



Ltd & 2 others v Rural Electrification Authority (Miscellaneous Application 410 & 246 of 2017) [2021] KEHC 176 (KLR) (Commercial and Tax) (15 October 2021) (Ruling)

Neutral citation: [2021] KEHC 176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION 410 & 246 OF 2017

MW MUIGAI, J

OCTOBER 15, 2021

BETWEEN

LIME LIGHT CREATION LIMITED 1ST CLAIMANT

ALLAYAYS SOUTHERN CORPORATION LTD 2ND CLAIMANT

GLOBAL TRADE MARKET PLACE (E. A) LTD 3RD CLAIMANT

AND

RURAL ELECTRIFICATION AUTHORITY RESPONDENT

RULING

1. A dispute arose between the parties that resulted in Arbitration proceedings. The Final Award was published on 16th May 2017. The parties filed in Court 2 separate Miscellaneous Applications; The Application of 30th May 2017 to recognize and enforce the Final Award as a judgment of the Court in the instant Court File 410 of 2017 and Application of 11th October 2017 filed in Misc. Application 246 of 2017.
2. The Trial Court Hon LJ R. Ngetich by Ruling of 19th December 2018 granted the Application of 30th May 2017, the Final Award was adopted as an order of the Court.
3. The Applicant filed Reference on 8th October 2019. Proceedings before this Court commenced on 15th October 2019 and submissions on 2nd October 2020.
4. On 2nd February 2021, Dr Benjamin Musau addressed the Court as an interested party. He informed Court of the untimely demise of Former Counsel of the Claimants the late Mr. Kabaka and that he was /is Administrator of his estate and running /winding up his lawfirm. Dr Musau sought disclosure of Legal Fees Agreement or payments the late Mr. Kabaka and Holding Brief Counsel Mr. Thuo. The



Court halted proceedings with regard to the filed Reference and granted the parties to file formal application ,hence the 2nd Application.

CHAMBER SUMMONS

5. The Applicant filed a Chamber Summons Application dated 8th October 2019 for orders that; -
 1. The Court to stay the proclamation and attachment of the Applicant's property by the Respondents whether by themselves or their representatives, employees, agents, servants or other person acting on their behalf or claiming through them, and any other proceedings and execution arising from the taxation ruling of the Taxing Officer delivered on 8th August 2019 pending hearing and determination of the Applicant's intended reference.
 2. The decision of the Taxing Officer and all consequential orders be set aside and/or vacated.
 3. The Bill of Costs dated 25th January 2019 be remitted back for fresh taxation under a different Taxing Officer with appropriate directions.

6. Which Application was supported by the sworn Affidavit of Kevin Wakwaya dated 8th October 2019 and stated that; -
 1. The Applicant being dissatisfied by the Taxing Officer's decision taxing the Bill of Costs at Kshs.277, 730 wrote to the Deputy Registrar on 22nd August 2019 requesting for written reasons for the decision with the intention of filing a reference. The Deputy Registrar has not provided reasons for the decision.
 2. The Taxing Officer erred in law by failing to properly tax item 1 and 18 of the Bill of Costs with regard to instruction and getting up fees to schedule VI of the Advocates Remuneration Order.
 3. The Taxing officer did not consider the nature of the suit, the Bill of Costs and the written submissions made in opposition of the Bill of Costs and thereby arrived at an erroneous decision.
 4. The Taxing Officer misapprehended herself in law and fact in awarding the Respondents costs which in all circumstances of the suit were disproportionate to the suit and inordinately high so as to amount to double enrichment on the part of the Respondents.
 5. The Respondents purport to proclaim an amount of Kshs.167, 122, 291.72 which amount was neither in the taxed costs nor specified in any decree extracted and/or served upon the Applicant which is contrary to the law.
 6. The Applicant paid the entirety of the amount subject of the Applications for adoption and setting aside of the Arbitral Award which gave rise to the taxation decision save for Kshs.31, 339, 402.16 which the Applicant contends is not payable and is subject of the Court of Appeal.
 7. The Application has been made timeously and without any latches on the part of the Applicant.

REPLYING AFFIDAVIT



7. The Application was opposed vide the sworn Affidavit of Samuel Kang'ethe Mburu dated 14th November 2019 and stated as follows; -
- a. The Decree herein was issued pursuant to the Court's ruling dated 19th December 2018 and was served upon the Applicant on 28th August 2019 but the Applicant failed to respond.
 - b. The Applicant has not filed any competent appeal against the Ruling of the Court dated 19th December 2018 where the Final Award as adopted as a judgment of the Court.
 - c. The Applicant's letter dated 22nd August 2019 purporting to seek reasons from the Deputy Registrar is fatally defective as it does not specify which items on the Bill of Costs the Applicant was aggrieved with and is meant to delay the Respondents from enjoying the fruits of the judgment herein.
 - d. The Application should be dismissed with costs as it lacks merit and that the Application herein is incompetent as the Court has no jurisdiction to stay payment of taxed costs nor a decree merely because the taxed costs are challenged.

SUPPLEMENTARY AFFIDAVIT

8. The Applicant filed a supplementary Affidavit of Kevin Wakwaya dated 12th November 2019 and stated; -
- a. There has never been a draft decree as per the Respondent's Annexure served upon the Applicant. The said decree served upon the Applicant is not in any way *pari materia* with the annexure now adduced in court.
 - b. The total amount in the annexed alleged decree is Kshs.101, 427, 905.27 which is the total amount in the warrants of execution. This is contrary to the law and procedure as the Applicant had already made payments of the said amount and it is unconscionable that the Respondents now seek to enforce the entire decretal amount when the same has been part paid.
 - c. The Respondents sought to use compound interest in computing the amount of Kshs.167, 122, 291.72 whereas the Arbitral Award was clear that the interest charged would be simple.
 - d. The decree and warrants of execution are not in line with the judgment of the court and the Arbitral Award and if allowed the same would occasion prejudice and irreparable damage to the Applicant.
 - e. The execution should be for the balance of the amount (which is a matter before the Court of Appeal) and not for the entire amount which has been defrayed by part payment.
 - f. The decision of the Taxing Officer acknowledged that the issue before the Taxing Officer was adoption and setting aside which is provided for under Schedule 6 Par.1(j)(iii) of the Advocates Remuneration Order. However, the Taxing Officer proceeded to enhance the amount contrary to the authorities provided to her.



- g. The decree as extracted carries with it the element for costs for both the applications for adoption and setting aside of the Arbitral Award and it is trite law under S.94 as read with S.89 of CPA that execution of the decree cannot proceed without assessment of costs unless there is application for leave to execute without costs.
- h. The costs which form part of the instant decree sought to be executed are being challenged it then follows that by operation of the law that the execution cannot proceed on the basis that execution cannot proceed without costs having been ascertained.

APPLICANT’S SUBMISSIONS

9. The Applicant submitted that at the time of filing the instant Application the Taxing Officer had not provided reasons for the impugned decision. The Applicant’s reference is within the ambit of Rule 11(2) of the *Advocates Remuneration Order* as was held in *Kipkorir, Titoo & Kiara Advocates versus Deposit Protection Fund Board [2005] eKLR* as follows; -

“Indeed, we are of the view, that 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.”

10. It was the Applicant’s submission that the Taxing Officer failed to apply the correct principles and made consideration of irrelevant factors in making the impugned decision. The general principles governing interference with the exercise of the Taxing Officer’s discretion were laid out in the case of *First American Bank of Kenya versus Shah & Others [2002] 1 E.A. 64*.

“Of course it would be an error of principle to take into account relevant 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 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.”

11. The Applications being for setting aside and adoption of Arbitral Award, the Applicant submitted that there was no preparation of witnesses or witness statements, no trial and no viva voce evidence adduced.

12. The claim for Getting Up Fees as item 18 should therefore not have been allowed in entirety. Further, that the Taxing Officer enhanced the instruction fees from Kshs.50, 000 to Kshs.200, 000 without any valid reason contrary to the principles outlined and the same amounts to enrichment of the Respondents at the expense of the Applicant as was held in *Republic versus Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others [2006] eKLR*

“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.”

13. The Applicant argued that the reference should not be struck out for failure to particularize items the Applicant was objecting to as the Applicant’s notice was clear that it was objecting to the entire decision of the Taxing Officer.
14. In addition, the Applicant in its reference did particularize the specific items and the Respondents adequately responded without citing any prejudice suffered. The Applicant relied on the case of *Muriu Mungai & Co. Advocates versus China Civil Engineering Construction Corporation (K) Limited [2018] eKLR* where the court stated; -

“In this case the Notice of objection reads “... The Respondent herein objects to the entire decision of the Taxing master...” I understand the Notice to say that there was objection against all the 26 items in the bill of costs. That to me is permissible just as it is permissible to object to a single item. To the extent that there is objection to the entire decision on taxation, I find nothing objectionable to the notice as to invite the very draconian remedy to strike out the objection and thereby leave the dispute by the client undetermined. In any event there was never an allegation that the advocate had been misled or prejudiced in any way.”

RESPONDENTS’ SUBMISSIONS

15. It was the Respondents’ submission that the Applicant’s Application is bad in law and fatally defective for failing to comply with Rule 11(1) of the Advocates Remuneration Order and in particular the Applicant failed to give notice of objection to the Taxing Officer of what it was objecting to and should thus be dismissed. The Court of Appeal in *Machira & Co. Advocates versus Arthur K. Magugu & another [2012] eKLR* held; -

“Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with Counsel for the Appellant that it should have been struck out.”

16. On the issue of instruction fees, the Respondent submitted that the Taxing Officer has discretion to increase the instruction fees under the Advocates Remuneration Order and the increase made was in consideration of the three Respondents. The Taxing Officer alluded in her decision to the work done, the nature and the importance of the case, the value involved and the general conduct of the proceedings.
17. Further to the above, the Respondents submitted that, on items no. 18 & 19 – Getting up fees, the Applicant has not shown what amount the Taxing Officer allegedly assessed as fees under the two items and is merely seeking to obtain stay of execution through deception. The Applicant is making idle accusations against the Taxing Officer without offering any credible evidence. To support the submissions, the Respondents relied on the case of *First American Bank of Kenya versus Shah and Others [2002] E.A.LR 64* where the court stated; -

“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle.”

18. The Respondent argued that the Applicant’s conduct of failing to object to specific items on the Bill of Costs is prejudicial for the Respondents when the Applicant seeks to rely on a misrepresentation alleging that the Taxing Officer failed to give reasons for the ruling on the items referred to in the submissions yet the Applicant’s letter dated 8th August 2020 was vague for want of identifying the specific items.

2ND APPLICATION

NOTICE OF MOTION

19. The Applicant filed a Notice of Motion Application dated 27th January 2021 for orders that;
1. The Court allows the firm of A. Thuo Kanai Advocates to come on record for the Respondents in place of the firm of Kabaka & Associates Advocates.
20. Which Application was supported by the sworn Affidavit of Anthony Thuo Kanai dated 27th January 2021 and based on the grounds; -
1. The Hon. Mr. Boniface Mutinda Kabaka Advocate unfortunately passed on in December 2020 and he was the sole proprietor of Kabaka & Associates Advocates.
 2. The Respondents have instructed the firm of A. Thuo Kanai Advocates to take up conduct of the matter herein on their behalf.
 3. It is in the interest of justice that the Respondent’s Application herein be allowed to safeguard the Respondents’ right to be represented in the suit herein.

REPLYING AFFIDAVIT

21. The Application was opposed vide the sworn Affidavit of Dr. Benjamin Munywoki Musau dated 15th February 2021 and stated that; -
1. The Deceased Advocate died on 11th December 2020. (Marked BMM1 – Certificate of Death)
 2. By letter of 25th January 2020, Law Society of Kenya confirmed that Hon. Boniface Mutinda Kabaka (deceased) appointed him to manage his legal practice in the event of death.
 3. On 27th January 2021, a meeting was held between Kabaka & Associates Advocates and B M Musau & Co. Advocates to discuss the Respondent’s appointment as the Administrator Advocate and administration of Kabaka & Associates. It is during this meeting that the Respondent learnt that the deceased had instructed the Applicant to hold brief for him in several matters including this matter.
 4. The Respondent is in the process of formalizing his appointment and had filed a Petition (HCFP & A/E185/2021) for Letter of Administration ad colligenda



bona defuncti, which Application is scheduled for hearing on 2nd March 2021. (Marked BMM3 – Court Order)

5. On 28th January 2021, the Respondent wrote a letter to the Applicant requesting for a list of files in respect of which Kabaka Advocates instructed him regarding the legal practice and those where he was acting for the Deceased in his individual capacity. The Applicant refused to surrender the same and has since obtained instructions from the Deceased's clients to act for them.
6. The Applicant was professionally bound to check with LSK who the Deceased had appointed as the administrator of his legal practice. The Applicant should have advised the client on what the LSK regulations provide in those circumstances before accepting any appointment in a matter where he had been retained by the Deceased to hold brief.
7. The Applicant purported to come on record long before making a formal application or engaging the appointed Administrator thus offending the provisions of Order 9 Rule 9 CPR.
8. The Applicant did not file and serve a Notice of Change of Advocates upon the former advocate on record and the Appointed Administrator for the legal practice to be considered as properly on record.
9. It is in the interest on justice that the Applicant be denied leave to come on record as he is taking advantage of his position to solicit for instructions from the Deceased's clients.

APPLICANT'S FURTHER AFFIDAVIT

22. The Applicant's client filed a sworn Affidavit of Samuel Kangethe Mburu dated 17th February 2021 and stated; -

1. He had instructed Hon. Boniface Mutinda Kabaka (deceased) Advocate to act in the matter and he is turn instructed Mr.A. Thuo Advocates to act in the matters on behalf of the client's companies as the Deceased was pressed for time due to his political career and since on or about May 2018, Mr. Thuo had been attending and conducting the hearing of the matter with full authority of the client and the Deceased who entrusted the matter to him.
2. All the pleadings and documents filed in the matter herein since May 2018 were prepared by Mr. Thuo and the only thing was the use of the name of the firm of the Deceased. He dealt with Mr. Thuo whom he interacted closely in the absence of Hon. Kabaka Advocate who travelled across the Country in his role as Senator.
3. On 9th January 2021, he wrote to the Applicant and appointed him Advocate in conduct of the matter previously holding brief for Hon. Kabaka Advocate who passed on in December 2020.

APPLICANT'S SUBMISSIONS



23. On applying Order 9 Rule 9 CPR 2010 on change of Advocate where judgment is on record, allows the application of Change of advocate be made party's recognized agent. The Applicant relied on the case of *Samson Okun Orinda vs Ayub Muthee M/Igweta & 2 Others* [2013] eKLR where the Court noted;

The provisions referred to by the Respondent do not bar a party from changing his advocate because the case had been completed and final judgment entered. The Provision allows change after judgment. Further, under Article 50 (2) (g) *Constitution of Kenya 2010*, any party to a suit has a right to choose and be represented by an advocate of his choice.

24. On the Respondent's Submission that Kabaka & Associates was/is still on record, the Applicant submitted that since Kabaka & Associates was a sole proprietorship, the arrangement died with the proprietor and there was no perpetual succession. See *In Re Estate of Elijah Dolfus Nyaseme (Deceased)* [2013.] e KLR.
25. The Respondent's demand from the Applicant of a Retainer Agreement, the Applicant relied on Section 107 of *Evidence Act* that the onus of proving the existence of retainer Agreement lies with the one who wishes to rely on it. See *Omulele & Tollo Advocates vs Mount Holdings Ltd* [2016] e KLR

RESPONDENT'S SUBMISSIONS

26. The Respondent submitted that the firm of Kabaka & Associates, Advocates had the conduct of the suit herein until his untimely and unfortunate demise. It is also not contested that during the hearing and determination of the matter, Kabaka & Associates, Advocates instructed Mr.A.Thuo to hold brief in these proceedings.

The physical file and papers related to this matter were given to Mr.A.Thuo.

27. After Mr.B.M.Kabaka's demise the interested party was notified that he was appointed Administrator to manage the law firm of Kabaka & Associates. The Administrator/interested Party obtained Limited Grant of Letters of Administration Colligenda bona on 3rd March 2021.
28. Whereas the Applicant and client in their Affidavits and submissions have contested his appointment as administrator, he is lawfully appointed under the Law of Succession in the Family Court. Also, in line with Rule 14 of Law Society of Kenya (General) Regulations,2020 and LSK's Letters of 25th January 2021 & 1st March 2021 are conclusive on his appointment as Administrator of his estate and to manage the law firm of Kabaka & Associates.
29. The Administrator relied on the case of *In Re Estate of Joe Wandago Okwach (Deceased)* [2018] eKLR that outlines the functions of an Administrator Advocate appointed in accordance with LSK Regulations.
30. The Administrator asserted that the Applicant has not complied with Order 9 Rules 5 ,6 & 7 of the CPR 2010 to effectively be placed on record as the client's advocate.
31. The Administrator submitted that the Applicant ought not to be appointed as Counsel/Advocate of the Clients as such appointment is vitiated by conflict of interest and relied on the cases of *Delphis Bank Ltd vs Channan Singh Chatthe & 6 Others* [2005]eKLR where the Court observed that whereas the most valued constitutional right to a litigant is the right to legal representation and/or advocate of his choice in some cases, the right is put to serious test if there is conflict of interest.
32. In Serve in *Love Africa(Sila) Trust vs David Kipsang Kipyego & 7 Others* [2017]eKLR the Court stated;

An advocate will be deemed to be acting in conflict of interest when serving or attempting to serve 2 or more interests which aren't compatible or serves or attempts to serve 2 or more



interests which are not to be served consistently, or honors or attempts to honor 2 or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.

33. The Administrator submitted that there is conflict between the interests and duties owed to Kabaka & Associates, Advocates and the Client Companies. Mr. A. Thuo has conflict of interest between his own interests and those of Kabaka & Associates, Advocates which are irreconcilable. Mr. A. Thuo and his client were said to be on a mission to deprive the Hon. Mr. B. M. Kabaka of Kabaka & Associates, Advocates legal fees due to it after he diligently represented the client Companies and secured Arbitration Final award in the Client's Companies favor.

DETERMINATION

34. The Court considered both Applications pleadings and submissions and the issues that emerge for determination are;

- a. Is the Applicant's Reference competent before Court?
- b. Did the Taxing Officer err in taxing the 2 consolidated Bills of Costs?
- c. Should the execution of the decree be stayed?
- d. Is the Applicant entitled to represent the clients in these proceedings?
- e. Who should be paid Costs?

a) Is the Applicant's Reference competent before Court?

35. The Taxing Officer by Ruling of 8th August 2019 found;

The upshot of the above is that the Applicant's Bill of Costs in Misc Appl Cause 246 of 2017 is taxed at Ksh 276,165/- with an amount of Ksh 2,818,456.44 being taxed off, while the Bill of Costs in Misc Appl 410 of 2017 is taxed at Ksh 277,730/- with an amount of Ksh 2,800,631.44 being taxed off.

36. The Applicant was dissatisfied by the Taxing Officer's decision wrote to the Deputy Registrar on 22nd August 2019 requesting for written reasons for the decision with the intention of filing a reference. The Deputy Registrar did not provide reasons for the decision.

37. The Respondent challenged the reference as incompetent as the Applicant's letter of 22nd August 2019 was/is defective as it did not specify which items of the taxed Bill of Costs the Applicant took issue with.

11(1) of Advocates Remuneration Order provides;

Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.



See *Peter Julius Njoroge vs Fidelity Commercial Bank & Anor [2018]eKLR* on the issue of timelines of compliance with Rule 11 of Advocates Remuneration Order.

38. The letter of 22nd August 2019 was timely and reasons were sought for the items as submitted are from Item 1-18 of the Bill of Costs. Rule 11 does not preclude an aggrieved party to seek reasons for taxation of the Bill of Costs in totality if the party is concerned and/or aggrieved by the whole Bill. The Court finds the letter of 22nd August 2019 regular and lawful in timeline and content and the Reference competent before Court.

b) Did the Taxing Officer err in taxing the 2 consolidated Bills of Costs?

39. The Applicant took issue with taxation with regard to Item 1 and 18 of the Bill of Costs with regard to Instruction Fees and Getting Up Fees contrary to Schedule VI of the Advocates Remuneration Order.

40. The Applicant alleged that the Taxing officer did not consider the nature of the suit, the Bill of Costs and the written submissions made in opposition of the Bill of Costs and thereby arrived at an erroneous decision.

41. The Ruling of 8th August 2019 Pg 2 Clause No 8 Instruction Fees the Taxing Officer considered the nature of the suit by reference to the subject matter. The Taxing Officer considered the Applications of 30th May 2017 for adoption and enforcement of Arbitral Award and Application of 11th October 2017 for setting aside the Final Arbitral Award and found;

However, it is clear that the issue before the Court was not a claim of any amount but whether or not to adopt or set aside the Arbitral Award.....The Applicable provision is Paragraph 1(j)(iii) of Schedule VI of Advocates Remuneration Order 2014.

42. The submission by the Applicant that the Taxing Officer failed to apply the Advocates Remuneration Order, consider the nature of the suit, the Bill of Costs and Submissions is not borne out by the Record/Ruling. The Taxing Officer considered that the Advocates Remuneration Order that to present or oppose the Application for setting aside arbitral award is Ksh 50,000/- and considered the value involved and general conduct of proceedings and enhanced Instruction Fees to Ksh 200,000/-.

43. This Court confirms proceedings in Court commenced in 2017 with 3 Plaintiff Companies seeking enforcement of Arbitral Award from the Respondent/Applicant and the matter involved 2 bulky Court files as numbered above yet the matter is still pending Court in terms of execution proceedings. This Court finds that the Taxing Officer's exercise of judicial discretion reasonable in the circumstances. On Getting Up Fees, this Court read the Taxing Officer's Ruling and there is no mention or reference of such Fees. Item 18 of Bill of Costs Getting Up fees Ksh 746,395/- is cancelled. The Court shall say no more on this point.

44. The Applicant opposed awarding the Respondents costs which in all circumstances of the suit were disproportionate to the suit and inordinately high so as to amount to double enrichment on the part of the Respondents. The Applicant took issue with drawings, copies, perusals and attendances costs awarded by the Taxing Officer on allegation that they were exaggerated and the number of folios in drawings copies and perusals were not ascertained.

45. The Court Record is available for perusal by and through Deputy Registrar Commercial & Tax Division and further each application and pleadings filed ideally is served. The Applicant apart from citing numbers ought to ascertain and confirm to the Court what was exaggerated and by how many increased folios, 'he who alleges must prove'. To mandate the Court during the Reference, to



comb through and decipher each pleading filed where the Applicant has not determined the same as exaggerated and how it was/is done, is an uphill task.

46. This Court is satisfied that the Taxing Officer taxed Drawings Ksh 1,400/- at Ksh 1,100/-, Copies at Ksh 300/- to 200/-, attendances to Court for Filing Ksh 500/-, attendance in Court for hearing Ksh 2,300/- in compliance with Advocates Remuneration Order Schedule 6 Rules 4,5,6,7 & 8 that outlines Costs of Proceedings in the High Court- Party to Party Costs.
- c) Should the execution of the decree be stayed?
47. The Applicant took issue with execution of the decree as follows; The Respondents proclaimed an amount of Kshs.167, 122, 291.72 which amount was neither in the taxed costs nor specified in any decree extracted and/or served upon the Applicant which is contrary to the law.
48. The Applicant paid the entirety of the amount subject of the Applications for adoption and setting aside of the Arbitral Award which gave rise to the taxation decision save for Kshs.31, 339, 402.16 which the Applicant contends is not payable and is subject of the Court of Appeal.
49. The Final Arbitral Award of 16th May 2017 at Pg 65 outlined Summary of Award what was due to each of the Claimant Companies, inclusive of Arbitrator's Costs, interest at the rate of 12% p.a. on accruing sums from the date of filing claim i.e 12th May 2014 and each party to bear its own costs. The Final Award was adopted as an order of the Court vide Ruling by Hon LJ R. Ngetich of 19th December 2018. The issue of interest costs and expenses is as determined by the Arbitrator vide Section 32 B & C of *Arbitration Act*.
50. After Ruling by Taxing Officer of 8th August 2019 the Decree of 17th September 2019 was inclusive of the Final Award and Taxing Officer's Taxed amount of Bill of Costs in both Court Files named above. On 15th October 2019, Mr Kabaka informed the Court that the decree was served to the Respondent through its advocates on record vide Letter of 28th August 2019 a copy filed in Court and the Respondent did not respond. The decree was approved for execution.
51. This Court perused both Court files and found Replying Affidavit by Ms Lucky Rono filed on 17th May 2018 & Further Affidavit filed on 25th May 2018 & Supplementary Affidavit by Ms Sharon Tugee filed on 4th September 2018 all detailing payment of Ksh 71,280,810.70 of the Ksh 101, 427,905.27 of the Final Award and interest at 12% p.a.of the uncontested figure and paid interest Ksh 8,520,000/- and left unpaid Ksh 31,254,103.53 that is said to be subject to an appeal. These payments are contested by the Respondents.
52. The evidence above strongly suggests that part payment/performance was undertaken by the Applicant. How much, when it was paid and to whom is the subject of controversy and determination. Suffice is to state at this stage, execution of the decree ought to have deducted the paid amount and interest on 12% p.a. visited only on the outstanding amount.
53. On other hand, the Applicant contends that the outstanding amount of Ksh 31,254,103.53/- is subject of an appeal but no notice of appeal and/or memorandum of appeal filed in Court of Appeal has been presented in Court or if right of appeal and/or stay of execution proved. In the absence of either of the above, the outstanding amount remains due and owing and maybe subject to execution.
54. On the issue of execution, in light of emerging evidence of part-payment the decree as drawn amounted to an irregularity and is hereby stayed pending verification and confirmation of the part payment and outstanding amount under Order 22 Rule 2 CPR 2010.

d) Is the Applicant entitled to represent the clients in these proceedings?



56. The Applicant in the 2nd Application sought that the Court grants him the order/right to come on record in place of of Kabaka & Associates Advocates. It is on record the unfortunate circumstances that led to the present situation and justifies the interested Party Administrator interjecting midstream these proceedings so as to determine what and to whom Legal Fees/Costs of Kabaka& associates would be paid to.
57. The Administrator submitted that the Applicant failed to comply with Order 9 rules 5,6 & 7 CPR 2010 and added there is conflict between Kabaka & Associates, Advocates and the Client Companies & the Applicant as stated in *Serve in Love Africa (Sila) Trust vs David Kipsang Kipyego & 7 Others* [2017] eKLR supra. Therefore, the Applicant should not be allowed to come on record for the client. The Administrator took the view that the Applicant is on a mission to deprive the Hon. Mr. B. M. Kabaka of Kabaka & Associates, Advocates' legal fees due to it for legal services rendered to the clients. The Administrator contended the Applicant held brief for Kabaka Associates Advocates' in these proceedings and ought to disclose information and/or documents on Fees.
58. The Applicant stated that the Administrator should obtain legal representation of Kabaka & Associates Advocates' which does not include taking over legal representation of the client as he has been instructed to take over legal representation. Secondly, the Applicant contended that the Administrator should file Bill of Costs to be taxed for Kabaka & Associates, Advocates.
59. These proceedings commenced in 2013 before Sole Arbitrator and Hon.Kabaka represented the 3 Companies/Client and Final Award was published on 16th May 2017. The Legal Fees were determined between Advocate & Client then and paid and is not subject of these proceedings.
60. In May 2017, Hon.B.M.Kabaka filed Misc App 246 of 2017 for recognition and enforcement of the Arbitral Award as an order of the Court. The pleadings, correspondence and submissions in both Court files are drawn and filed by Kabaka & Associates,Advocates or in the said letterhead. The Court record confirms that the Court Appearances from 7th May, 2018 before Hon LJ R.Ngetich was by both Hon.Kabaka & Mr Thuo culminating with Ruling of 19th December 2018.
61. On 15th October 2019, Hon.Mr. Kabaka appeared before this Court and thereafter, it was Mr.Thuo holding brief for Mr .Kabaka. On 2nd February 2021. Mr Samuel Kangethe Mburu on behalf of client Companies informed this Court that he instructed Hon.Kabaka since 2013 and he appointed Mr.Thuo to represent the Client as from 9th January 2021. The client had no problem with the Administrator being part of the proceedings to safeguard the previous law-firm'
62. Under Article 50 (2) (g) COK 2010, the client or a party is entitled to choose, and be represented by, an advocate [of his/her choice] Therefore, the client herein has chosen Mr.Thuo to represent them.
63. In terms of Order 9 Rules 5,6 & 9 CPR 2010, the Applicant ought to have served the Administrator with Notice of Change of Advocates; since judgment [Final Award] had been upheld as order of the Court. However, vide the instant application the Applicant notified the Administrator and the Court of change of representation. The Court is alive to the legitimate concern of Legal Fees and/or Costs due to Kabaka& Associates Advocates which right shall is protected hence the issue of conflict of interest shall not arise.
64. In terms of Order 9 Rule 9 CPR 2010, this Court grants the Application on legal representation of client(s) by Mr Thuo but on Conditions as follows;
 - e) Who should be paid Costs?



65. The Administrator/interested Party has Limited Grant of Letters of Administration Colligenda bona in HCFP & A/E 185/2021 issued on 3rd March 2021 and under Rule 14 of Law Society of Kenya (General) Regulations,2020 and LSK's Letters of 25th January 2021 & 1st March 2021 the Administrator was appointed as Administrator of the estate of and to manage the law firm of Kabaka & Associates.
66. The client's right to appoint and/or retain his choice of Counsel and to terminate/discontinue legal representation by Counsel is acknowledged. The client has corresponding duty to Counsel appointed and retained for whatever duration in the proceedings to be remunerated for the time/period of engagement or representation. The client ought to pay the Advocate for legal services rendered in accordance either with a Retainer Agreement or the Advocates Remuneration Order whichever is applicable.
67. In the circumstances of the instant case, Arbitration proceedings and Court proceedings to recognize and enforce the Final Award as an order of the Court, Kabaka Associates Advocates were appointed by and represented the client as confirmed by Mr Samuel Kangethe Mburu for the client from 2013 upto January 2021 when the Applicant Mr Thuo was appointed as Counsel to take over legal representation of the client. For that duration and work done the legal firm of Kabaka & Associates Advocates was/is entitled to Legal Fees/Costs.
68. The Administrator appointed to manage the lawfirm Kabaka & Associates Advocates and Hon.Kabaka's estate is Dr.B.Musau. Therefore, any legal Fees determined to be due and owing / payable to Kabaka & Associates Advocates ought to be paid to and shall be paid to the Administrator. Any other Fees arising from these proceedings after appointment of new Counsel shall not be paid to Kabaka & Associates Advocates.

DISPOSITION

1. The Application dated 8th October 2019 seeking to set aside the taxation vide Ruling of 8th August 2019 is not granted and the ruling by taxing Officer is upheld.
2. The Application dated 8th October 2019 seeking stay of execution of proclamation and decree is granted. The execution is stayed pending the issue of part payment/performance of the Final Award is determined by Taxing Officer by parties herein.
3. The Application dated 27th January 2021 to allow Mr. A Thuo Advocate to represent the Client is granted.
4. The Proceeds/Costs arising from Taxation of bills of Costs of 25th January 2019 in Misc. Appl 246 of 2017 & 410 of 2017 shall and are withheld pending determination of Legal fees /Costs due to Kabaka Associates Advocates to be determined by the Taxing Officer either through Court record/Court files or presentation/disclosure by Administrator ,Client and New Counsel on record.
5. In default of presentation or disclosure the amounts due to Kabaka& Associates Advocates as per the Court record and Ruling(s) shall be paid to the Administrator Dr. B. Musau.



DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH OCTOBER 2021 (VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

WAKWAYA FOR APPLICANT

A.THUO ADVOCATE FOR RESPONDENTS

DR B.MUSAU ADMINISTRATOR

