



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

WINDING UP CAUSE NO. 42 OF 1993

IN THE MATTER OF NZAMA KUU CEMENT COMPANY LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT, LAWS OF KENYA.

RULING

Background

1. On 19th June 2018 the Liquidator/Applicant herein filed his Bill of Costs (BOC) dated 12th June 2018 for taxation.
2. In a ruling delivered by the Taxing Master Honourable Tanui on 4th November 2019 the learned Taxing Master taxed the Bill of Cost at Kshs 800,652. On 16th December 2019 the liquidator filed a Notice of Objection to the taxation signifying his intention to file a reference to the High Court.

Application.

3. Through the application dated 23rd December 2019, the Liquidator seeks the following orders: -

- 1. That the Ruling and/or decision delivered herein on 4th November 2019 by the Honourable Learned Taxing Master, Honourable E. Tanui, taxing the Liquidators Bill of Costs dated 12th June, 2018 at Kshs 800,652/- be set aside and/or vacated.*
- 2. That the Bill of Costs aforesaid be remitted back for taxing by a different taxing officer.*
- 3. That alternatively to prayer 2 above, the Honourable court be pleased to re-tax the said Bill of Costs herein.*
- 4. That the costs of this application be provided for.*

4. The application is supported by the liquidator's affidavit and is premised on the grounds that: -

- a) That fees awarded on Item 1 of the said Bill relating to initial instructions on preliminary meetings and discussions is too low at Kshs 6,000/- and the Learned Taxing Master committed an error as my fees were on the basis of fair practice for time spent by professionals and liquidators of similar status.*
- b) That in taxing the total Bill of Costs in the amount of Kshs 800,652/-, the Taxing Officer erred in law and principle in failing to appreciate that:*
 - i. That the total receipts collected/managed by the liquidator were Kshs 16.7 million up to the year 2017.*
 - ii. That if the work was to be done by an advocate or a similar professional the Learned Taxing Master would have awarded a much fairer sum nearer thereto to the sum awarded to my advocates on record.*
 - iii. That the Learned Taxing Master erred in law and fact in failing to appreciate that the Liquidator took a period of over 26 years to conclude his work having been engaged in the year 1993. That including this period he had to deal with a Director of Company in Liquidation who was not very cooperative in settling his debt/s. The said Director together*

with his Group of Companies were the Principal Debtor. There was a lot of time effort and perseverance required in our attempts to recover these primary debts.

All this was carried out under the direction and supervision of the Committee of Inspection. This is quite apparent from the fact that:

- The Director was once arrested for Contempt of court.*
- The Director was put through a lengthy court examination, where the focus of our submissions was to hold the Director personally responsible on removing the corporate veil.*

iv. That the Learned Taxing Master failed to consider the skill, responsibility, time and stress encountered during this lengthy liquidation process. That further the Liquidator diligently carried out his duties under due supervision and instructions of the Committee Inspection where necessary and throughout his tenure. FURTHER THAT The Committee of Inspection never adversely commented or questioned the work or integrity of the Liquidator.

c) That the Learned Taxing Master erred in law and in fact in failing to apply the correct schedule and practice applicable to a professional of the Liquidators experience and standing. Instead Learned Taxing Master wrongly taxed the same by significantly reducing the hourly rate applied in practice by professionals of a similar kind and nature.

d) That it is fair and in the interest of justice that the said Bill of Costs be set aside and taxation be conducted afresh by a different taxing officer.

5. East African Portland Cement Company Ltd, a supporting creditor opposed the application through the Grounds of Opposition dated 28th January 2020 wherein it lists the following grounds: -

1. That the reference is a non-starter on the grounds, reasons and facts that: -

a) It was filed late and without leave of court.

b) The reference is an affront to the clear provisions of Rule 16 of the Advocates (Remuneration) Order which grants the Taxing Officer discretion.

c) The annexures produced by the applicant are indicative of its tax obligations, an issue well beyond the purview of the taxation of costs.

d) That the applicant has not enunciated the purported principles that the Taxing Officer erred in, to warrant the setting aside of the taxation.

e) That the Taxing Officer considered all the relevant factors in arriving at his decision.

f) That the Taxing Officer took into account the principles of taxation in conformity with Rule 5 of the Advocates Remuneration Order.

2. The grounds relied on by the applicant do not warrant any of the reliefs sought in its application.

3. The reference dated 23rd December 2019 is otherwise misconceived, unmeritorious and vexatious and the same ought to be dismissed with costs to the Supporting Creditor.

6. M/S Ghalia & Ghalia Advocates for the Creditor filed a Notice of Preliminary Objection dated 27th February 2020 and listed the following points of law: -

1. That the Notice of Objection dated 18th November 2019 was filed inordinately out of time on 17th December 2019 contrary to Rule 11(1) of the Advocates(Remuneration) Order.

2. That the Notice of Objection is statute time barred and therefore invalid, null and void.

3. That the Chamber Summons Application dated 23rd December 2019 premised on the fatally defective Notice of Objection dated 18th November 2019 is statute time barred and therefore invalid, null and void.

4. That the Notice of Objection dated 18th November 2019 and Chamber Summons dated 23rd December 2019 are an abuse of Due process of the law of this Honourable court by virtue of the provisions of Rule 11(1) of the Advocates (Remuneration)Order.

7. Parties canvassed the application and Preliminary Objection by way of written submissions which I have considered.

8. I will first consider the Preliminary Objection raised by the Creditors and depending on its outcome, deal with the merits of liquidator's

application. In *Mukhisa Biscuit Manufacturers Limited v West End*