REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 8 OF 2018

IN THE MATTER OF: THE LAW REFORM ACT (CHAPTER 26) LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION BY: JOSEPH K. KANYI,

FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF: THE FAIR ADMINISTRATION ACT (2015) LAWS OF KENYA

IN THE MATTER OF: THE ADVOCATES ACT (CAP 16) LAWS OF KENYA

BETWEEN

JOSEPH KARANJA KANYI.....APPLICANT

AND

THE ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

KENYA TOURISM DEVELOPMENT CORPORATION.....INTERESTED PARTY

RULING

The Application

1. Vide Chamber Summons dated 10/07/2020 brought pursuant to the provisions of Rule 11 of the Advocates (Remuneration) Order the Applicant herein seeks the following orders:

a) That this Honourable Court be pleased to set aside the decision of the Taxing Master dated 4th day of June, 2020.

b) That the Bill of Costs dated 17th September,2019, be placed before different Taxation master for Taxation.

c) Costs of this Applicant be provided for.

2. The motion is premised upon the grounds set out therein and the Supporting Affidavit sworn on 10/07/2020 by the Applicant. The Applicant avers that he is yet to receive reasons for the said decision from the taxing master, and he believes that the taxing master misdirected himself, erred, took into account irrelevant factors into consideration and failed to correctly and judicially exercise his discretion by taxing the said bill at Kshs. 205,525.00.

3. The Application was opposed by the Interested Party's Counsel **Ms. Anne Kaguri** Advocate via her Replying Affidavit sworn on 14/09/2020. The deponent avers that the taxing master's ruling on the bill of costs was justified and therefore, the application is hopelessly incompetent, devoid of merit, frivolous, vexatious and is an abuse of the court process.

4. The deponent avers that the Applicant's counsel has since made an offer to liquidate the debt in Kshs. 30,000/= monthly instalments with effect from 2/07/2020, and on the 2nd of each succeeding month, and that the Applicant's counsel's request was accepted by the Interested Party noting the harsh economic period. Therefore, following the acceptance, the Applicant's counsel has since paid the Interested Party three instalments cheques of Kshs. 30,000/= as per their request.

5. The deponent further avers that the Applicant has never served on them a letter requesting for the reasons for the taxing master's decision, and that the same was only brought to their attention when the Applicant attached the said letter in the instant application. Further, the deponent avers that the instant application is premature, as no reasons have been tendered by the taxing officer as averred by the Applicant.

The Determination

6. The instant application was canvassed through written submissions. The ex-parte Applicant filed submissions dated 16/12/2020 and 17/05/2021, while Interested Party's advocate filed submissions dated 15/01/2021. Arising from the pleadings and submissions, the main issues for determination are:

a) Whether the instant reference is premature incompetent for want of compliance with Rule 11(1) of the Advocates Remuneration Order;

b) Whether the taxing master exercised his discretion judicially.

(a) Whether the instant reference is premature incompetent for want of compliance with Rule 11(1) of the Advocates Remuneration Order;

7. The procedure for challenging a taxing master's decision is provided under the Rule 11 of the Advocates Remuneration Order as follows:

> ***"(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.***
>
> ***(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.***
>
> ***(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under 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), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***
>
> ***(5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."***

8. From the foregoing, an objector to a decision of a taxing officer is required to give notice within 14 days thereof of the items objected to, and the reference is to be filed within 14 days of receipt of the reasons for the decision from the taxing master. In the present case, it is not in dispute that the Respondent sent a letter to the Deputy Registrar on 4/06/2020 requesting for reasons for the said taxation. Thereafter, the ex-parte Applicant filed the instant reference on 15/07/2020. It is evident from the foregoing that by the time of filing the reference, no reasons for taxation had been given in writing by the taxing master despite the same having been requested for via email on 4/06/2020 and there has been no further correspondence ever since.

9. In **Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited [2012] eKLR,** this Court expressed itself *inter alia* as follows:

> ***"In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles. However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent. In the present case, the ruling on taxation was made on 6th July 2011. If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he could request for the same in writing, in which case, he would be bound to wait for the same. If, however, at a later stage he decided to prefer the reference***

notwithstanding the failure by the Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons which, according to the decision in Kipkorir, Titoo & Kiara Advocates (ibid), is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference, the said reasons have not been furnished. I, accordingly, find that as the client filed the reference outside the 14 days of the delivery of the decision and before being furnished with the reasons, the reference is incompetent for being out of time and/or being prematurely instituted. I accordingly strike out the Chamber Summons dated 18th January, 2012 but make no order as to costs since the problem has been partly caused by inaction on the part of the court."

10. In **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] 1 KLR 528** the Court of Appeal expressed itself as follows:

"If a taxing officer totally fails to record any reasons and to forward them to the objector as required then, that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference."

11. Having considered the aforestated authorities, I am satisfied that attempts were made to get the reasons for the taxation, and the taxing officer failed to avail them. Therefore, this court will not visit the mistakes of the court on the ex-parte Applicant. In the circumstance of this case, the application appears not to be premature.

(b) Whether the taxing master exercised his discretion judicially.

12. Odunga J. in **Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd, [2014] eKLR** stated as follows:

"The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that 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 inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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 and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64."

13. These principles reiterate the position of the Court of Appeal in **Joreth Ltd v Kigano & Associates [2002] 1 EA 92,** wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

14. In this case, the ex-parte Applicant submitted that the taxing officer found that in the judicial review Application no novel or complex matter was raised. However, he still went ahead to increase the instruction fees to Kshs. 90,000/=from Kshs. 45,000/=. The taxing officer in his decision first recognized the basic instructions fee payable of Kshs. 45,000/=before venturing to consider whether to reduce or increase it which was within the discretion, which I find was reasonable since the ex-parte Applicant's motion was opposed.

16. On item No. 2 *"Getting up fees"* on the Bill of Costs, I find that the same is pegged on the instruction fees. Since the motion proceeded to full hearing, there is no basis for interfering with the same.

17. On item Nos. 3-19 on the Bill of Costs, I find and hold that no serious arguments have been advanced with respect to the said items to justify my interfering with the same.

18. In the premises, I find that the decision of the taxing master in awarding instruction fees of Kshs 90,000/= and getting up fees of Kshs 30,000/= was not based on any error of principle; neither were the said fees as awarded excessive to justify interference by this Court. I accordingly dismiss the Chamber Summons dated 10/7/2020. Parties to bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JULY, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Kaguri for Interested Party

Mr. Makuto holding brief Maundu for Respondent

Ms. Peris Court Assistant