REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

MISC. CIVIL APPLICATION NO. 50 OF 2020

Formerly H.C. Misc.17 OF 2020

MWANGANGI & COMPANY ADVOCATES.....APPLICANT

VERSUS

MACHAKOS COUNTY.....RESPONDENT

AND IN THE MATTER OF A TAXATION DECISION DELIVERED ON 12/03/2020 BUT DATED 5.03.2020 IN MACHAKOS HIGH COURT MISC. APPLICATION NO. 197 OF 2014

MWANGANGI & COMPANY ADVOCATES –vs- MACHAKOS COUNTY

AND IN THE MATTER OF

MACHAKOS HCCC. NO. 225 OF 2019 (Formerly Nairobi HCCC No.2765 of 1998)

DANSON MUTUKU MUEMA & 118 OTHERS –vs- COUNTY OF MACHAKOS & 3 OTHERS

R U L I NG

1. The Applicant who had represented the Respondent in **Machakos HCCC No. 225 of 2009 (formerly Nairobi HCCC No. 2765 of 1998**) filed the present application dated 21/04/2020 seeking several prayers inter alia: that the decision of the Taxing Officer dated 5/03/2020 but delivered on 12/03/2020 on the re-taxation of the Applicant's Bill of Costs dated 15/12/2014 and filed on 16/12/2014 and any consequential orders thereon be set aside and or vacated; that the Advocate/Client Bill of Costs dated 15/12/2014 be expeditiously taxed afresh by a different constituted taxing court in strict compliance with the Advocates remuneration Order and the applicable principles of taxation, fairness and equity as guided by this court; *that in the alternative this court be pleased to assess/tax the costs lawfully payable to the Applicant vide the said Bill of Costs dated 15/12/2014 on Item No. 1 thereof being instruction fees, attendant fees for getting up or preparing for trial and the VAT payable thereon; that the costs be borne by the Respondent.*

2. The application is supported by the annexed affidavit of Florence M. Mwangangi Advocate sworn on even date and a supplementary affidavit sworn by her on 7/05/2020 together with another supplementary affidavit by Kyalo Kivuva sworn on 7/05/2020. There are also grounds set out on the face of the application which are hereby reproduced verbatim as follows:

> **1. The learned Taxing Officer grossly misapprehended the law and principles of taxation by failing to correctly apply the principles and formula provided for in Schedule VI of the Advocate (Remuneration) Order 1997 for assessing the instruction fees and the attendant fees for getting up or preparing for trial in that he:-**
>
> > **a. Did NOT take into consideration the fact that the Bill of Costs herein is an Advocate/Client Bill of Costs thereby requiring an increase by one half of the amount he taxed off of Kshs. 30,040,000/= on Item No. 1 of the Bill for instruction fees as provided under Schedule VI paragraph 1(b) part B(b) of the Advocates Remuneration Order.**
> >
> > **b. Did NOT provide for the attendant fee for getting up or preparing for trial at not less than one third of the instruction fees he taxed on item 1 of the Bill as provided for under Schedule VI paragraph 2 of the Advocates Remuneration Order 1997 and which fees would also require to be increased by one half as stipulated under Schedule VI part B (b) of the Advocates (Remuneration) Order 1997, the same being on an Advocate/Client Bill of**

Costs.

2. The learned Taxing Officer grossly misapprehended and misapplied the law and principles of taxation of Advocate/Client Bill of Costs as he did NOT provide for VAT at the applicable rate on the instruction fees thereby wrongly exposing the Advocate to the possibility of having to pay VAT for the client out of the sum allowed under item 1 for instruction fees.

3. The learned Taxing Officer grossly misapprehended and failed to properly apply the law and the general principles of fairness and equity in the taxation of the bill of Costs herein as he did NOT address and therefore made no finding on the issue raised by the Applicant of the loss of value of the Kenya Shilling and/or inflation since 1998 when the suit giving rise to the taxation was filed, a factor that called for the enhancement of the costs due to the Applicant which have remained unpaid to–date.

4. The learned Taxing Officer did not apply his mind properly on the suit, the Bill of Costs before him and the submissions by the Applicant on the quantum of costs and thereby arrived at an erroneous decision.

5. In all the circumstances of this matter the decision of the learned Taxing Officer is contrary to the clear provisions of the Advocates (Remuneration) Order and well settled principles of taxation of Bill of Costs, fairness and equity and is therefore irregular, unlawful, unreasonable and unjust and ought to be set aside/vacated.

6. It is in the interest of justice that the orders sought herein do issue.

3. The Applicant further stated that it sought for reasons informing the ruling by the Taxing Officer through several letters together with a follow up at the registry and only received the Taxing Officer's comments on 21/04/2020 where he referred parties to the ruling dated 5/03/2020 for the reasons, and that due to the corona virus pandemic the court's operations were affected thereby leading to the delay by the Taxing Officer to avail to the Applicant the reasons for the ruling in a timely manner. It was thus the Applicant's contention that the application was filed within the stipulated period. The Applicant further stated that there are valid grounds to warrant a re-taxation of the Bill of Costs before another Taxing Officer. The Applicant attached copies of the letters addressed to the Deputy Registrar as well as all the pleadings relevant to the matter.

4. The Respondent filed a replying affidavit sworn on 30/04/2020. It was contended by the Respondent that the application was filed out of time and ought to be struck out since it ought to have been filed within 14 days from the 12/03/2020. It was also contended that the Applicant is out on a forum shopping with the aim of extorting money from the Respondent since the said Bill had already been re-taxed. It was finally contended that the orders sought are discretionary and that this court should find that litigation must come to an end.

5. The application was canvassed vide written submissions. Learned counsel for the Applicant submitted that the earlier taxation in this matter had been challenged by the Applicant herein vide **HC Misc. Civil Application No. 318 of 2016** wherein Justice Nyamweya vide a ruling dated 14/11/2016 ordered the Bill of Costs herein to be re-taxed before another Taxing officer only as regards Item No. 1 on instruction fees and further that a fresh valuation report indicating the value of the property as at the date of filing suit be filed. It was further submitted that a new taxing officer taxed the bill on item No. 1 at Kshs. 30,040,000/ and failed to factor an increase thereon by one half as stipulated under Schedule VI paragraph 1(b) part B(b) of the Advocates Remuneration Order 1997. Learned counsel raised three (3) issues for determination: *firstly whether the matter is properly before this court; secondly whether the taxing master made errors in principle in the ruling dated 15/03/3020 and delivered on 12/03/2020; thirdly what orders ought to be made?*

On the first issue, learned counsel submitted that the Applicant duly made its intention known that it intended to seek reasons from the Taxing Master which informed the ruling. Pursuant to the ruling of the Taxing Officer the Applicant wrote two letters dated 16/03/2020 and 2/04/2020 indicating the grounds why it was dissatisfied with the said ruling and needed the reasons therefor. The Applicant filed a supplementary affidavit by its court clerk one Kyalo Kivuva who gave a chronology of events regarding the steps he took to ensure that the two letters reached the court despite the difficulties posed owing to the Covid -19 pandemic. Reliance was placed in the case of **Evans Thiga Gaturu –Vs- Kenya Commercial Bank Limited [2012] eKLR** where Odunga J held that if an Applicant decides to wait for a formal response from the Taxing Officer to the notice before proceeding then he cannot be faulted for doing so and hence the reference is deemed to have been filed within time. It was thus submitted by counsel that the reference herein was filed within time and that the matter is properly before this court.

As regards the second issue, it was submitted that the taxing officer committed an error of principle when he failed to increase the instruction fees of Kshs. 30,040,000/ by one half as provided for under Schedule VI part B(b) of the Advocates Remuneration Order 1997. It was also submitted that there was an error when the issue of VAT was not factored yet the Applicant is entitled to. Another error committed was the failure by the taxing officer to include fees for getting up or preparing for trial at one third of the instruction fees taxed as provided for under schedule VI paragraph 2 of the Advocates Remuneration Order 1997 and which sum should be increased again by one half since the Applicant prepared and conducted the hearing. It was also submitted that the taxing officer erred when he failed to factor the incidence of inflation on the shilling from 1998 to date at the rate of Kshs.4.66 as calculated by the Central Bank of Kenya.

On the last issue, learned counsel submitted that the bill be remitted to the taxing officer for re-taxation with clear guidelines for the taxing officer to take into account the following issues:

i. Increase the instruction fees by one half.

ii. Getting up fees to be allowed at a third of the instruction fees.

iii. VAT to be chargeable on all items save for disbursements.

iv. Loss of value of the shilling from 1998 to date.

In the alterative it was submitted that this court can as well tax the Applicant's bill as follows:

i. On instruction fees of Kshs. 30,040,1000/ the same be increased by one half under Schedule VI paragraph 1(b) part B(b) of the Advocates Remuneration Order 1997 and which comes to Kshs. 45,060,000/=.

ii. On fees for getting up or preparing for trial the factor of one third of the instruction fees comes to 15,020,000/= and which should be increased by one half under Schedule VI part B (b) of the Advocates Remuneration Order 1997 and hence the fees under this head comes to Kshs. 22,530,000/.

iii. On the effects of inflation, the instruction fees be deemed to have been earned in 1998 when the suit was filed and instructions given and that the Central Bank of Kenya letter dated 7/11/2019 which determined the rate of loss of value of the shilling from 1998 to date as Kshs.4 .66 per one shilling and hence the instruction fees of Kshs. 45,060,000/ should be increased at that rate thereby giving the sum of Kshs. 209,979,600/ but which the Applicants is ready to forego half of it thus leaving the sum of Kshs. 104,989,800. Again the same rate should apply to the getting up fees of Kshs. 22,530,000/ thereby coming to a sum of Kshs.59,929, 800/=.

iv. On the issue of VAT, the same should be given on the instruction fees as well as getting up fees plus all other items excluding disbursements at the rate of 14%.

6. Learned counsel for the Respondents submitted that the Applicant's application purporting to be a reference was lodged outside the stipulated period of 14 days after the delivery of the taxing officer's ruling and that no application has been made to seek for enlargement of time. It was also submitted that this court vide a ruling dated 14/03/2018 had ordered for the re-taxation of the Applicant's Bill of Costs only on item No. 1 namely instruction fees which was duly done by the new Taxing Officer but however the Applicant has expanded the field to include other items such as numbers 539, 791 and on inflation rate from 1998 to 2019 in the initial bill of costs yet no review or appeal has been lodged against the ruling dated 14/03/2018. It was contended by counsel that as the Taxing Officer had been directed to re-tax only item No. 1 of the Bill which he has duly complied then the Applicant has no window to venture into other items. It was submitted that the Taxing Officer duly complied with the court's guidelines and came up with the sum of Kshs. 30,040,000/ being the instruction fees that had been disputed vide item No.1. It was also submitted that the claim for compensation owing to the effects of inflation on the shilling should not be granted as the Respondent stands to suffer prejudice. Reliance was placed in the case of **Trans National Bank limited –vs- Elite Communications limited & another [2005] eKLR** where it was held that inflation should not be a factor that the taxing officer should take into account and if it is to be a factor then the Chief Justice will need to consider when reviewing the remuneration order. Finally learned counsel urged this court to dismiss the application with costs as it is an attempt by the Applicant to extort money from the Respondent.

7. I have considered the rival affidavits and the submissions plus the cited authorities. It is not in dispute that the Applicant's bill of costs dated 15/12/2014 had been taxed vide the taxing officer's ruling dated 14/11/2016. It is also not in dispute that the Applicant sought for a re-taxation of the said bill vide **Hc.Misc. Application No. 318 of 2016** which application was considered by Nyamweya J vide her ruling dated 14/03/2018 in which the said bill of costs was to be re-taxed only on item No.1 on instruction fees with the only addition being that the Applicant was to file a valuation report on the Respondent's property as at the time of filing of the clients suit in 1998. It is also not in dispute that the re-taxation of the bill of costs was duly carried out by the taxing officer vide his ruling dated 5/03/2020 and delivered on 12/03/2020 and which precipitated into the present application. That being the position, I find the following issues necessary for determination namely:

i. Whether the application dated 21/04/2020 is properly before the court?

ii. Whether the taxing officer made errors vide the ruling dated 5/03/3030 and delivered on 12/03/2020?

iii. What orders can be made by this court?

8. As regards the first issue, the Respondent has vehemently opposed the application on the grounds that the same was filed outside the stipulated period provided under Rule 11 of the Advocates Remuneration Order. The Advocates (Remuneration) Order provides for the procedure for filing a reference in Rule 11 as follows:

1. 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.

2. The taxing officer shall forthwith record and forward to the Objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons which shall be served on all the parties concerned setting out the grounds of his objection.

3. Any person aggrieved by the decision of the Judge upon any objection referred to such judge under sub section (2) may with the leave of the Judge but not otherwise appeal to the Court of Appeal. the High Court shall however in its discretion by order enlarge the time fixed by sub-paragraph (1) or sub-paragraph (2) for the taking of any steps; application for such an order may be made by chamber summons upon giving 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."

It was contended by counsel for the Respondent that the application having been lodged outside the requisite period of 14 days, then the same is improperly before this court and should be struck out with costs. The Applicant through its counsel has sought to explain the

circumstances that could have caused the delay. It was the Applicant's case that upon the delivery of the ruling by the taxing officer on 12/03/2020 it wrote a letter dated 16/03/2020 seeking to be given the reasons which informed the taxing officer's decision. The Applicant added that there was a back and forth until the month of April, 2020 when the Applicants legal clerk one Kyalo Kivuva managed to receive information from the court's registry to the effect that the taxing officer had made a note on their earlier letter and in which he had directed that the reasons sought were within the ruling. The Applicant has also sought to lay blame on the effects of the Covid- 19 pandemic whereby the court access had been restricted. Looking at the explanation offered and in view of the fact that the Applicant had already sought for the reasons as early as 16/03/2020 and had also notified the Respondent of its intention to lodge an objection, I am satisfied that if a delay occurred thereafter the Applicant ought to be excused since it was patiently waiting for the reasons from the taxing officer. I am however alive to the fact that in most if not all of the rulings by taxing officers the reasons informing the decision is always captured in those rulings and that an aggrieved party can easily proceed to file the requisite references if needed. However, if a party decides to follow the script in Rule 11 of the Advocates (Remuneration) Order then in the event of a delay to lodge the reference then such delay ought to be excused. I wish to associate myself with the decision of Odunga J in **Evans Thiga Gaturu –Vs- Kenya Commercial Bank Limited [2012] eKLR** when he held as follows:

> **"That brings us to the question of what happens, as the client alleges in this case, where no reasons are given. First and foremost, the above provision presupposes that in delivering their decisions on taxation, the Taxing Officer only pronounce the results of the taxation without the reasons behind them. In most cases the court is aware that taxing officers in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances it would be foolhardy to expect the Taxing Officer to redraft another "ruling" containing the reasons. In my view this is another provision that requires to be looked into afresh. I do not see the reasons why the taxing officer cannot be at the time of making his decision to do so together with the reasons therefor. In my view there is no magic in requiring the Taxing Officer to furnish reasons before the making of a reference. However, if the Applicant decides to wait for a formal response from the Taxing Officer to the Notice before proceeding, he cannot be faulted for doing so. Accordingly, I find the reference was filed within time."**

As the formal communication reached the Applicant outside the stipulated 14 days' period and in view of the fact that the Applicant had notified the Taxing Officer and the Respondent of its intention to lodge objection to the taxation, I am satisfied that the reference was lodged within time. Consequently, it is my finding that the application lodged by the Applicant is properly before this court.

9. As regards the second issue, the Applicant has beseeched this court to find that the Taxing Officer applied wrong principles in determining the legitimate dues to the Applicant and thus arrived at a wrong decision thereby warranting this court to interfere with it.

The principles that guide the court when dealing with a reference are well settled. A Judge sitting on a reference will not interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs (see **Joreth limited –Vs- Kigano & Associates [2002] eKLR** and **Premchand Raichand limited and Another –Vs- Quarry Services of East Africa limited & another [1972] EA 162).**

As directed vide the ruling of Nyamweya J on 14/03/2018 the Taxing Officer was to re-tax only item No.1 namely instruction fees by one half as provided for under Schedule VI paragraph 1 (b) Part B (b) of the Advocates Remuneration Order 1997. The client's suit had been filed in 1998 and hence the Advocates (Remuneration) Order 1997 was the one applicable. Since the bill was an Advocate/Client bill then the minimum fee shall be the fees prescribed in Schedule VI A increased by one half or fees ordered by the court increased by one half or the fees agreed on by the parties. Schedule VI A paragraphs (a) and (b) stipulate that the instruction fees are to be calculated on the basis of the value of the subject matter which is to be determined from the pleadings, judgement or settlement between the parties. The ruling dated 14/03/2018 had directed the Applicant to file valuation report on the property as at the time of filing the suit in 1998. This was duly done and that the property was valued at Kshs. 2,000,000,000/= and which the Taxing Officer factored and came up with a fee of Kshs. 30,040,000/. Up to this extent both the Applicant and the Respondent have no problem. However, the applicant has claimed that the Taxing Officer ought to have gone ahead to increase the same by one half as provided for in the Advocates (Remuneration) Order since the costs fell under the category of Advocates/Client. I am satisfied that the learned Taxing Officer went into error when he failed to factor the said increase and hence the Applicant's objection therein must succeed. The Applicant has also faulted the Taxing Officer for failing to provide for fees for getting up or preparing for the trial. The same is provided for under Schedule VI paragraph 2 of the Advocates Remuneration Order 1997 which is pegged on the instruction fees. It is noted that the initial client's suit proceeded to trial and hence the Applicant must have gotten down to business in defending the client. The initial instructions fees are always stand alone and are earned straight away the moment pleadings are filed and exchanged and therefore the fee for getting up or preparing for trial must be considered as well. Under the relevant Schedule the Advocate is entitled to not less than one third of the instruction fees. Since the getting up fees are part of the instruction fees the Taxing Officer ought to have factored the same and it should not have treated the same in isolation. I find there was an error of principle when the Taxing Officer omitted the same yet there is evidence that the counsel made the requisite preparations for the hearing. It is common knowledge that once an Advocate receives instructions he/she gets down to preparing for the matter as that is what he or she is paid for by the client and at the end of the trial all fees ought to be paid to such Advocate. The case cited by counsel for the Applicant namely **Okoth and Kiplagat Advocates –Vs- the Board of Trustees National Social Security Fund [2007] eKLR** is persuasive where Justice Warsame (as he then was) held as follows:

> **"Getting up fees is only restricted to trial and a party is entitled to a getting up fees when he gets up or prepares a case for trial. In this case, the matter was set down for hearing and in the process preparation for trial was undertaken by the Respondent. According to Schedule 6 a fee for getting up or preparing a case for trial is allowed in addition to the instructions fees, provided the case has been set down for hearing and preparation for its trial made by the Advocate. The Taxing master may also increase this fee as he may consider reasonable....."**

On the issue of value Added Tax (VAT) I note that the Taxing Officer did not provide for the same. Even though the ruling by this court had directed that a re-taxation was to be done only on the instruction fees, this did not in any way dislodge the applicability of the VAT which is mandatory on all incomes earned. The issue of the VAT had been claimed in the bill of costs which was to change once the sums on the instruction fees are interfered with. The Respondent has maintained that the Taxing Officer was not supposed to go outside Item No. 1 of the bill of costs. However, the issue of the VAT could not be left out since the income earned must automatically be charged for VAT and that it

would not be appropriate to force the Applicant to pay VAT on behalf of its client. I note that the Applicant has sought for VAT at 16% which then was the prevailing rate. However, the current rate is 14% and which should be the applicable rate since the sums if paid is in the present and not past. The VAT therefore will attract the rate of 14%. As the Taxing Officer left this out then I find that there was an error of principle warranting this court to interfere with the award.

On the claim for compensation owing to the loss of value of the shilling due to inflation effects from 1998 to date, I note that the Applicant has engaged the Central Bank for guidance thereon and has come up with a figure of Khss.4.66 per shilling as the loss for the period 1998 to 2019. I am not convinced that the issue of inflation should be considered in this matter since inflationary trends are features which are beyond anyone's control as the factors in issue takes into account several actors in an economy. It would be preposterous to grant such a request as it might turn out that the reasons for non-payment of fees by the Respondent were beyond their control. In any event the relevant Advocates (Remuneration) Order does not provide for the same. Further the Applicant is still at liberty to claim for interest on the amount. The Respondent's counsel in their submissions contended that the Applicant is out to extort money out of the Respondent by any means. Whereas I find the use of the word "extort" to be unpalatable, the Respondents fears might be legitimate in the sense that the Applicant seeks to get payments on all fronts in the bill of costs yet the taxation is an exercise of discretion and that the usual mantra that "the bill be taxed as drawn" does not always apply since the same must be considered in a discretionary manner by the taxing officer.

The Respondent has challenged the Applicant's attempt to bring up other items in the bill of costs yet the ruling dated 14/03/2018 only directed the Taxing Officer to re-tax only item No. 1 namely instruction fees. It was the Respondent's case that the Applicant should have sought for review of the said ruling or appeal against it. With respect I find the Respondent's assertions to be way off the mark since the items contested by the Applicant all fall under instructions fees on item No. 1 and therefore there was no need for the Applicant to seek for review of the ruling dated 14/03/2018. All the issues raised by the Applicant were to be addressed under item No. 1 of the bill of costs.

10. Having found that the Taxing Officer erred in principle, this court has the discretion to either remit the bill to the Taxing Officer with appropriate directions on how it should be taxed or to proceed and tax the same. Whereas the exercise of taxation is mainly the preserve of the Taxing Officer, a court to which a reference has been lodged has discretion to tax such a bill if the dictates of the case warrants it. In the case of **Kipkorir Titoo & Kiara Advocates –Vs- Deposit Protection Fund Board [2005] eKLR** where the court of Appeal held as follows:

> **"And if a Judge on reference from a Taxing Officer finds that the Taxing Officer has committed an error of principle the general practice is to remit the question of quantum for the decision of the Taxing Officer. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires."**

Learned Counsel for the Applicant has urged this court to proceed to tax the item on instruction fees. Indeed, this court has the requisite jurisdiction to do so. In the case of **First American Bank of Kenya Limited –Vs- Gulab P. Shah & Others [2002} IEA 64** Ringera JA (as he then was) held as follows:

> **"I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ..... in my view t*hat would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for the court to exercise its discretion in a reference on taxation to determine the matter with some finality."***

As it has transpired that the taxing officer made errors in principle I hereby proceed to set aside the decision of the Taxing Officer dated 5/03/3030. Being guided by the above authorities and taking note of the fact that this matter has been pending for several years I find that the justice of the case dictates that this court does proceed to tax the bill.

11. Both counsels do not dispute the initial instruction fees made by the Taxing Officer in the sum of Kshs. 30,040,000/. This sum will be increased by one half in the sum of Kshs. 15,020,000/ thus making a total of Kshs. 45,060,000/ as instruction fees. Fees for getting up will attract a third of the instruction fees in the sum of Kshs. 15,020,000/ all totaling the sum of Kshs. 60,080,000/ being in respect of instructions and getting up fees. The said sum will attract the current value added tax in the rate of 14% in the sum of Kshs. 8,411,200/. The other items that had been taxed by the former Taxing Officer dated 14/11/2016 and in which the parties herein are not opposed to came to Kshs.2,604,742/. Hence the Applicants Bill of Costs dated 15/12/2014 is hereby taxed at Kshs. 71,095,942/=.

12. In the result, the Applicant's application dated 21/04/2020 has merit and is allowed with an order that the Applicant's Bill of Costs dated 15/12/2014 is taxed at **Kshs. 71,095,942/.** Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this 16th day of June, 2020.

D. K. Kemei

Judge