REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL & TAX DIVISION)

CIVIL CASE NO. 543 OF 2007; MISC 276 OF 2016; MISC 182 OF 2017

HOUSING COMPANY OF EAST AFRICA LTD.....PLAINTIFF/RESPONDENT

VERSUS

BOARD OF TRUSTEES OF NSSF.....1ST DEFENDANT/APPLICANT

KISIMA MANAGEMENT LTD.....2ND DEFENDANT/RESPONDENT

AND

KAJWANG & KAJWANG CO. ADVOCATES.....ADVOCATE/APPLICANT

VERUS

BOARD OF TRUSTEES, NSSSF.....CLIENT/RESPONDENT

(IN THE MATTER OF AN ADVOCATE/CLIENT BILL OF COSTS

ARISING FROM LEGAL SERVICES RENDERED IN H.C.C.C 543/2007

HOUSING CO. OF EAST AFRICA LTD -VS- KISIMA MANAGEMENT LTD & NSSF)

AND

KINYANJUI NJUGUNA & CO. ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

BOARD OF TRUSTEES NSSF.....CLIENT/RESPONDENT

(IN THE MATTER OF AN ADVOCATE/CLIENT BILL OF COSTS ARISING FROM LEGAL SERVICES RENDERED IN H.C.C.C 543/2007 HOUSING CO. OF EAST AFRICA LTD -VS- KISIMA MANAGEMENT LTD & NSSF)

CONSOLIDATED RULING

1. This ruling relates to the above subject matters, and in particular, a Chamber Summons Application dated 6th April 2018 and a Notice of Motion Application dated 18th April 2019, filed in suit HCCC 543 of 2007, a Chamber Summons Application dated 6th April 2018 and a Notice of Motion Application dated 6th February 2018, filed in Misc. 276 of 2016 and a Chamber Summons Application dated 29th October 2018 and a Notice of Motion Application dated 1st October 2018 in Misc. 182 of 2017.

2. To deal with all the issues raised in these applications, I shall first analyse the facts in each application. The first application I shall deal with is dated 18th April 2019, brought under the provisions of: Rules 15, 16 & 17 of the High Court (Organisation and Administrative) (General) Rules, 2016 (Vacation Rules); Order 45 of the Civil Procedure Rules; Article 159(2)(d) of the Constitution of Kenya; the inherent

powers of the Court and all other enabling provisions if the law.

3. The Applicant is seeking for orders: -

a. That the Honourable Court be pleased to review and thereafter set aside that part of its decision made and/or issued on 8th April 2019, finding that the firm of Wetangula, Adan & Company Advocates, was not properly on record for the 1st Defendant, under Order 9 of the Civil Procedure Rules, together with all adverse consequential findings pertaining thereto and orders resulting therefrom;

b. That consequential to (a) above, this Court do dismiss the motion dated 12th October 2018, filed by M/S Kinyanjui Njuguna & Company Advocates, with costs and/or incidentals to the same being awarded to the 1st defendant;

c. That cost of and/or incidentals to this application be provided for.

4. The application is premised on the grounds on the face of it and an Affidavit in support, dated 18th April 2019, sworn by Daniel Ngaca Gacugia, an Advocate of the High Court of Kenya with the firm of M/S Kinyanjui Njuguna & Company Advocates, having conduct of the matter on behalf of the Applicant.

5. He averred that the firms of M/S Kinyanjui, Njuguna & Company Advocates and M/S Kajwang & Kajwang Advocates signed a consent letter dated 23rd August 2017, permitting the firm of M/S Wetangula, Adan & Company Advocates, to come on record for the 1st Defendant, post judgment, as provided under Order 9 of the Civil Procedure Rules.

6. Pursuant to the consent letter, the firm of M/S Wetangula, Adan & Company Advocates, filed its notice of change of advocates and the same was adopted by the Honourable Court on 26th July 2018. However, before the hearing of 1st Defendant's taxation reference, the firm of M/S Kinyanjui, Njuguna & Company Advocates, filed a Notice of Motion application dated 12th October 2018, seeking to set aside the Honourable Court's order of 26th July 2018, validating the change of Advocates pursuant to the consent letters, and further, to strike out the notice of change of advocates filed by M/S Wetangula, Adan & Company Advocates pursuant thereto. That the main reason was that, it was an express condition in the consent that, the consent would only come into operation upon payment of all legal fees accrued to date.

7. The application was however, opposed by the 1st Defendant. It was brought to the attention of the Court, on 2nd April 2019, that the notice of change of advocates and the consents which had earlier been adopted by the order of Honourable Court on 26th July 2018, were not in the court file. The Respondent also argued that the firm of M/S Kinyanjui, Njuguna & Company Advocates, had in the course of arguments, raised an un-pleaded issue of the 1st Defendant's letter dated 6th September 2018, that, it could not be relied upon, post facto after the consents, which were dated 23rd August 2017.

8. The Court delivered its decision on the application on 8th April 2019 and held that while the consents were indeed executed by the former Advocates, the same were conditional and would only come into operation upon payment of all legal fees accrued by the date thereof. That, the letter dated 6th September 2018 could not be relied upon post facto after the consents dated 23rd August 2017.

9. However, rather than strike out the same, the Court gave the 1st Defendant fourteen (14) days to settle the legal fees, in default of which the notice of change of advocates and the consents, would stand struck out.

10. The 1st Defendant argues that in essence it was required to pay in excess of Seventy-Two Million Kenya Shillings (Kshs. 72,000,000.00): approximately Forty Million Kenya Shillings (Kshs. 40,000,000.00) to M/S Kinyanjui, Njuguna & Company Advocates and approximately Thirty-Two Million Kenya Shillings (Kshs. 32,000,000.00) to M/S Kajwang & Kajwang Advocates regardless of the fact that, both their advocate/client certificate of taxations, were also under challenge in two other references Misc. 276 of 2016 Kinyanjui, Njuguna & Company – vs – NSSF and Misc. 182 of 2017 Kajwang & Kajwang – vs – NSSF.

11. The Applicant avers that, there is a clear error on the face of the Court's decision in making the finding that, the consent letter dated 23rd August 2017, could not have been based on the client letter dated 6th September 2017, as in fact, M/S Kinyanjui, Njuguna & Company Advocates executed the consent on 27th September 2017 as evidenced by the consent itself.

12. That the error was clearly occasioned by two (2) factors, raising the issue that was not pleaded in the motion, specifically, that the consent letter dated 6th September 2017, and deliberate misinformation by, M/S Kinyanjui Njuguna & Company Advocates, to the fact that, while the consent letter was dated 23rd August 2017, they only executed the same on 27th September 2017, after receipt and agreement with the client's letter dated 6th September 2017.

13. The 1st Defendant argued that, unless the Honourable Court, allows the application, it stands to suffer irreparable harm in its quest to protect public funds running into over Seventy Million Kenya Shillings (Kshs. 70,000,000.00) in exorbitant advocate fees, through the taxation reference dated 6th April 2018, filed by M/S Wetangula, Adan & Company Advocates.

14. That unless a stay is granted, the harm it will suffer far outweighs any harm that the former advocates may allege, more so in light of the fact that, it will be denied the opportunity to access Court. That, it is only through the filing of the taxation reference dated, 6th April 2018 that the 1st Defendant discovered that M/S Kinyanjui, Njuguna & Company Advocates had received a sum of Twenty Million Kenya Shillings (Kshs. 20,000,000.00) on its behalf from party and party costs, but failed to disclose or account for the same, either to the 1st

Defendant or the firm of M/S Kajwang & Kajwang Advocates, and appropriated the same.

15. That it will only be in a position to ultimately settle the advocate fees once the Court has rendered its decision on not only the taxation reference in this matter, but also the other two (2) related taxation references. It is apprehensive that, should it ultimately succeed in setting aside the certificate of costs, it would not be in a position to recover the colossal sum of over Seventy Million Kenya Shillings (Kshs. 70,000,000.00) from the aforesaid advocates. Accordingly, in the interests of a fair and just determination of the bills, as well as the efficient disposal of the business of the Court, at a cost affordable by the respective parties, will be advanced.

16. The application was opposed by the firm of; M/s Kajwang & Kajwang Advocates through notice of preliminary objection filed on, 18th April 2019, on the grounds that the Honourable court, lacks the jurisdiction to hear and determine the said application. It was also opposed by the firm of; Kinyanjui Njuguna & Company Advocates, through a replying affidavit dated, 14th May 2018, sworn by John Kinyanjui Theuri.

17. He averred the application is; incompetent and ought to be struck out at the first instance. That, the Applicant has not complied with the orders of the court issued on; 8th April 2019 and therefore, all the documents they have filed herein be expunged from the record with immediate effect and be denied audience for the non-compliance and being in contempt of court. Further the application has no basis whatsoever in law or in fact, in that, order sought to be reviewed has not been annexed to the said application and none of the grounds set out satisfies any of the prayers sought.

18. Further, the Applicant has not demonstrated the discovery of any new and important matters or circumstances which could not be discovered before the ruling delivered on 8th April 2019; nor demonstrated the existence of an error apparent on the face of the record. That, the consent issued herein by, M/s Wetangula Adan & Company Advocates, had a conditional clause for payment of fees before coming on record which condition remain unfulfilled. It was executed voluntarily by the said firm without any compulsion by any party and they cannot run away from it.

19. In any event, the Applicant has not sought to have the terms of the said consent set aside which in any event is incapable of being set aside regard being to the relevant laws. The Applicant is thus, trying to prefer an appeal by way of an application for review and yet the Honourable Court is functus officio. It is also, trying to use all means in the books, to derail/delay the conclusion of the matters herein and deny the Respondents a chance from realization of the fruits of duly earned fees against which the court via the Deputy Registrar have rendered a ruling. It brought in bad faith, lacks merit and ought to be dismissed with costs.

20. The application was canvassed through oral submissions. In a nutshell it was submitted that, an error, anticipated must be a mathematical or unforeseen. That the issues raised are not matters that are error on the face of the record, they are apprehension or misapprehension. That, court gave a final decision, that can only be appealed against. The Applicant had an opportunity to remedy the situation, but did not, nor has it impeached the consent. The contemnor must deal with contempt before they are heard.

21. However, Mr. Gacha responded that, the court can review the decision on error or any other grounds. By law, when there is an order that, is being enforced and there is an application for review, the review ought to be heard first. That, section 80 and Order 45 of the Civil Procedure Rules, applies and that each matter ought to be considered on own facts.

22. The 2nd application dated 6th April 2018, is brought under the provision of; Order 9 Rules 9 & 10, of; the Civil Procedure Rules, Rule 11 of the Advocate Remuneration Order, Article 159(2)(d) of the Constitution of Kenya, the inherent jurisdiction of the Court, and all other enabling provisions of the law.

23. The Applicant is seeking for the following orders: -

> a. That the court, for sufficient cause, be pleased to enlarge the time fixed for the filing the reference from taxation decision of the Hon. Sandra Got delivered on 18th September 2015, in respect of the 1st Defendant's party & party bill of costs dated 17th December 2014, and the reference be admitted for consideration on its merits.
>
> b. That the court be pleased to set aside the taxation decision of the Hon. Sandra Got delivered on 18th September 2015, limited to her taxation of Items; 1, 9, 116 and 118 of the 1st Defendant's party & party bill of costs dated 17th December 2014, and the same be remitted for taxation afresh before any other taxing officer, on only those items in accordance with the findings of the court.
>
> c. That costs of the application be provided for.

24. The Application is based on the grounds on the face of it, and the affidavit sworn by; the 1st Defendant's a legal officer Austin Ouko. He deposed that; the decision of the taxing officer on the items states, is founded on error of principle in that; the amount assessed in respect of instruction fees, was based on the pleadings and yet, judgment in the matter was delivered on; 9th September 2014, therefore, it should have been based on the amount awarded by the court and not on the amount claimed.

25. That, as a result of the error, the taxing officer erred in assessing the instruction fees, on the main suit, in the sum claimed of Kenya Shillings, Nine Hundred and Twenty-Four Million Kenya Shillings (Kshs. 924,000,000.00), rather than the correct sum of; Kenya Shillings, Thirty-Six Million, Seven Hundred and Eighty Thousand Kenya Shillings (Kshs. 36,780,000.00), resulting in the instruction fees on the main suit being taxed at, the exceptionally high sum of Kenya Shillings, Twenty Million, Four Hundred and Eight Four, Three Hundred and Seventy-Five, (Kshs.20,484,375).

26. Similarly, the instruction fees on the counterclaim were assessed on the sum of; Kenya Shillings Seventy-Seven Million, Two Hundred

and Fifty Thousand Kenya Shillings (Kshs.77,250,000.00); rather than the correct sum of; Kenya Shillings Seven Million, Seven Hundred and Twenty-Five Thousand Kenya Shillings (Kshs. 7,725,000.00), resulting in instruction fees on the counterclaim being taxed at the exceptionally high sum of Three Million Kenya Shillings (Kshs.3,000,000.00).

27. Thus, the taxation decision on items numbers; 116 and 118; getting up fees, on main suit and counterclaim, was similarly erroneous and founded on an extension of the first error of principle, in that, the erroneously assessed instruction fees aforesaid, were then used to assess the getting up fees. Consequently, the Applicant has been subjected to a first manifestly excessive advocate/client fees of; Kenya Shillings; Thirty-Two Million, Six Hundred and Forty-Six Thousand, Five Hundred and Sixty-Two Kenya Shillings (Kshs.32,646,562.00), in Misc. Application No. 276 of 2016, and Kenya Shillings Forty-Two Million, Five Hundred and Eighty-Five Thousand, Five Hundred Kenya Shillings(Kshs 42,585,500.00) in Misc. Application No.182 of 2017. The sum is manifestly excessive in light of the judgment sums.

28. The 1st Defendant's reiterated that, had bill of costs been taxed properly, the resulting advocate/client costs, would have been significantly less. If the taxation is not set aside; it will suffer irreparable financial loss, as the sums to pay the taxed bills are drawn from contributions of its members.

29. However, the Application was opposed by the firm of; Kinyanjui, Njuguna & Co. Advocates, through a replying affidavit dated; 4th October 2018, sworn by Kinyanjui Theuri. He averred that, the application has been filed after an inordinate, unexplained, and inexcusable delay of; two years and seven months, yet the Applicant and the incoming Advocates have at all material time, been aware of the ruling. That the substantial delay in moving the court; for extension of time and filing of reference, clearly shows that; the application is an afterthought and meant to delay the Advocates from enjoying fruits due from taxation.

30. That, the taxation was conducted properly based on the subject matter of the claim, with substantial liability due from the Plaintiff who shoulders, party & party costs, and which has not filed a reference clearly showing that all the parties were satisfied with the ruling. Therefore, the Applicant cannot approbate and reprobate and seek to reverse a position taken by the same party at the point of 1st reference.

31. Further the Applicant seek to raise submissions at this stage, that were not raised at the initial proceedings before the taxing officer.

That, in any event, the Plaintiff has already paid the entire taxed amount to; Kinyanjui, Njuguna & Co. Advocates, and there is nothing to litigate. The money was deposited at; Chase Bank which went under and will be paid as per the current advisory. Therefore, for all purposes and intent this court is functus officio.

32. The firm of; Kajwang & Kajwang Advocate, filed a notice of preliminary objection, dated 20th February 2019, in opposition to the application, stating that, the Honourable court lacks jurisdiction to hear and determine the application. There was not further explanation thereof.

33. However, the Applicant filed a response vide an affidavit described as "a replying affidavit" dated 4th March 2019, sworn by; Hellen Koch, its Ag. Legal Manager. She deposed that, the preliminary objection raised by the firm of; Kajwang and Kajwang & Co. Advocate, is not grounded on any disclosed issue of law and ought to be struck out as irreparably incompetent.

34. The response by the firm of Kinyanjui, Njuguna Co. Advocates, lacks in merit and is made in bad faith. That, if the firms wish to be heard in this matter, then it should apply to be joined in, as Interested parties, rather than purport to be representing the Applicant. As such, both firms opposing the application ought to be struck out of the record. That they are delaying the hearing of the application herein.

35. The application dated 6th April 2018, in Miscellaneous 276 of 2016, is brought under the provisions of, Paragraph 11 of the Advocates' Remuneration Order, the inherent jurisdiction of the court, sections 3A, 3B of the Civil Procedure Act and all other enabling provisions of the law.

36. The Applicant is seeking for orders;

> a. That the court, if need be, do enlarge the time fixed under Paragraph 11 of the Advocate Remuneration Order for filing the reference in respect of the taxation decision of the Hon. Deputy Registrar Nancy Makau made and / or delivered on 9th January 2017 and the reference, in the wider interests of justice and expediency, be admitted for hearing on its merits, as the reasons for taxation are apparent on the face of the decision;
>
> b. That the Honourable court, for sufficient cause demonstrated, do set aside the taxation decision of the Hon. Deputy Registrar Nancy Makau made and / or delivered on 9th January 2017, as well as the Certificate of taxation thereafter issued in respect of the Advocate/Client bill of costs filed on 16th January 2016 by M/S Kajwang & Kajwang Co. Advocates, and the same be remitted for taxation afresh, before any other taxing officer;
>
> c. That costs of this application, as well as cost in the aforesaid proceedings, be provided for.

37. It is based on the grounds on the face of it and an affidavit sworn by the Applicant's Legal officer, Austin Ouko. He averred that, the Applicant, was denied a right to be heard during the taxation proceedings, as a consequence thereof; it was unable to demonstrate that, the instruction fees claimed under items; 1 and 7 of the advocate/client bill were in full paid by the Applicant, to M/s Waweru Gatonye & Co. Advocates, prior to the appointment of; M/S Kajwang & Kajwang Co. Advocates, and therefore, ought to have been included in the bill of costs. Further, the certificate filed by the Advocates, under Paragraph 62A of; the Advocates Remuneration Order, is patently incorrect, as: -

> a. M/S Kajwang & Kajwang Co. Advocates was acting jointly with M/s Kinyanjui Njuguna & Co. Advocates, and without a correct

certificate, the taxation proceedings are nullity ab initio, as if no certificate had been filed;

b. The bill was not filed with the consent, concurrence and / or authority of; M/s Kinyanjui Njuguna & Co. Advocates and accordingly, was taxed without affording a necessary and integral party the right to participate in it, by demonstrating its part of services rendered; and

c. As a result of the aforesaid, the taxing officer was incapable of apportioning the rest of the taxable costs to the respective advocates, on the basis of fees for actual work done, rendering the resultant taxation and certificate a nullity;

38. That, the decision of the taxing officer, the certificate of taxation, should also be set aside, on the grounds that, the taxation of the advocate/client bill of costs, was based on an erroneously taxed party & party bill of costs in HCCC No. 543 of 2007; Housing Company of East Africa -vs- NSSF and KasIma Management Co. Ltd, as stated above. Therefore, it is in wider interests of justice and overriding objectives that the court allows the application as prayed. That, any delay in lodging this reference can be adequately compensated by an appropriate award of costs and therefore the Respondent will not be prejudiced.

39. However, the application was opposed through a replying affidavit dated 8th May 2018, sworn by Ibrahim Oduor, an Advocate of the High Court who is representing the Respondent in this matter. He deposed that, Paragraph 11 the Advocates (Remuneration) Order sets out a strict timeline within which a reference may be brought against the decision of a taxing master. That it is apparent from the record that, the Applicant has not complied with the timelines, set out in the provisions of the Order.

40. That, in any event, the application is lacking in merit even if it had been brought before the Honourable court within the period allowed in law. The Applicant appointed the Respondent Advocate to represent them in proceedings in; High Court Commercial Case Number 543 of 2007; Housing Company of East Africa -vs- Board of Trustee, National Social Security Fund and Another. The Advocate represented the client with effect from; 4th August 2010, having come on record in the place of'; Waweru Gatonye & Co. Advocates.

41. The Matter was concluded on 9th September 2014, when the Hon. Justice J.B. Havelock, (Rtd), delivered a judgement substantially in favour of the client/applicant and costs thereof were awarded to the Applicant. That, upon filing the bill of costs, the client filed; a notice of motion application dated 8th June 2016, raised a number of objections to the bill of costs and sought that, it be struck out on the following grounds: -

a. That, the bill of costs having been filed as Miscellaneous cause was incompetent and ought to have been filed in the High Court file HCCC No. 543 of 2007; and

b. That, the Advocate had not complied with the provisions of paragraph 62A of the Advocates (Remuneration) Order.

42. The Taxing Master considered the objection and dismissed it and proceeded to tax the bill of costs, having regard to the party & party costs; in HCCC No. 543 of 2007, where the costs had been taxed at Kshs. 20,484,375.00, then awarded an increase of; one half hereof in accordance with; Schedule 6B of the Advocates (Remuneration) Order, making a total of Kshs. 32,646,562.50, as stated in the resultant ruling delivered on 9th January 2017.

43. The Respondent argues that, there are now new or novel issues raised in the application. The issues raised in the application have previously been raised either as objections or substantially in other applications and have all the time been dismissed to lack any merit. Thus, the instant application has been brought ostensibly to frustrate the earlier resolution, in respect of taxation of costs and to further obfuscate clear issues herein in that; the Applicant confirms that, it duly appointed the Advocate to represent, it in Nairobi HCCC 543 of 2007 and does not deny that the Advocate acted as accordingly.

44. The firm of M/s Kinyanjui Njuguna & Co. Advocates were acting alongside the Advocate on the instructions of the Applicant, and the provisions of, paragraph 62A, of the Advocates (Remuneration) Order, are not applicable to the circumstances of this matter. That, the Applicant cannot at this stage advance arguments that ought to have been advanced at the point of taxation to which it was duly invited and fully participated. These issues are res judicata and lack in merit.

45. Further, it is unacceptable that, the Applicant, wishes to raise the issues around the taxation of costs in; Nairobi HCCC No. 543 of 2007, in which costs were taxed in its favour, which but it now claims was undertaken erroneously. That, the circumstances of Nairobi HCCC No. 543 of 2007, in terms of; party & party costs, are similar; to the circumstances, of this matter, save for, the increases under, schedule 6B of the Advocates (Remuneration) Order. As such, the instant application is misconceived, brought after extreme delay and lacking in merit and ought to be dismissed with costs.

46. However, the Applicant swore a further affidavit, dated 20th July, 2018, and argued that, right from the onset, it is clear that, there is a very serious dispute of retainer, both in substance and scope, which fully supports its case for a stay of further proceedings, and which must be resolved before any consideration or relief can be given in respect of the motion dated 6th February 2018.

47. Further, while the law firm of; Kajwang & Kajwang Co. Advocates legally existed at some point in time, the Applicant holds a genuine belief that, the law firm no longer legally or factually exists, and has no existing partners or advocates, rendering the application fatally defective and one for striking out ab initio; as an non-starter by being filed by; a non-existent entity or (b) by a person who has no instructions or authority of the firm.

48. That, in the absence of anything that, would enable both the court and the Applicant to ascertain or verify the law firm's current legal existence, then the court must stay, any further proceedings on the motion dated 6th February 2018, until such time as the same maybe provided.

49. The next subject application dated, 6th February 2018, is brought under the provisions of; section 51(2) of the Advocates Act, Rule 7 of the Advocates (Remuneration) Order and all other enabling provisions of the law. The Applicant is seeking for orders that; the Honourable court, be pleased to enter judgment in its favour against the Respondent, in the sum of; Kshs. 32,646,562.50, as it appears in the certificate of taxation dated, 9th January 2017, with interest from the date of filing the application until payment in full; the Applicant be allowed to execute the judgment, against the Respondent; and the costs of the application be provided for.

50. The Application was supported by an affidavit dated 6th February 2018, sworn by Ibrahim Oduor, an advocate of the High Court of Kenya. The contents of this affidavit is the same in substance and/or facts deposed in the affidavit in reply to the application seeking to set aside the decision of the taxing master, dated on 9th January 2017, save to add that, the Applicant had sought costs for a sum of, Kshs. 69,881,338.20, but it was reduced to Kshs. 32,646,562.50.

51. Further, the Respondent had been served with the certificate of taxation for the said amount, and in view of the fact that, the Applicant sent, the bills to the Respondent on 2nd March 2017, he is entitled to charge interest at 14% per annum as per the Advocates (Remuneration) Order, from 2nd April 2017, one month from the date the bill was tendered until payment in full.

52. However, the Application was opposed vide a replying affidavit dated 6th April 2018, sworn by Austin Ouko, who reiterated the averments in the supporting and further affidavit, in support of the application to set aside the impugned decision of the taxing master.

53. He maintained that the application does not on its face, disclose who are the persons trading under the firm of; Kajwang & Kajwang Advocates nor produce documentary evidence produced, in terms of the registration of business name, KRA tax documents or anything indeed that, would enable ascertainment or verification of its legal existence. The application is not signed by any Advocate trading under the Applicant and from information obtained from; Law Society of Kenya, search engine, Ibrahim Oduor ESq. who presumably made and signed the application, is an advocate practicing under the firm of; M/s Orego & Odhiambo Advocates, and does not disclose under what authority he was swearing the affidavit.

54. The affidavit is signed by an Advocate, who does not have personal knowledge of the taxation proceedings, as they were not conducted by him, and to this extent, the contents of paragraph 4 and 5 of this affidavit ought to be struck out, as it does not disclose the source of his information. Accordingly, before the motion can be considered on its merits, it is necessary for the court to satisfy itself that, it has a proper and/or competent application before it for consideration.

55. That, even if there is a competent application, the letter to the instructing Applicant dated 7th July 2010, stated that, the legal fees would be based on preparation for and actual hearing, should the matter proceed that far. On that understanding, the Applicant on 13th August 2017, filed the attendant notice of change of Advocates, and therefore was only entitled to getting up fees and fees for any other additional services rendered moving forward.

56. That, by a letter dated 6th February 2014, the Respondent appointed the firm of; M/s Kinyanjui Njuguna & Co. Advocates, as co-counsel, on the understanding that; the Applicant would be lead counsel and M/s Kinyanjui Njuguna & Co. Advocates, the assisting counsel, and the fees for; M/s Kinyanjui Njuguna & Co. Advocates would be charged strictly to scale. The firm of; M/s Kinyanjui Njuguna & Co. Advocates accepted the same, filed a notice of appointment as joint counsel on 20th February 2014, as evidenced by the letter dated 10th February 2014.

57. The first application in Miscellanoeous,182 of 2017, is a chamber summons dated, 29th October 2018, brought under the provisions of Paragraph 11 of the Advocates (Remuneration) Order, the inherent jurisdiction of the Court, Advocates (Accounts) Rules, 1966 and Advocates (Deposit Interest) Rules, 1967, Sections 3A & 3B of the Civil Procedure Act and all other enabling provisions of the law.

58. The Applicant is seeking for orders that; -

a. The proceedings in this cause be consolidated with and disposed off together with the related taxation references in HCCC 543 of 2007; Housing Company of East Africa vs. Board of Trustees, National Social Security Fund & Another and Misc. App. No. 276 of 2016; Kajwang & Kajwang Advocates vs. Board of Trustees, National Social Security Fund;

b. An order issue in the following terms;

i. compelling the Advocates/Applicant within 7 days, to disclose and render a full and detailed written statement of account to the Respondent, in respect of Party & Party costs made by the Plaintiff in; HCCC 543 of 2007, in terms of date of payment, sums, interest accrued and for which the firm has a mandatory obligation to account to Respondent, but have refused to do so'

ii. taxing consequential thereto, the principal sum and all interest that has or ought to have accrued thereon from the date of payment to the date of the order be immediately, and not more than 7 days from the date of receipt of the aforesaid statement of account of the principal and interest, be deposited in a joint interest bearing account between the Applicant and Respondent's advocates on record, and the same do abide further orders from the court;

iii. in default of compliance with either of the above by the Applicant, the application dated 1st October 2018, together with the taxation proceedings and decision before Hon. Deputy Registrar, Aswani Opande, and the resultant Advocate/Client Certificate of taxation issued on 7th November 2017, stand automatically set aside, without the need for any further order, with costs to the Respondent, and the matter stands remitted for taxation afresh before any other officer.

c. The court if need be, do enlarge the time fixed under paragraph 11 of the Advocates (Remuneration) Order for filing the reference in respect of the taxation decision made on; 7th November 2017, and the reference in the wider interests of justice and expediency, be admitted for hearing on its merits;

d. The Honourable court for sufficient cause demonstrated, do set aside the taxation proceedings and taxation decision made on 7th November 2017, as well as the Certificate of taxation issued on 6th April 2017, and the same be remitted for taxation afresh, before any other taxing officer;

e. For sufficient cause, the court be at liberty to make such further orders as the interests of justice may require; and

f. Costs of the application, as well as costs in the aforesaid proceedings, be provided for.

59. The application was supported by an affidavit dated 29th October 2018, sworn by Hellen Koech, the legal manager of the Respondent, who reiterated the averments deposed in the affidavit in support of the application to set aside the decision of the taxing master in HCCC 543 of 2007 and Misc. application number 276 of 2016.

60. However, the application was opposed through a replying affidavit dated, 21st November 2018, sworn by Kinyanjui Theuri, who averred that, the application is incompetent and ought to be struck out as, the provisions of the law cited in support therein, do not support the prayers sought and the orders sought are not supported by the grounds set out in the application.

61. That, prayer 2.1 seeking stay of enforcement of the certificate of taxation dated 20th June 2018, has no legal basis as; there is no substantive reference or appeal from the ruling in the taxation, in that, reference is filed out of time, and has not crystallized and the provisions dealing with stay in an appeal have not been cited, the conditions necessary for a stay of proceedings or ruling have not been satisfied. Thus, the prayer is only meant to delay the matter and put the Applicant out of the reach of what is legally owing and due.

62. Further, prayer 2.2 has no basis, as consolidation is a mechanism, that was abandoned in the Civil Procedure Rules, each Advocate has already taxed their bill and ruling delivered arose from different taxation causes, hence consolidation would only cloud and delay the finalization of the matters. Further, prayers 2.3.1, 2.3.2 & 2.3.3 have no foundation in law as; the applicant already disclosed receiving monies as, party & party costs, on behalf of the Respondent and indicated that, the amount was paid out, on or about 2nd March 2016 and deposited at Chase bank, where the monies are still held. That, there is no foundation in law or otherwise for; party & party costs to be paid to the client, unless the entire bill due is already paid. That, legal fees can never be shared with an unqualified person.

63. The Respondent averred that, Paragraph 11 of the Advocate (Remuneration) Order, provides for 14 days, in which to lodge a reference. The ruling herein was delivered on 7th November 2017 and the application presented in court 11 months and 23 days later, without seeking leave to lodge a reference out of time as per the law hence, circumventing the procedure.

64. Further, the period of delay in seeking reference extension is inordinate, lengthy, unexplained, inexcusable. The delay is deliberate in bad faith and against the interest of justice. That the Respondent has demonstrated a similar pattern in not acting within the set legal limits, as seen in; HCCC 543 of 2007 and Misc. App. No 276 of 2016, thus portraying impunity and a total disregard of statutory or legal timelines.

65. It was argued that, a client is always at liberty to engage the services of one or more Advocates, to best protect their interest and where he so does, all the Advocates become entitled to all legal fees, including instruction fees, except where the Advocates are from the same law firm. That, under schedule vi (iii)(a), the primary aspect to be considered in determining instruction fees, is the value of the subject matter, if it can be determined from the pleadings.

66. It has not been demonstrated that, the taxing officer abused his discretion, committed any error in principle or considered extraneous issues in assessing the instruction fees, which would entitle the court to interfere. The fact that, the taxing master arrived at different amounts in taxation does not make the taxation wrong. Mr Kinyanjui Theuri, swore a further affidavit dated 3rd December 2018, averring that, it is incorrect for the Respondent to state that, the instructions given to the law firm were limited, as it was not stated so, in the instruction letter or any other letter whatsoever. The instruction letter dated 6th February 2014, clearly spells out that the Applicant's fees would be charged strictly to scale.

67. The role played by the Applicant's firm was not peripheral, as it included but was not limited to;

a. Familiarizing with details with the entire claim which includes the counterclaim;

b. Opposing an attempt to introduce a new claim;

c. Preparing pleadings;

d. Preparing issues for determination;

e. Briefing clients and preparing statements for filing in court;

f. Attending to all hearings, applications, mentions, rulings, judgment and post judgment applications;

g. Cross examining all the witnesses for the plaintiff and the 2nd defendant; leading examination in chief of witnesses for the client;

h. Preparation and filing of submissions;

i. Opposing applications filed subsequent to the judgment including filing replying affidavits to protect the client's interest;

j. Updating the client on all issues which arose at all steps of the proceedings;

k. Opposing an application for stay pending appeal both in the high court and court of appeal including filing replying affidavits;

l. Filing a bill of costs against the plaintiff and ensuring that the plaintiff was enjoined to pay the party & party costs thereby saving the client substantial exposure.

68. That, the Applicant had at the onset of the matter raised an interim fee of; Kshs. 1,740,000.00, which indicated in the descriptive parts the claim as Kshs. 1,000,000,000.00 and to which the Respondent never raised any issue.

69. The last application filed in; Miscellaneous 182 of 2017, is a notice of application dated 1st October 2018, brought under the provisions of Order 51, rule 1 of the Court Procedure Rules, section 51(2) & 48 of the Advocates Act and Order 7 of the Advocates (Remuneration) Order.

70. The Applicant is seeking for orders that; -

a. The Honourable court be pleased to enter judgment in favour of the applicant in terms of the certificate of taxation dated 20th June 2018, for Kshs. 42,585,500.00.

b. The Honourable court be pleased to issue a decree/judgment above for Kshs. 42,585,500.00 plus interest at 14% per annum from 10th September 2014.

c. Costs of the application be provided for.

71. The application is supported by an affidavit sworn by Kinyanjui Theuri, reiterating the averments in the affidavit referred to herein opposing the Respondent's application to set aside the taxation decision made on; 7th November 2017. He averred that, when the matter came up for taxation on 26th April 2017 and on 30th May 2017 the Respondent sought for time, to take proper instructions on settlement.

72. That, on 16th June 2017, the parties agreed to dispose of the matter with written submissions, and on 7th July 2017, the Respondent was given 14 days to file and serve their submissions but failed to do so on several occasions, causing the Applicant to seek for taxation of the bill as drawn and ruling delivered in favour of Applicant. Subsequently, the certificate of taxation which was issued on 20th June 2018, was serviced, but the Respondent has failed to satisfy the amount. Receipt of; Kshs. 20,484,375.00 due from the Plaintiff in Milimani HCCC 543 of 2007 was acknowledged as part of settlement.

73. That the firm of; M/s Kajwang & Kajwang Advocates, without prior notice or demand, then filed the Advocate/Client bill of costs seeking cumulative legal fees of Kshs. 69,881,338.00 against the respondent, on behalf of itself and the applicant, though it did not disclose the applicant had taxed its bill.

74. I have considered all the applications in the light of the affidavits filed in support thereof and or opposition thereto, alongside the submissions. I find that, the first application dated 18th April 2019, should be determined first, in view of the fact that, the orders made therein, will determine whether, the firm of; M/S Wetangula, Adan & Company Advocates, is properly on record and by extension whether, all the applications filed and/or the affidavits in support thereof are competent and/or properly on record, similarly whether the affidavits they have filed in oppositions to the other applications are validly.

75. It suffices to note that, the issue of representation of the 1st Defendant by that law firm, was fully canvassed before the court and determined vide a substantive ruling delivered on 8th April, 2019. The subject application herein seeks to review the orders in that ruling. I have already summarised the arguments on this application and I find as follows:

a. The consent, to herein was drawn on 23rd August, 2017, and notice of change of Advocates, filed by the firm of; Wetangula, Adan & Co. the same date;

b. The law firm of; Kajwang and Company Advocates, executed the consent on the same date, it on 23rd August 2017,

c. The law firm of; Kinyanjui & Njuguna Co. Advocates executed it on 27th September,2017,

d. In the meantime, the 1st Defendant had written the letter, dated, 6th September 2017;

e. The firm of, Kajwang and Company Advocates have not filed any application challenging the appearance of the firm of; M/S Wetangula, Adan & Company Advocates.

f. It is the firm of; Kinyanjui & Njuguna Co. Advocates, that filed the application.

g. Therefore, taking into account the fact that, the firm of; Kinyanjui & Njuguna Co. Advocates, executed the consent after the letter of; 6th September 2017; the letter supersedes the consent and the content thereof takes precedent over the consent as regard to that firm;

h. The court having held to the contrary, then is an error apparent on the court record.

i. Even then, if the court were to hold others, that holding will only convolute the matter. in view of the fact that, the applications filed by the firm, of Wetangula, Adan & Co. Advocates, have already been fully canvassed.

j. It will not be in the interest of justice to strike them out.

In the interest of justice and pursuant to the provisions of Article 159(2) of the Constitution of Kenya, to uphold substantive justice, I allow the application, as prayed in terms of prayer (2) and (3) thereof with no orders as to costs.

k. I shall revert back to prayer (4) and (5) thereof later.

76. Having then held the firm is properly on record, I shall then consider its application seeking for an order to enlarge time, within which to file reference, in matter HCCC543 of 2007, and setting aside of the decision therein. I note that, the 1st Defendant's filed party & party bill of cots dated 17th December, 2014, through the firm of; Kinyanjui Njuguna & co. Advocates. It was served upon firms of; Njoroge Regeru & Co. Advocates, Nchogu Omwanza & Nyassimi Advocates, and Kajwang and Company Advocates.

77. It was opposed by the Plaintiff/Respondent and heard inter parties. The ruling was delivered on 18th September, 2015, and the orders therein complied with, as stated herein. The subject application herein was filed on, 9th April, 2018. A period of two years and about seven months.

78. The question that arises is; why wasn't the application filed within the time lines set under the law? The Applicant avers that; the delay was occasioned by engagements with the outgoing Advocates "to see if the issue can be resolved amicably". The Applicant then states that; "more importantly, it is the fund's respectively view that, no prejudice will be occasioned to the Respondents on the account of delay that cannot be compensated by an appropriate award of costs"

79. The period of filing a reference is; provided for under; Paragraph 11 of the Advocates Remuneration Order, and stipulates for filing thereof, within 14 days after receipt of the reason for the taxation; thus any reference filed out of this time line is, incompetent as held in the case of; *Governors Balloon Safaris limited VS Skyship company Limited & Another (2015) e KLR,* that a reference filed 48 days after delivery of taxation was fatally incompetent.

80. These provisions, are not superfluous. When a party is successful in the taxation of a bill of costs, that party, is at liberty to enjoy the fruit of its sweat unless otherwise determined. The timelines of challenge are critical. A party that intends to challenge that, decision cannot sit back and only wake up upon execution.

81. With due respect, the reasons, by the 1st Defendant, advanced for the long, inordinate delay, hold no water, the alleged engagement between the lawyers that, took over two years is not supported by evidence. The Applicant is not treating this the issue of delay seriously, it's very casual. In particular, they are dismissing the issue of delay, as non-issue, by stating that, the Respondents will be compensated in costs. It is not about costs. When, drafters set timelines for filing a reference, they were well aware of costs.

82. It is incomprehensible that, that the Applicant cannot appreciate the prejudice, the setting aside of the taxing master's decision will be occasion especially to the respondents who have decisions in the miscellaneous applications herein.

83. Further, it is surprising that, the 1st Defendant who benefitted from those orders in that taxation decision, is seeking to set them aside. The Plaintiff liable who was ordered to pay the sum therein, has not sought to set it aside. In fact, irrespective where the money paid is held, the same has been paid and the party that paid is not seeking to have it back.

84. The 1st Defendant is a big organisation with, presumably a full-fledged legal department, that should evaluate all decisions from court and deal accordingly. It cannot be understood why they sat back for two and a half years. Obviously, the Applicant is aware of the basic principles of Equity; that the "Equity assists the vigilant and not the indolent" and that "delay defeats equity". Finally, the old saying that, "justice delayed is justice denied".

85. The Applicant strongly opposed the participation of the other parties in the matters in the hearing of the application, but those parties have already been heard and I have held that, I shall uphold the substantive justice. Even, if the other parties did not address the court, the Applicant has the burden to satisfy the court that it has sufficient cause to be allowed to file the reference out of time.

86. Indeed, the court has wide discretion to extent time as provided for under the law, however, the exercise of this jurisdiction and discretion, like any other discretion of court, must be exercised reasonably and not whimsically. It must be based on good and reasonable cause for delay, and as stated in the case of; *Sound Entertainment Limited v Anthony Burungu & Co Advocates [2014] eKLR,* the Applicant has to show or demonstrate those good grounds to persuade the court to exercise the discretion in its favour.

87. The court in that case stated as follows; "the Applicants cause of delay from October, 25th 2012 to 31st January, 2013, is not reasonable. His advocate was in court and wrote to the Applicant on 1st December, 2012. The explanation that he was engaging a new Advocate between

then and 31st January, 2013 is not reasonable. It needs only a few days to engage an Advocate and 60 days is inordinate delay".

88. Further, in exercise of the discretion to extent time, the court will take into account the length of delay, the reason for delay and the chances of success of the reference. These are indeed, the same factors that, a court will consider in allowing an application to extent time within which to file an appeal. As held in the case of; ***Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No. Nai 255 of 1997***:-

> **"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."**

89. In view of the aforesaid and in the absence of a reasonable, sufficient and adequate explanation, for the prolonged delay herein, I find the prayers (3) seeking for an order to enlarge the time for filing a reference has no merit, I disallow that prayer, and as a consequent thereof, prayer (4), is not allowed. It however, suffices to note the issue raised on the merit of the taxing master have been advanced in the other two matters herein.

90. I shall now deal with the two applications by the 1st Defendant in the miscellaneous matters. The first application is seeking for orders similar orders as above, that time for filing the reference be enlarged and the decision of taxation be set aside. I note that in the Miscellaneous 276 0of 2016, the advocate filed the advocate/client bill of costs dated; 16th January 2016, on 20th January, 2016. The same was served upon the 1st Defendant, and opposed vide a notice of motion dated; 8th June, 2016. The decision on the bill was rendered on 9th January, 2017. The application herein was filed on 6th April, 2018. A period of one year and about three months.

91. At paragraph 13 of the supporting affidavit, the Applicant acknowledges that, it instructed the firm of; Wetangula, Adan & Company Advocates to represent it in the taxation, but avers that; the taxing master taxed the bill without affording it a right to be heard, in that, the taxing master had directed that, she would rule on the Applicant's notice of motion application first, and then on the merit of the bill, but proceeded to deliver the impugned ruling, dismissing the motion and tax the bill, ex parte.

92. That, although the Applicant could not access the file and peruse to understand the reasons for the ruling, on 23rd January 2017, it gave notice, within the prescribed time under; Paragraph 11 of the Advocates Remuneration Order, objecting to the taxation decision on items 1–102, both inclusive and requested for reasons to file a reference.

93. There was no response to that letter, and subsequently, by a court order issued on, 29th May 2017, in related proceedings, a typed copy of the ruling was finally obtained in September 2017. Even then, a reference was filed, notwithstanding lack of response to the letter dated 23rd January, 2017.

94. The Applicant submitted that, the 14 days period under; Paragraph 11 of the Advocates Remuneration Order, starts to run from the date of receipt of the reasons for taxation and, in view of the fact that, the reasons were not given when the letter dated 23rd January 2017 was sent to the taxing master, the time has not yet started to run. Further, the Advocate subsequently, filled a Judicial Review Application number, 135 of 2017, R vs Ex. Parte Kajwang & Kajwang Advocates, to enforce the certificate of costs and that caused further delay. The application was withdrawn in the year 2018.

95. The Applicant argued that, whereas there has been delay, the same is excusable and "in keeping with the court overriding principles and dispensation of substantive justice without undue regard to technicality, the time ought to be enlarged to address the real issues in contention". That, an award of costs will adequately, compensate the Respondent, in that, pursuant to the provisions of Paragraph 7 of the Advocates (Remuneration) Order, interest is provided for.

96. However, the Advocate submitted that, the ruling delivered by the taxing master, provided reasons for the decision and the same is acknowledged/affirmed by the Applicant, in their application. The decision was rendered on 9th January, 2017 and therefore a reference should have been filed by 23rd January, 2017, but the application for enlargement was brought 441 days late.

97. The Respondent relied, on several authorities listed in the submissions to argue that, enlargement of time must be based on sufficient cause and even where such cause is shown then the delay should not be condoned as a matter of right. That, diligence of the party seeking extension is key. That; the Applicant has not offered any reason for the delay.

98. Be that as it may, before I rule on that issue of enlargement of time, I shall deal a similar prayer in the application dated, 30th October, 2018, filed in miscellaneous case number, 182 of 2017. The 1st Defendant/Applicant, advanced similar arguments on the prayer for enlargement of time as indicated above, save for the fact that, the decision by the taxing officer in the matter was rendered on; 7th November, 2017, therefore I shall adopt the same arguments herein.

99. The Advocate/Respondent argued that, the application herein having been filed on; 30th October, 2018, there was a delay of eleven (11) months and twenty three (23) days. That, the ruling was delivered in the presence of the Applicant's lawyer and the Applicant subsequently was served with a notice of extraction of the certificate of taxation on 18th July, 2018, and the application for judgment filed and served on the Applicant on 1st October, 2018. The Respondent termed the delay as; inordinate, lengthy, unexplained and inexcusable and that the Applicant has no sufficient cause to warrant extension of time.

100. I have considered the arguments advanced in both miscellaneous matters on this issue of; enlargement of time for, filing a reference out

of time and I find that, in both matters, the Applicant did not comply with the timelines set under; Paragraph 11 of the Advocates (Remuneration) Order. The delay period in both is stated to be 441 days and 11 months and 23 days respectively. As already stated herein, the period set for filing a reference is 14 days after receipt of the reasons for the taxation decision.

101. The question is; has the applicant advanced sufficient cause for the court to exercise its discretion in its favour and grant the order sought. In answer to this question, I wish to reiterate the legal principles I have addressed herein and the findings on a similar application herein, HCCC 543 of 2007.

102. Similarly, as observed in that matter, the explanation offered for the delay is that, the delay, if any, will not cause prejudice and if it does, then the Respondents can be compensated in costs. As already held, the fact that, the Applicant may be efficiently endowed financially, (if that be the case) to compensate the Respondents, is not sufficient cause for delay. As observed herein, the absence of a sufficient cause will not guarantee the Applicant grant of the subject prayer.

103. However, before I deal with the other prayers in the miscellaneous application, and the applications for entry of judgment on the certificate of taxation, I note that, several fundamental issues have been raised in these matters and it is in the interest of justice that I address them.

104. These issues are inter alia:

a. Whether the advocate/client bill of costs in; Miscellaneous 276 of 2016, was taxed without the Respondent thereto, being given an opportunity to be heard, on the same;

b. Whether the said bill of costs is, competent in view of the fact, it was not filed with the consent, concurrence and/or authority of the firm of; Kinyanjui Njuguna & Co. Advocates;

c. Whether the party and party bill of costs in HCCC 543 of 20007 was erroneously taxed; if the answer is in the affirmative, whether the error was imported in the taxation of the advocates/client bill of costs;

d. Whether the law firm, of; Kajwang and Kajwang legally exist; if the answer is in the negative, whether its application for judgment on the basis of; the certificate of taxation is competent;

e. Whether the two firms that were appointed after the firm of Gatonye Waweru & Co Advocates, are entitled to any legal fees, and in particular instruction fees; or

f. Whether the 1st Defendant/ Applicant will be exposed to double jeopardy by paying twice for the same work, if the certificates of taxation herein are enforced;

g. Whether, in taxing the bill in, Miscellaneous 182 of 2017, the taxing officer erroneously held that, it was unopposed when it was actually opposed;

h. Whether, the firm of Kinyanjui Njuguna &Co. Advocates, received, a sum of Kshs 20, 484,375, in trust for the Applicant and failed to disclose the same to the Applicant and/or the joint counsel;

i. Whether, the 1st Defendant Applicant is intentionally refused to honour the consent executed by the parties to pay the Respondents legal fees and is filing the applications herein, to merely, buy time and frustrate the Respondents.

105. I have considered the arguments advanced by the respective parties on all of these issues and I find that; there is no dispute that, the initial brief; in HCCC 543 of 2007, was handled by the firm of; M/s Waweru Gatonye & Co. Advocates, which entered an appearance on 30th October 2007, and filed a defence & counterclaim on 30th November 2007. Thereafter, its services were withdrawn and it is stated that it was paid its legal dues.

106. The firm of Kajwang and Kajwang & Co. Advocates, was appointed to take over the matter and allegedly, expressly informed vide a letter dated 7th July, 2010, that, it would be paid legal fees based on preparation for and actual hearing, should the matter proceed that far. However, I have read the letter and I note it simply states “we therefore instruct you to take over the brief from M/s Waweru Gatonye & Co. Advocates, for finalization”.

107. It is also admitted that, by a letter dated 6th February 2014, the firm of; M/s Kinyanjui Njuguna & Co. Advocates was appointed into the matter. The 1st Defendant argues that, the letter expressly stated that, the fees for. M/s Kinyanjui Njuguna & Co. Advocates would be charged strictly to scale. I note from the letter that, it is stated, the firm of; M/s Kajwang & Kajwang Co. Advocates would be lead counsel and that of; M/s Kinyanjui Njuguna & Co. Advocates, assisting counsel. It is noteworthy that, the M/s Kinyanjui Njuguna & Co. Advocates was the appointment as about four years after the firm of M/s Kajwang & Kajwang Co. Advocates.

108. The matter proceeded to full hearing and judgment delivered as stated herein. The question that arises is whether; both firms are entitled to independent legal and/or instruction fees. It is settled that, a client who instructs more than one law firm must be prepared to shoulder the associated legal fees by all the firms. The issue would always be, how much is payable.

109. At this stage, it is noteworthy that; the firm of; M/s Kajwang & Kajwang & Co. Advocates, has taxed its advocate/client bill of costs at, Kshs. 32, 646,5632, while M/s Kinyanjui Njuguna & Co. Advocates, has taxed its advocate/client bill of costs, at Kshs. 42, 585,500, giving

rise to a total cost of Kshs, 75, 232,062. The 1st Defendant argues that, this sum, must be considered against the final orders in the judgment in, HCCC 543 of 2007, where the 1st Defendant was ordered to refund the Plaintiff a sum of; Kshs 36,780,000.00, and Kshs 7,725,000.00, allowed on counter claim.

110. It is also noteworthy that, the two law firms filed separate advocate/client bills of costs and were taxed at different times by different taxing masters and gave rise to different sums. The Applicant has faulted the filing of two bills on the ground that, they violate the provisions of; Paragraph 62A of the Advocates (Remuneration) Order. I am aware this issue was raised before the taxing officers and dealt with, but the court is not barred from interrogating the provisions to find out whether, the Hon, taxing masters addressed the same adequately.

111. The provisions provide that, where there has been change of advocates or more than one change, the advocate final on record shall draw a single bill for the whole of the matter in respect of which costs have been awarded. The 1st Defendant argues that, the two firms herein should have filed a single advocate/client bill of costs. However, the Respondents argued that, the issue is res judicata as it was dealt with by the taxing officers and in any case, the provisions do not apply to, advocate/client bill of costs.

112. I have considered the arguments advanced, in the light of the settled legal principles, as well detailed in the authorities cited and I find that, it has been held in the case of; ***Machira & Co. Advocates vs Arthur Magugu & Another, HCC Misc. App. No. 358 of 2001*** that, **Paragraph 62 A of the Advocates Remuneration Order** applies to party and party bills of costs and not Advocate/Client bills of costs.

113. The next issue to consider is whether both firms were entitled to instruction fees and whether, the fees awarded in the respective certificate of taxation were properly assessed. In that regard, Schedule VI B of the Advocates (Remuneration) Order states that: -

> "As between advocate and client the minimum fee shall be—
>
> (a) the fees prescribed in A above, increased by 50%; or
>
> (b) the fees ordered by the court, increased by 50%; or
>
> (c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; *as the case may be, such increase to include all proper attendances on the client and all necessary correspondences".*

114. In the case of; Mayers & Another V. Hamilton & Others [1975] EA 13 Spry Ag. P. held that: -

> "I accept that the moment an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee but it is only necessary to look at the concluding words of the particulars of the instruction fee in the bill of costs now in issue - "considering most difficult and conflicting case-law on the matter" - to realise that an advocate will not ordinarily become entitled at the moment of instruction to the whole fee which he may ultimately claim. Suppose, for example, that within a few minutes of receiving instructions to defend a suit, an advocate was informed that the Plaintiff had decided to withdraw. The advocate, as I see it, would be entitled to claim the minimum instruction fee but he could not properly claim in respect of work he had not done. The entitlement under the instruction fee grows as the matter proceeds."

115. The Court of Appeal stated in the case of, *Joreth Ltd V. Kigano & Associates [2002] 1 EA* that, "the instructions fees are an independent and static item; it is charged once only and it is not affected or determined by the stage the suit has reached" Similarly, in the case of; ***Tononoka Steels Ltd vs. The Eastern & Southern African Trade & Development Bank (P.T.A Bank) Hccc No 267/98,*** it was held that: -

> "The instruction fee does not depend on the period taken to determine the suit finally. For the time taken in the course of the case hearing or arguments is a matter to be separately remunerated."

116. It therefore follows from the above legal principles that, an advocate will be entitled to instructions and/or getting up fees, however minimum, from the moment he is instructed, irrespective of how complex the matter may be and/or how long it takes to conclude the matter.

117. The question would therefore be, how much should be awarded. In the case of; *Joreth Ltd V. Kigano & Associates(supra)* the court stated that: -

> "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, judgement on 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."

118. The taxing master in the subject advocates/client bills relied on, the assessment of; party and party costs in, HCCC 543 of 2007.However, that taxation decision therein is challenged as stated herein. In my considered opinion, once the costs were assessed in HCCC 543 of 2007, the assessment of; advocates/client bills, was bound to follow the party and party costs. What is rather, puzzling is how then the two advocates/client bills attracted different amount of taxed costs.

119. I have considered the rulings in both matters and I find that, in Miscellaneous 276 of 2016, the taxing master was guided by the party and party costs of; Kshs 20,484,375,.00 and awarded instruction fees of Kshs 11,662,000, on the main suit, increased to Kshs 12,000,000 plus a third getting up fees of Kshs, 4,000,000 then, Kshs 3,000,000 as instruction fees on counter claim plus Kshs 1,000,000 as getting up

fees, and awarded total costs of; Kshs, 32, 646,562.50.

120. In miscellaneous 182 of 2017, the taxing officer, states that, "the total party and party costs is Kshs 28,390,333/=." I am not quite sure how this figure came about. The party and party costs had already been taxed in HCCC 543 of 2007 at Kshs, 20,484,375.00. Be that as it were, the taxing officer proceeded to add half of the party and party costs of Kshs 14,195, 166 and arrived at the total sum of; Kshs. 42,585,500. Therefore, it is evident that, the two taxed amounts are different.

121. In the same vein, the 1st Defendant/Applicant, avers that, in Miscellaneous 276 of 2016, the Applicant was not heard on the bill of costs and in Miscellaneous 182 of 2017, the taxing officer indicated the bill was not opposed when the Respondent had actually filed a notice of preliminary objection. These are salient issues.

122. Be that as it may, it suffices to note that, this matter is not without its history. The Client/Applicant entered into a consent agreement referred to herein, to pay the Advocates/Respondents, their legal fees and on that basis, the advocates on record were allowed, to come and file the notice of change of Advocates and come on record. That agreement has not been set aside nor honoured. As observed in the ruling I delivered in this matter on 8th April 2018, there was a condition set in the consent that, the firm of; Wetangula Adan & Company Advocates; would only come on record for the 1st Defendant "subject to settlement of all due and/or outstanding fees for legal work done up to the date of the consents.".

123. Pursuant to that consent, the 1st Defendant wrote a letter dated 6th September 2017, indicating that, outstanding legal fees would be paid once ascertained. The advocates/client bills were then taxed. The 1st Defendant/Applicant was aware. It did not file a reference therefrom in time. When the Advocates sought for judgment on the certificate of taxation, the 1st Defendant/Applicant woke and filed the Application to set aside the taxation decisions and resultant certificates. It seems that, the Applicant is not determined to settle this matter, as evidenced by their unexplained laches, in challenging the taxed bills in all the three matters herein. Very unfortunate.

124. To revert back to the issues herein, should the court allow the applications by the 1st Defendant in the miscellaneous matters or reject the same and order that judgment be entered for the Respondents on the certificates of taxation. The Court of Appeal has held in; *Joreth Ltd Vs Kigano & Associates* (supra), that a Judge determining reference against the assessment of instructions fee by the taxing officer, ought not to interfere with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.

125. Similarly, it was held in the case of; *Premchand Reichand vs. Quary Services of EA Ltd & others EALR (1972) EA 162* that :-

> "(a) That costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy;
>
> (b) That a successful litigant ought to be fairly reimbursed for the costs that he has had to incur
>
> (c) That the general level of remuneration of advocates must be such as to attract recruits to the profession and
>
> (d) That so far as practicable there should be consistency in the awards made.
>
> (ii) The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party;
>
> (iii) In considering bills taxed in comparable cases allowance may be made for the fall in value of money.
>
> (iv) A part from a small allowance to the appellant for the responsibility of advising the undertaking of the appeal there is no difference between the fee to be allowed to an appellant as distinguished from a respondent.
>
> (v) The fact that counsel from overseas was briefed was irrelevant: the fee of a counsel capable of taking the appeal and not insisting on the fee of the most expensive counsel must be estimated (Simpson Motor Sales v Herdon Corporations (2) followed……"

126. Finally the case of, Joreth, stated the principles to be applied by a taxing officer in exercise of his discretion to; increase the instructions fees. These include inter alia: -

> a. Care and labour required by the advocate;
>
> b. Specify the number and length of the papers to be perused,
>
> c. The nature and importance of the matter,
>
> d. The value (where ascertainable) of the subject matter;
>
> e. Interest of the parties'
>
> f. Novelty of the matter.

127. Having considered, the above legal principles and all arguments advanced herein, I find that, taking into account, the fact that, the decision in miscellaneous 276 of 2016, was rendered before the matter was fully canvassed, and in the same vein, the taxing officer in Miscellaneous 182 of 2017, indicates the taxation proceedings was unopposed when it was actually opposed, it would be unjust to allow the decision to stand.

128. Again, in view of the fact that, the two miscellaneous applications herein were taxed at different amounts, over the same subject matter, with the results that, the firm of; Kinyanjui Njuguna & Co. Advocates that joined the matter later, was awarded Kshs. 10,000,000 more, than the firm of Kajwang and Kajwang & Co. Advocates, is just. Therefore it will not be in the interest of justice to uphold the two certificates of taxation.

129. Further, it suffices to note and I do note, in assessing costs and more so instruction fees, the taxing officer is guided by either, the value of the subject matter as pleaded, or judgment or settlement if any. The taxing officer in the party and party bill of costs herein, relied on pleadings than the judgement, though there was a judgment. The results therefore, is costs in favour of both firms of advocates amounts to approximately Kshs 75,000,000.00. The total sum in judgment is Kshs 36,780,000.00 on the main suit and Kshs 7,725,000.00 on the counter claim. The party and party costs are Kshs 20,484, 085.00.

130. The question that arises is whether, that figure of Kshs 75,000,000 can be upheld. This question arises in view of the fact that, the law is settled, legal fees should not be so exorbitant as to drive an ordinary member of public from the seat of justice or to make the justice system a preserve of the wealthy. Indeed the principles of overriding objective under sections 1A and 1B of the Civil Procedure Act, require that litigation be cost effective, to give effect to Article 48 of the Constitution on access to justice.

131. In addition, the National Social Security Fund (NSSF) the 1st Defendant, that is liable to pay the advocates costs, was established in 1965, through an Act of Parliament (Cap 258) of the Laws of Kenya, as government agency responsible for; "the collection, safekeeping, responsible investment and distribution of; retirement funds of employees, in both the formal and informal sectors of the Kenyan Economy". Therefore, the sum to be paid will be drawn from the members contributions.

132. The question is whether it will be in the interest of the public to uphold the two certificates of taxation in the sum stated therein. A consideration of public interest, reveal that it is "anything affecting the rights, health, or finances of the public at large. It is defined in business dictionary as involving, "the welfare of the general public (in contrast to the selfish interest of a person, group, or firm), in which the whole society has a stake and which warrants recognition, promotion, and protection by the government and its agencies". The Black's Law Dictionary defines "public interest" as the **general welfare of the public that warrants recognition and protection".**

133. Thus, based on the reasons stated herein and in the recognitions of the principles of public interest, I shall allow the prayers for enlargement of time within which to file references, in the miscellaneous matters; 276 of 2016 and 182 of 2017, on condition that, the 1st Defendant pays each party therein, costs of; in the sum of; Kshs 30,000, for the prejudice that it may occasion.

134. The 1st Defendant was supposed to file a reference after being allowed to file the same out of time but the references herein are already canvassed and I have dealt with the same. I shall set aside the decision of the Taxing officer in both miscellaneous matters for the reasons stated above.

135. However, the question is; whether to refer the matter for fresh taxation. I find that, in view of the fact that the matter has been in court for too long it will not serve the interest of justice. I am of the opinion, that this matter can be settled through mediation and the court is ready to guide the same under Article 159 (2) of the Constitution of Kenya or through court annexed mediation, in that, case, I allow the parties time for negotiated settlement or mediation failure of which, the same shall be referred to a different taxing officer for taxation on the impugned items, within thirty (30) days of this order.

136. As stated, the 1st Defendant has caused the delay herein. It is the beneficiary of the work done. The firm of Kinyanjui Njuguna & Co. Advocate have about Kshs 20,000,000. To mitigate any further prejudice, to the firm of; Kajwang and Kajwang Co. Advocates, that has not been paid any money, I order it be paid at least, a sum of Kshs 5,000,000 of the sums claimed, within twenty one (21) days from the date of this order. In default of compliance of payments of the sums ordered the order setting aside the taxed advocate/client fees shall stand vacated without recourse to court.

137. It is so ordered

Dated, delivered and signed on this 29th day of April 2020

G. L. NZIOKA

JUDGE

<u>In the presence of;</u>

Mr. Orege for the Plaintiff

Mr. Onyango for Mr. Kinyanjui for the 1st Defendant

Mr. Mwangi for the 2nd defendant