to copies of the replying affidavit to oppose the petition and the application seeking conservatory orders were calculated and duly drawn in accordance with schedule 6 (A) of the Advocates Remuneration Order, 2014. He implored this court to find that the aggregate amount of Kshs 10,505,441.40 was awarded fairly and justly and the same should stay as the matter was of great public interest. It was concluded that the client's application should be dismissed and the certificate of taxation dated 23/07/2020 be enforced. The advocate relied on the decision in **Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No.3)[1972]EA 162** as cited in the case of Brampton Investment Ltd v Attorney General & 2 others (2013), **eKLR, Simpton Motor Sales (London) v Hedon Corporation (1964) 3 ALL E.R, Republic v Minister for Agriculture &2 others ex parte Samuel Muchiri W'njuguna (2006)eKLR, Kagwimi Kang'ethe & Company Advocates v Penelope Combos & anor** as cited in the case of Governors Balloon Safaris Ltd v Skyship Company Ltd & Anor (2015)eKLR to support his submissions and proposition of the law that the decision of the taxing master can only be interfered with if made contrary to the principles of taxation or where the award is too high or too low to amount to an injustice to one of the parties.

Analysis and determination

11. This determination is undertaken with the appreciation that the prayer for stay pending determination stands spent the moment I determine the reference. The other appreciation is that only if I interfere with the taxing master's decision would it then be necessary to consider whether to remit the matter back to the taxing master of just deal with it.

12. On the merits, it is clear from the client's application that the only items in contention are Nos.1, 5 &18 of the bill of costs as taxed. I have perused the decision on taxation by the master and observed that item one was taxed from Kshs 10,000,000 to Kshs 6,000,000, item 5 taxed down from Kshs 25,000 to 10,900 while item 18 was reduced from 25,050 to Kshs 5,750. In the decision the taxing master went into great depth to justify the award on instructions fees and I consider the reasons as sufficient to lead to the conclusion reached. I consider the awards on items 5 and 18 to be bases on mathematical calculation grounded upon the threshold of folios and the sum prescribed per folio. I have not understood the client to challenge the number of folios charged. Instead the client's contention in the Affidavit in support was not that the sum was high but rather that the charge was unnecessary. However, even with assertion no submission was offered on the two items with concentration being heaped on item 1. That notwithstanding, a reference call upon the court to scrutinize the record and to satisfy itself that nothing untoward has gone into the decision leading to taxed costs. Being appreciative of that mandate I have looked at the record, confirmed that the two affidavits were indeed filed. I also consider the law to require a respondent to a constitutional petition who wishes to oppose to file replying Affidavit. That makes the filling of such affidavits to be not only necessary but equally important to enable the court have all necessary material for consideration and evaluation in coming to its decision. In deed the Remuneration order specifically provide for filling of Affidavits and making copies of documents. In those circumstances, I find it untenable to argue that the costs met in making copies were unnecessary but rather determine that the same was in accordance with Schedule 6(A) (5) of the Advocates Remuneration Order, 2014. For such reasons, I find no merit in the challenge to the award and determine that the same was properly and justly made.

13. Having so said, the only issue now left for determination is whether the amount awarded under item 1 for instruction fees was excessive in the circumstances. In seeking to resolve that issue I have given due regard to the submissions by the parties and the position of the law enunciated in the cited decisions in the submissions.

14. In taxing a bill of costs, the taxing master is mandated to bear in mind the nature of the matters in dispute including the novelty and complexity involved while remaining cognizant of the act that the taxation should also take into account and promote access to justice and generally develop jurisprudence in the new area like in the area of devolved system of government[1]. The general position of the law is that the court to which a reference is made is to exercise restraint and not to interfere at any slight provocation.

15. The general principles governing when a judge would interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in ***Visser vs Gubb 1981 (3) 753 (C)*** as follows;-

> **"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."**

16. While considering whether or not the taxing officer arrived at reasonable instruction fees, the court must always bear in mind that there is no mathematical formula by which to calculate the instruction fees and that the exercise involves weighing the diverse general principles, maintaining consistency in the level of costs and that bearing in mind all these intricate balancing acts, the reviewing court cannot lightly interfere with what in the taxing officer's opinion is reasonable fee. There has to be a compelling reason to justify such interference. In ***Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'Njuguna & 6 Others (2006) eKLR) Prof J B Ojwang J,*** *as he then was, observed* ***:-***

> **´the correct perception of a discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by *transparent, regular, reliable* and *just* criteria...**
>
> **From the foregoing analysis it is clear that I am *not* of the opinion that the taxing officer was properly guided when she conducted the taxation which has been challenged in the two applications – and certainly not, with regard to the item on *advocate's instruction fees*. Her exercise of *discretion* was, in my view, and with much respect, done perfunctorily and as a mere formality. It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by *principles*, the *elements* of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs. Since the sum awarded as instruction fees herein, namely Kshs.20,000,000/=, was not shown to have been guided by the relevant principles, nor was it transparently accounted for, it appeared, in my assessment, as a mystical figure which cannot be allowed to stand. Taxation of costs as a *judicial function* is to be conducted *regularly,* on the basis of *rational criteria* which are *clearly expressed* for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding *fairness* as between the parties; the taxing officer is to provide only for reasonable compensation for *work done*; the taxing officer should avoid the possibility for *unjust enrichment* for any party and ought to refuse any claim that tends to be usurious; so far as possible, the taxing officer should apply the test of *comparability*; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as *public policy, interests affected, importance of matter to parties*, or *importance of matter to the public;* the taxing officer should clearly identify any *elements* of *complexity* in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the *trial judge*; the taxing officer ought to describe accurately the nature of the r*esponsibility* which has fallen upon counsel; the taxing officer should state clearly the nature of any *novel* matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of *time, research* and *skill* entailed in the professional work of counsel.**

17. I am persuaded by the foregoing decision that the taxing master's discretion to award what is reasonable, like all discretions, ought to be exercised reasonably and judiciously. Some valid reasons or explanations must be given for the award of a specific sum. It is not a question of plucking a number from the sky. Being so guided, I must in this matter examine the impugned decision and seek to decide if the decision gave reasons for the award or if the figure was just picked from the air and thus demonstration a perfunctory conduct by the taxing master. I have fully perused the decision on taxation and I do find it to have given reasons for the figure. I consider those reasons to have been guided by the principles applicable and I have not discerned a departure from the established principles on taxation nor have I gleaned any consideration of an irrelevant matter of failure to consider a relevant matter to justify my interference.

18. In come to the said conclusion I am equally guided by the general principles adopted by the court ***in the Estate of Ogilvie: Ogilvie –vs Massey (1910) P 243*** where the court stated:-

> **"on questions of quantum, the decision of the taxing mater is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In question of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered".**

19. In this matter, and as said before, I have not discerned an error by the taxing master and in that even it would be an adventure toward substituting my discretion for that by the taxing master. That should never be the intent of the court in determining references. I also hold the view that the taxing master must be deemed the master in taxation of costs and the court must retain only supervisory mandate to ensure that justice is done by the law and legal principles being upheld and maintained. To go beyond that mandate would be to usurp the masters mandate. That I will remain hesitant to do.

20. The upshot is that I find no justification to interfere with the discretion exercised by the taxing master with the axiomatic consequence that the application dated 30/09/2020 lacks any merits and the same is hereby dismissed with costs.

21. I award the costs of the reference to the advocate and, being aware that this is a matter on taxation on which no further bill of costs can be lodged for another taxation, assess such costs at Kshs 30,000 to cover disbursements, drawings, making of copies and court attendances.

DATED, SIGNED AND DELIVERED AT MERU, ONLINE, THIS 19TH DAY OF MARCH, 2021

Patrick J O Otieno

Judge