



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION NO. 385 OF 2018

NDUNGU NJOROGE & KWACH ADVOCATES.....ADVOCATE

VERSUS

NATIONAL BANK OF KENYA LIMITED.....CLIENT

RULING

(1) Before this Court are two applications for consideration. The first is the Notice of Motion dated **18th March 2019** by which **NDUNGU NJOROGE & KWACH ADVOCATES** (the “**Advocate**”) seek for orders:-

- “1. THAT this Honourable Court be pleased to enter Judgment against the Respondent for the sum of Kshs. 5,884,240.20 as per the Certificate of Taxation herein dated 8th march 2019 together with interest at the rate of 14% p.a from 21st November 2018 until payment in full.**
- 2. THAT a Decree do issue as per Order No. 1 above.**
- 3. THAT costs of this application be provided for.”**

(2) The application which was premised upon **Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, Section 51 of the Advocates Act Cap 16 Laws of Kenya, Rule 7 of the Advocates (Remuneration) Order, Order 51 Rule 1 of the Civil Procedure Rules 2010**, was supported by the Affidavit of even date sworn by **ELIUD N. NJOROGE** and Advocate of the High Court of Kenya.

(3) The Client/Respondent **NATIONAL BANK OF KENYA** filed Grounds of Opposition dated **2nd October 2019** to the application dated **18th March 2019**.

(4) The second application for consideration is the Chamber Summons dated **14th June 2019** by which **NATIONAL BANK OF KENYA** (the “**Client**”) seeks orders:-

- “1. THAT the Taxing Officers ruling and decision on Taxation of the Advocate-Client Bill of Costs herein dated 29th August 2018 delivered on 21st November 2018 be and is hereby set aside.**
- 2. THAT the Honourable Court be pleased to remit the Advocate-Client Bill of Costs to the Taxing Officer for reconsideration taking into account the Client’s position in respect thereof.**
- 3. THAT the costs of this application be provided for.”**

(5) The Summons which was brought under **Paragraph 11(2)** of the Advocates (Remuneration) Order was supported by the affidavit of even date sworn by **SAMUEL W. MUNDIA**, the Head of Commercial Transactions and Litigation with the Client’s Bank.

(6) The Advocate in Reply filed their Replying affidavit dated **19th June 2019** and also filed a Preliminary Objection dated **19th June 2019** which Preliminary Objection was premised on grounds that the orders being sought in the Chamber Summons of **14th June 2018**, cannot be granted under **Paragraph 11(2)** of the Advocates Remuneration Order which only provides for objection to Taxation of Bills of Costs not for

setting aside. The applications were canvassed by way of written submissions. The Advocate filed its written submissions on **6th February 2020** whilst the Client's Bank filed its submissions on **22nd October 2019**.

BACKGROUND

(7) The Advocate herein commenced proceedings for the purposes of taxation of the Advocate/Client fees in connection with the conduct of **Milimani HCCC No. 319 of 2016; NATIONAL BANK OF KENYA LIMITED –VS- ARVIND KUMAR MAVJI LADHA & OTHERS**, in which matter the Advocate acted for the Client Bank. Despite the Client having been served with a Notice of Taxation of the Bill of Costs, on the allocated date for hearing being **17th October 2018**, neither the Client nor its legal representative was present. Accordingly the Taxation proceeded ex parte. Thereafter the Taxing Master **Hon. S. A. OPANDE** delivered his Ruling on the Advocates Bill of Costs on **21st November 2018** in which Ruling the Bill was taxed at **Kshs. 5,884,240.20**.

(8) The Client being dissatisfied with the Ruling filed a Notice of Objection dated **4th December 2018** and pursuant to the provision of **Paragraph 11(2)** of the Advocates Remuneration Order, the Client sought for the reasons for the Taxing Masters decision. By way of a letter dated **15th May 2019** the Taxing Officer responded that his reasons for the decision were contained in the Ruling of **21st November 2018**. This letter from the Taxing Officer conveying the reasons for his decision was received by the Client on **31st May 2019**. The Advocate then filed the Notice of Motion dated **18th March 2018** seeking to have Judgment entered in its favour for the taxed amount of **Kshs. 5,884,240.20**.

(9) The Client on the other hand filed the Chamber Summons dated **14th June 2019** seeking to have the decision of the Taxing Master set aside. The Client submits that due to inadvertence, they failed to diarize the date fixed for Taxation and as such failed to instruct external Counsel on time to enter appearance on the Clients behalf. That as a consequence the Taxation proceeded ex parte. The Client pleads that its failure to participate in the taxation of the Bill of Costs was not pre-meditated but was occasioned by an excusable mistake.

(10) The Client states that due to its failure to participate in the Taxation, the Taxing Officer was not alerted to the fact that there was in existence a binding agreement on remuneration between the Advocate and the Client pursuant to and within the meaning of **The Advocates Act, Cap 16, Laws of Kenya**. That therefore the Taxing Officer failed to consider whether in light of the provisions of **Section 45(6)** of the **Advocates Act**, he had jurisdiction to entertain the Taxation of the Bill of Costs.

(11) The Advocate then filed the Preliminary Objection arguing that orders for setting aside a Bill of Costs are not provided for by **Paragraph 11(2)** of the **Advocates Remuneration Order**.

ANALYSIS AND DETERMINATION

(12) I have carefully considered the submissions filed by both parties in this matter as well as the relevant law. It is trite law that where a Preliminary Objection has been raised in a matter this must be considered and disposed of first.

(13) **Paragraph 11** of the **Advocates Remuneration Order** provides 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 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 those reasons apply to a Judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

(14) The Advocate submitted that the prayers for setting aside as sought in the Chamber Summons dated **14th June 2019** were not available under **Paragraph 11** of the Advocates Remuneration Order. That **Paragraph 11** provides only for **“objections to the amount taxed.”** The Advocate submits that the High Court's jurisdiction under **Paragraph 11** is limited only to dealing with a Reference challenging the **amounts** awarded to by a Taxing Officer. That the Summons filed by the Client is **not** a Reference as envisaged by **Paragraph 11** and as such cannot be entertained by the Court.

(15) In response the Client submitted that it is settled law that any grievance emanating from a Ruling on Taxation can only be ventilated through **Paragraph 11** of the **Advocates Remuneration Order**. In **MACHIRA & CO. ADVOCATES –VS- MAGUGU [2002]2 E.A Hon. Justice Aaron Ringera** (as he then was) held as follows:-

“As I understand the practice relating to Taxation of Bills of Costs, any complaint about any decision of the Taxing officer whether it relates to a point of law taken with regard to Taxation or to a grievance about the Taxation of any item in the Bill of Costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

(16) Similarly, in **GACAU KARIUKI & CO. ADVOCATES –VS- ALLAN MBUGUA NG'ANG'A [2012]eKLR** it was held thus:-

“I am also of the same school of thought as the 'learned judges' as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing master has misdirected himself on a matter of principle. If the same is found to have been the case the usual course is to remit the matter

back to the taxing master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the client herein was to come by way of a reference. [own emphasis]

(17) It is clear from the above decisions that the only avenue available to a party who wishes to object to a decision following a Taxation would be to approach the Court under **Paragraph 11** of the **Advocates Remuneration Order** as the Client herein has done. Accordingly I find no merit in the Preliminary Objection dated **19th June 2019** and the same is hereby dismissed in its entirety.

(18) The next issue for consideration is whether sufficient ground has been laid to warrant the setting aside of the decision of the Taxing Officer. The Client has explained that its non-attendance in Court on the day scheduled for hearing of the Taxation was occasioned by an inadvertent omission on their part due to failure to diarize said hearing date. The Advocate retorts that no valid reasons have been advanced for the Clients non-attendance in Court. That failure to diarize the hearing date amounted to negligence and carelessness which are not sufficient grounds to set aside the decision.

(19) In **OMWOYO –VS- AFRICAN HIGHLANDS & PRODUCE CO. LTD [2002]1 KLR**, the Court held that:-

“Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant’s Advocates. This is a proper case where the Defendants remedy is against its erstwhile Advocates for professional negligence and not setting aside the judgment”. [own emphasis]

(20) Likewise in **SHAH –VS- MBOGO [1967]E.A 116** the Court of Appeal for Eastern Africa expounded upon the principles governing the exercise of the Court’s discretion to set aside a Judgment [or Ruling] obtained ex parte as follows:-

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

(21) From the above decision it is clear that as a general rule the mistakes and/or omissions of Counsel ought not be visited upon the Client. In the case of **JORETH LTD –VS- KIGANO & ASSOCIATES [2002]II E.A**, the Court of Appeal was clear that unless a Taxing officer had misdirected himself on a matter of principle then a Judge sitting on reference against the Taxation ought not interfere with the findings therein.

(22) This position was reiterated by **Hon. Justice Ringera** (as he then was) in **FIRST AMERICAN BANK OF KENYA –VS- SHAH & OTHERS [2002]E.A** where he held:-

“First I find that on the authorities, this Court cannot interfere with the Taxing officer’s decision on Taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.”

(23) Likewise in **KIPKORIR, TITO & KIARA ADVCOATES –VS- DEPOSIT PROTECTION FUND BOARD [2005]eKLR** the Court of Appeal held as follows:-

“On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”

(24) The Client has not taken issue with specific awards made by the Taxing officer. They have only challenged the exercise of the Taxing officers discretion to proceed ex parte in their absence. A look at the record before the Honourable Deputy Registrar on **17th October 2018** reveals that when the matter was called out there was no appearance for the client. It was noted that though they had been properly served there was no appearance for the client. The learned Taxing Officer exercising his discretion decided to proceed with the matter ex-parte. In his Ruling dated **21st November 2018** the Taxing Officer stated:-

“The Respondents were served and there is a return of service to that effect sworn on **16th October 2018. It is however noteworthy that the Respondent never filed any response and thus, the bill remains unopposed.”**

(25) It is manifest that not only did the client fail to attend Court for the taxation, they also did not file any response to the Advocates Bill of Costs. In the circumstances I find that the decision of the Taxing Master to proceed ex parte was justified. The client has only explained the failure of its Advocate to attend Court on the date of Taxation. No mention (explanation) is given for their failure to file any response to the Advocates Bill of Costs. In the circumstances I am not inclined to re-open this matter at all. I find that the Taxing Officer was well within his discretion to proceed with the Taxation notwithstanding the absence of the Client. No error has been demonstrated on the part of the Taxing officer. Accordingly this reference must fail.

(26) Finally having found no merit in the Chamber Summons dated **14th June 2019** the application by the Advocate must succeed. **Section 51(2)** of the **Advocates Act** provides:-

“The certificate of the Taxing Officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in the case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs.”

(27) In **LUBULELLAH & ASSOCIATES ADVOCATES –VS- N. K. BROTHERS LIMITED [2014]eKLR** the Court observed that:-

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent herein for the taxed sum indicated in the Certificate of Taxation that was issued on 25th November 2012.” [own emphasis]

(28) The Advocate prayed for costs and interest to **Rule 7 of the Advocates (Remuneration) Order**. The said Rule provide:-

“An Advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiry to one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount has been paid or tendered in full.”

Accordingly I find that the Advocate is entitled to interest on the sum due. Therefore, since the Certificate of Taxation dated **8th March 2019** remains valid and enforceable, I do grant prayer (1) of the Notice of Motion dated **18th March 2019**. Costs are awarded to the Advocate.

CONCLUSION

(29) Finally this Court makes the following orders:-

- (i) The Notice of Motion dated 18th March 2019 is hereby allowed in terms of prayers (1) and (2) thereof.**
- (ii) Costs of the Motion are awarded to the Advocate.**
- (iii) The Chamber Summons dated 14th June 2019 is hereby dismissed in its entirety.**
- (iv) Costs of the Summons are awarded to the Advocate.**

Dated in **Nairobi** this 21ST day of **DECEMBER, 2020**.

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MAUREEN A. ODERO

JUDGE