

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

MISC. CAUSE NO E1067 OF 2020

RACHIER & AMOLLO ADVOCATES LLP.....ADVOCATE/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....CLIENT/RESPONDENT

CONSOLIDATED WITH

MISC. CAUSE NO. E1068 OF 2020

RACHIER & AMOLLO ADVOCATES LLP.....ADVOCATE

AND

KENYA COMMERCIAL BANK LIMITED.....CLIENT

RULING

Introduction

1. This ruling determines four applications filed in these two consolidated files by the parties herein. The common thread between the two suits is that they involve the same parties and in both suits a Taxation Ruling was rendered on the advocate/client Bill of costs in each file. The point of departure is that whereas the client's/Respondent's applications both dated 20th April 2021 seek to set aside the taxation decisions by the Taxing Master rendered in the two files, the advocate/applicant in his applications seeks entry of judgment against the client in terms of the Taxation Rulings under section 51 (2) of the Advocates Act.[\[1\]](#)

The client's reference(s)

2. The client's applications (both dated 20th April 2021), seek similar orders, namely, that the findings and rulings by the Taxing Master delivered on the 15th March 2021 in E1067 of 2021 awarding the advocate **Kshs. 37,358,826.46** and on 9th February 2021 in E 1068 of 2021 awarding the advocate **Kshs 28,552,38.97** respectively be varied and/or set aside in relation the instruction fees in both files and that the Bills of Costs be re-taxed considering the clients submissions. The client also prays that this court interrogates the said Bills in light of the actual work done inline with the consents filed on the 9th November 2017 settling the claims at **Kshs. 90,000,000/=** in each file. Additionally, the client prays for the costs of the application.

3. The clients core ground in both files is that Taxing Master failed to recognize that the admitted subject value of the suit property was **Kshs 90,000,000/=** as per the consent filed on 8th November 2017, but instead she taxed the instruction fee based on the pleaded sum of **Kshs.938,997,816.80**. The client states that the Taxing Master misdirected herself and erred in holding that the advocate was entitled to instructions fees on the counterclaim, and by failing to appreciate that the consent determined all claims including the counterclaim. The client argues that it is proper and just that this court allows the two References.

The Advocate's opposition to the client's reference

4. The applications are opposed. On record are Replying affidavits of Evans Ochieng', an advocate in the firm of Rachier & Amollo. The advocate contends that the applications lack merit, and that by the time the client withdrew instruction from the advocate in the primary suits, the suit(s) had already been confirmed for hearing and hearing dates fixed. It is the advocates case that the Taxing Master correctly rejected the client's allegation that the primary suit(s) were settled, and in any event the Taxing Master confirmed that the case(s) were under active litigation. Further, it is the advocates case that the value of the subject matter for purposes of taxation, is determined from the pleadings, judgment or settlement, hence, there is no error on the part of the Taxing Master.

5. Additionally, the client contends that a counterclaim is for all intents a suit attracting instruction fees and that he Taxing Master correctly computed instruction fees based on the figures pleaded in the counterclaim, and that, the court will not interfere with a Taxing Master's decision because the court happens hold a different view of the matter from that of the Taxing Officer. Further, that the court is required to

satisfy itself that the Taxing Master was clearly wrong before interfering with his decision.

6. Additionally, the advocate maintains that the Taxing master's discretion will not be interfered with unless it is found that he/she has not exercised discretion properly, or in the event of improper motive or a clear misdirection. Lastly, the advocate maintains that no credible reason has been shown to warrant disturbing the Taxation Ruling.

The advocates applications

7. The advocates applications are premised on the provisions of section 51 (2) of the Advocates Act^[2] and Rule 7 of the Advocates (Remuneration) Order. The advocate prays for judgment against the client as per taxed costs of **Kshs. 37,358,826.46/=** in **E1067** of 2020 plus interests thereon at **14%** per annum from the **15th** March 2021 until payment in full. The advocate also prays for costs of the application. In Misc. Cause No. **1068** of 2020, the advocate prays for judgment for **Kshs. 28,552,239.40** being the taxed and certified costs plus interests thereon at the rate of **14%** per annum from the **9th** February 2021 until payment in full. The advocate also prays for costs of the application.

The client's response

8. The client's response to the advocates applications as I discern it from the Replying affidavit of Faith Wamuyu, is that the applications be stayed pending the hearing of the reference(s). However, all the applications were heard together hence this this ruling.

The client's advocates submissions

9. M/s Wamuyu, the client's advocate submitted that consents were recorded in both files requiring the Plaintiff in the primary suit to remit to the client **Kshs. 90,000,000/=** in settlement of the claim in No. **1766** of 2000 and **735** of 2003 and upon payment, the matter be marked as settled. Counsel maintained that the value as per the consent should be applied in determining the instruction fees. She argued that in **E1067** of 2020, the Taxing Master correctly recognized the value of the subject matter as **Kshs. 1,390,000/=** and enhanced the sum to **Kshs. 5,000,000/=** without any explanation. Counsel argued that in **E1068** of 2020, the Taxing Master awarded getting up fees yet the matter never proceeded for trial. Counsel urged that **E1068** of 2020 be remitted for taxation, and that the instruction fees in **E1067** OF 2020 be set aside on grounds that the Taxing Master having agreed the value of the subject was **Kshs. 90,000,000/=**, he should have taxed the bill based on the agreed value. Counsel referred to Schedule **6 (1) (b)** and argued that the instruction fees in both files should be **Kshs. 1,500,000/=** for each file.

The advocates submissions

10. Mr. Ligunya, the advocates counsel submitted that the consent was never adopted as an order of the court nor were the terms of the consent complied with. Regarding **E 1068** of 2020, counsel submitted that the Taxing Master has discretion to enhance instruction fees, and that the Taxing Master did explain the reason for enhancing the fees. He argued that the Taxing Master called for the parent file and found that the matter was still active, hence, it was not open for the court to be bound by the consent. Counsel urged the court to find that the Taxing Master properly exercised her discretion and dismiss the references.

11. To fortify his arguments, Mr. Ligunya relied on *First American Bank of Kenya v Shah and Others*^[3] for the proposition that the High Court cannot interfere with the taxing officer's discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive to justify an inference, or it is based on an error of principle. Further, the court cannot upset a taxation because in its opinion, the amount awarded was high. Further, that it is within the discretion of the taxing officer to increase or reduce the instruction fees.

12. Mr. Ligunya also cited *Joreth Limited v Kigano & Associates*^[4] for the holding that the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. Additionally, counsel referred to *Green Hills Investments Ltd v China National Complete Plant Export Corporation t/a Covec*^[5] which relied on *Ogilvie v Massey*^[6] for the proposition that the Taxing Officer's decision on questions of quantum is generally final and that in questions of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; and, that the court will not interfere unless the taxing master is shown to have gone wholly wrong.

13. He also relied on *Kenyariri & Associates Advocates versus Salama Beach Hotel Ltd & 4 Others*^[7] which held that a counterclaim is in all respects a suit by the defendant and the advocate is entitled to instruction fees on the counterclaim. Also, Mr. Ligunya cited *KTK Advocates v Baringo County Government*^[8] for the holding that questions on quantum of instruction fees are matters solely within the province of the Taxing Master, and that the court will only intervene in exceptional instances.

14. Regarding the advocates application, Mr. Ligunya submitted that Rule 7 of the Advocates Remuneration Order empowers the court to award interests at **14%** per annum and cited *Kithi & Company Advocates v Menengai Downs Limited*^[9] for the holding that an advocate is entitled to interest on the amount taxed on an Advocate/Client bill of costs.

Determination

15. I will first discuss the applicable principles which guide the court in applications seeking to set aside Taxation Rulings. *First*, it is settled law that before interfering with a decision of a Taxing Master, 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. *Second*, 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.^[10] When a court reviews a taxation it is vested with the power to exercise the wider degree of supervision.^[11] 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.^[12]

16. 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(s). This requires this court to be satisfied that the Taxing Master was clearly wrong before interfering with her decision.^[13] 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.

17. 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.'^[14]

18. 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.** The law obligates the Taxing Master to take into account these principles. The Ugandan Supreme court put it best when it stated: -^[15]

"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."

19. In *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others*^[16] 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..."

20. Perhaps I should add that 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. 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.

21. 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. As was held in *Phemchand Raichand Ltd Another v Quarry services of East Africa Ltd and Another*^[17]: -

- 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.*^[18]

22. The nub of the client's grievance revolves around the alleged failure by the Taxing Master to award the Instruction fees based on the Consent. Two issue flow from this. One, whether the Taxing Master erred as alleged to warrant this courts interference. Two, what is the import of the counter-claim in the primary suit(s). Lucky for me, this route has been trodden by others before me. In *Kagwimi Kangethe & Company Advocates v Nairobi Mamba Village Limited*^[19] the court cited *Amon v Bobbet*^[20] which held that "for purposes of taxation the claim and Counter-claim must be treated as independent action; that the costs of the Counter- claim followed the ordinary rule as to costs and that the Plaintiff was entitled to have the costs of his defence to Counter-claim taxed on the High Court scale." Also relevant is *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 Others*^[21] which held : -

"57. A Counter-claim contains assertions that a defendant could have made by starting a lawsuit if the Plaintiff had not already begun an action. It is governed by almost the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant files in response to the Plaintiff's claim. A Counter claim is therefore in all respects a suit by the Defendant.

58. *The Applicant is therefore entitled to instruction fees on the Counter claim...*"

23. From the above decisions, it is clear a counter-claim is a suit and it attracts fees. Additionally, as was held in *Joreth Limited v Kigano & Associates* (supra) and *First American Bank of Kenya v Shah and Others*^[22] instruction fees is static such that it does not depend on such circumstances as the client is suggesting. Thus, its not sufficient to claim that the consent recorded was for a lesser amount.

24. Further, the value of the subject matter of a suit, for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case), but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any directions by the trial Judge and all other relevant circumstance.

25. In determining the reasonableness or otherwise of advocate's fee for the purpose of the taxation of advocate/client Bill of Costs, the taxing master must give consideration to factors such as the importance and complexity of the matter, the value of the subject matter, the work actually done by counsel and the fact that counsel must be fairly compensated for preparation and presentation of the case. The court will only interfere with an award of costs by the Taxing Master if such costs are so low or so high that they amount to an injustice to one of the parties.

26. The client invites the court to have the Bills re-taxed based on its submissions before the Taxing Master. Put differently, the client is arguing that its submissions were not considered by the Taxing Master. However, there was no attempt to show which submissions were ignored nor was there any attempt to demonstrate if the said submissions are considered, the decision will be different.

27. It is imperative for the trial court to evaluate all the evidence and the submissions presented by the parties. A court cannot afford to be seen to be selective in determining what submissions to consider. However, some of the submissions might be found to be irrelevant or of little value. The best indication that a court has applied its mind in the proper manner to all the material presented before it is to be found in its reasons for judgment/ruling. I am unable to fault the impugned ruling on the ground that it failed to consider the client's submissions.

28. In any event, requiring the trial court to consider and weigh all the submissions is not meant that the judgment or ruling of the trial court must also include a complete embodiment of all the submissions made, as if it comprises a transcript of the proceedings. The duty of the appellate court is to determine whether the trial court applied the law or applicable legal principles correctly to the facts in arriving at its decision. In other words, in order to determine the merit of the applicant's contention, this court must consider their submissions in the lower court, and, juxtapose it against the judgment/ruling, and finally determine whether there is any basis for interfering with the judgment/ruling.

29. If this court finds that a particular fact or submission is so material that it should have been dealt with in the judgment/ruling, but such fact or submission is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether either the said misdirection, viewed on its own or cumulatively together with any other misdirection, is so material as to affect the judgment/ruling, in the sense that it justifies interference by this court.

30. Applying the above tests to this case, I am unable to fault the ruling on the failure to consider the submissions before the Taxing Master or to conclude that the alleged failure existed and if it did, it led to a miscarriage of justice. A trial court does not have to reproduce verbatim what each advocate submitted. A reading of the impugned rulings shows that the Taxing Master properly considered all the material before her and properly exercised her discretion in arriving at her decision and she was not only alive to the law and principles governing taxation, but also, she took into account the applicable principles and fully understood the task before her. On the whole, the client failed to demonstrate that the Taxing Master misdirected herself or improperly exercised her discretion or arrived at inordinately high or unreasonable awards to warrant this court's intervention. In view of my conclusions arrived at above, it is my finding that the client's applications fail.

31. I now turn to the advocates applications seeking entry of judgment as per the Certificate of Taxations. Section 51(2) of the Advocates Act stipulates 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.”

32. The above 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.^[23] There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.^[24] 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.

33. 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.

34. 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.^[25] The Longman Dictionary of the English Language states that "*shall*" is used to express a command or exhortation or what is legally mandatory.^[26] Ordinarily the words '*shall*' and '*must*' are mandatory and the word '*may*' is directory.

35. 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*^[27] 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.

36. In *Musyoka & Wambua Advocates v Rustam Hira Advocate*^[28] 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, or 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.

37. I have already declined the client's applications seeking to set aside the Taxations. The import of my finding is that the subject Rulings on Taxations in both filed still stand. Consistent with the provisions of section 51(2) of the Advocates Act, the Rulings and Certificates issues in respect of the two taxations are final. In line with the said provision, the advocate is entitled to judgment in terms of the said Rulings/Certificates of Taxation in both matters.

1. Rule 7 of the Advocates (Remuneration) Order stipulates that an advocate may charge interest at **14%** per annum on his disbursements and costs, whether by scale or otherwise, from the expiry to one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount has been paid or tendered in full. In line with this provision, I find that the advocate is entitled to the interest as claimed.

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

a. ***That*** the client's applications dated 20th April 2021 filed in E1067 of 2020 and E1068 of 2020 are unmerited and the same are hereby dismissed with costs to the advocate.

b. ***That*** judgment be and is hereby entered in favour of the advocate M/s Rachier & Amollo Advocates in the sum of **Kshs.**

37,358,826.46 against the client Kenya Commercial Bank Limited being the certified costs as per the Ruling dated 15th March 2021 in E1067 of 2020.

c. *That* the Advocate be awarded interests on the above sum at 14% per annum from the 15th March 2021 until payment in full.

d. *That* Judgment be and is hereby entered in favour of the Advocate M/s Rachier & Amollo Advocates as against the Client Kenya Commercial Bank Limited for Kshs. 28,552,239.40 being the certified costs as per the Taxation Ruling dated 9th February 2021 issued in E1068 of 2020.

e. *That* the Advocate be and is hereby awarded interests on the above sum at the rate of 14% per annum from the 9th February 2021 until payment in full.

f. *That* the Client shall pay the costs of both applications.

Orders accordingly

SIGNED, DELIVERED VIA E-MAIL AND DATED AT NAIROBI THIS 30TH DAY OF JUNE 2021

JOHN M. MATIVO

JUDGE

Delivered via e-mail

[1] Cap 16, Laws of Kenya.

[2] Cap 16, Laws of Kenya

[3] {2002} 1 EA 64.

[4] {2002} eKLR.

[5] Civil Case No. 572 of 2000.

[6] (1910) P 243.

[7] {2014} e KLR.

[8] {2018} e KLR.

[9] {2015} e KLR.

[10] 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.

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

[12] *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.

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

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

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

[16]{2006} eKLR).

[17] {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.

[18] 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 electricians (U) Ltd* [1990-1994] 1 EA 306 (SCU).

[19] {2015} e KLR.

[20] {1889} 22 Q.B.D. 543.

[21] {2014} e KLR

[22] {2002} I EA 64

[23] *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).

[24] Ibid.

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

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

[27] {2014} e KLR.

[28] {2006} eKLR.