REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 313 OF 2017

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA MEDICAL SUPPLIES AUTHORITY.....1ST RESPONDENT

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....2ND RESPONDENT

AND

MEDOX PHARMACEUTICALS LIMITED.....INTERESTED PARTY

EX PARTE NAIROBI ENTERPRISES LIMITED

RULING

Background

1. Medox Pharmaceuticals Limited, the Interested Party herein, filed an application by way of a Chamber Summons dated 2nd August 2018 seeking the following orders:

> a. This Court be pleased to set aside the decision of the Taxing Master made on 18th July 2018 over the Interested Party's Bill of Costs.
>
> b. This Court be pleased to re-tax the said Bill of Costs.
>
> c. This Court be pleased to order that the Advocate/Client Bill of Costs dated 4th April 2018 be referred back to another taxing master with appropriate directions for re-taxation, or the same be dealt with as this Court may consider appropriate in the circumstances.

2. The said application is supported by the grounds on the face thereof, and an affidavit sworn on 2nd August 2018 by Julius Migos Ogamba, the Advocate on record for the Interested Party. The application arises from a ruling delivered by the Taxing Master on 18th July 2018 on the taxation of the Interested Party's Party & Party Bill of Costs dated 4th April 2018 . The said Taxing Master taxed the said Bill at Kshs 884,496.66 .

3. The grounds for the application are that the Taxing Master erred in law and acted contrary to the clear provisions of the Advocates Remuneration Order, and in particular as regards the taxation of items 1, 2,13,14,15,16, and 17 of the said Bill of Costs. Further, that the Taxing Master erred in law and principle in awarding Kshs 650,000/= as instruction fees, which was manifestly low considering the complexity and nature of the dispute, value of the subject matter, and scope of the work done. Lastly, that the taxing master erred in law and principle in basing her calculation of the getting up fees from a figure which has no basis in fact, since the instruction fee was taxed at 650,000/=.

4. Nairobi Enterprises Ltd, the *ex parte* Applicant herein, responded to the said application in a replying affidavit sworn on 10th September 2018 by its Advocate, Caroline Kaganzi. The *ex parte* Applicant averred that the Interested Party's application was incompetently filed, as it did not file a notice of objection to specific items as required under paragraph 11 of the Advocates Remuneration Order. Furthermore, that the Taxing Master did not commit any error of principle, correctly assessed the instruction fee and other items taking into account the relevant considerations, and that the sum of Kshs 650,000/= that was taxed as instruction fees was in accordance with the Advocates (Remuneration)(Amendment) Order 2014.

5. According to the *ex parte* Applicant, its substantive application was merely seeking declaratory and prerogative orders, and no monetary value was claimed, so as to justify instruction fees based on the value of the subject matter as suggested by the Interested Party. Therefore, that the Taxing Master properly applied Schedule 6A (j)(ii) of the Advocates (Remuneration)(Amendment) Order 2014.

6. The Respondents did not file any response to the Applicant's application. This Court thereupon directed that the Interested Party's application would be heard and determined by way of written submissions.

The Determination

7. The Interested Party's Advocates, Migos Ogamba & Co. Advocates, filed submissions dated 18th December 2018, while CM Advocates LLP, the *ex parte* Applicant's Advocates, filed submissions dated 17th January 2019.

8. A preliminary issue has been raised by the *ex parte* Applicant as to whether the Interested Party's application is properly before this Court, for reason that no Notice of Objection was filed by the Interested Party as required by Rule 11 of the Advocates Remuneration Order. The Applicant in its submissions relied on the procedure set out in Rule 11 of the Advocates (Remuneration) Order, and the decision in **Ufundi Co-operative Savings and Credit Society vs Njeri Onyango & Company Advocates (2015) e KLR** to urge that the said procedure is mandatory. Therefore, that since the Interested Party did not serve the requisite notice, nor seek enlargement of time to do so, the application should be dismissed for being incompetent. Further, that the letter attached by the Interested Party to its reference dated 18th July 2018 merely requested for a copy of the ruling of the Taxing Master, and is distinguishable from a notice of objection.

9. The Interested Party on the other hand submitted that it by a letter dated 18th July 2018 requested the Taxing Master for the reasons for the taxation of its Bill of Costs. Therefore, that the procedural requirements were complied with, and it is a settled principle of law that once the reasons are contained in the ruling there is no need to make another application for the same. Further, that the requirement is purely procedural, and any defect thereof is curable by Article 159 (2)(d) of the Constitution. The Interested Party cited the decision in **Governors Balloon Safaries Limited vs Skyship Company Limited & Another, (2015) e KLR** in support of its submissions.

10. The procedure for challenging a taxing master's decision is provided under the Rule 11 of the Advocates Remuneration Order as follows:

> **"(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the 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."**

11. From the foregoing, an objector to a decision of a taxing officer is required to give notice within 14 days thereof of the items objected to, and the reference is to be filed within 14 days of receipt of the reasons for the decision from the taxing master. In the present case, the Interested Party annexed a letter dated 18th July 2018 addressed to the Deputy Registrar of the Judicial Review Division, seeking to be furnished with a copy of the ruling by the Taxing Master delivered on the said date. The said letter is stamped as having been received on 25th July 2018. The current application was thereafter filed on 2nd August 2018. There is however no record that the Interested Party filed any notice of objection.

12. The circumstances arising in this application were addressed by the holding in **Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2) (2006) 1 EA 5** as follows:

> **"Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."**

13. I note that the Interested Party did annex a copy of the ruling with reasons delivered by the Taxing Master on 18th July 2018 to its supporting affidavit to the instant application. It can therefore be surmised that there was no need on its part to seek reasons for the said decisions. The omission to file a notice of objection was therefore not fatal, as in any case the ruling containing the reasons were availed to the Interested Party and the reference was filed within the 14 days of receipt of the ruling stated in Rule 11, and contained the substance of the objections made. I accordingly find that the Interested Party's application dated 2nd August 2018 and filed in Court on the same date is properly on record for the foregoing reasons.

14. The two outstanding substantive issue in dispute in the reference filed by the Interested Party are firstly, whether there was an error made

by the Taxing Master in the determination of the basis for taxation of item 1 on instruction fees in the Interested Party's Party and Party Bill of Costs dated 4th April 2018; and secondly, whether the Taxing Master erred in the taxation of item 2 on getting up fees in the said Interested Party's Party and Party Bill of Costs.

15. The Interested Party in this respect submitted that the Taxing Master in her ruling determined that the applicable law was Schedule 6A (1)(j) of the Advocates (Remuneration) (Amendment) Order 2014, and according to the Schedule, one of the considerations the Taxing Master must take into account in the determination of the quantum of instruction fees is the value of the subject matter. According to the Interested Party, from the pleadings it filed, the value of the subject matter was Kshs 180,960,000/=. Reliance was placed in this regard on the decision in **Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd (2014) eKLR** on ascertainment of the value of the subject matter.

16. The Interested Party further submitted that the nature of the proceedings in the matter were a procurement process for a tender, and it was therefore seeking a private law remedy and not a public law remedy. The decision relied upon by the Taxing Master, namely **Republic vs Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) e KLR** , was also distinguished by the Interested Party on the ground that it was a purely public law claim, unlike the Interested Party's claim which contained a discernable value, and involved private law remedies of contract from which the Interested Party would benefit.

17. The Interested Party also contended that the nature of responsibility placed upon its counsel in the matter, which challenged a forensic verification process in a tender procurement process, required a considerable amount of industry and was time consuming, and relied on the decision in **Mutuli & Apopo Advocates vs Jirongo ,(2010) e KLR** that these are relevant factors to be considered. The Interested Party thus submitted that the Taxing Master fell into error by disregarding the value of the subject matter, and even after finding that the matter involved a high level of research, failed to exercise her discretion in accordance with her findings.

18. On the item on getting up fees, the Interested Party submitted that the relevant law is Schedule 6 Paragraph 2 of the Advocates (Remuneration) Order, which provides that the fee is a surcharge of not less than one third of the instruction fees, and the main requirement is that the suit should be confirmed for hearing. However, that the Taxing Master taxed one third of Kshs 500,000/= as getting up fees, which figure had no basis as she had already taxed the instruction fees at Kshs 650,000/=, and therefore fell into error.

19. In opposition, the *ex parte* Applicant on its part submitted that the Taxing Master correctly assessed the instruction fee by taking all the relevant factors and nature of the pleadings filed, and did not commit any error of principle in arriving at her decision. Further, that the award of Kshs 650,000/= as instruction fees was in accordance with Schedule 6A of the Advocates (Remuneration) Order 2014.

20. The *ex parte* Applicant reiterated the principles and circumstances under which a Court can interfere with a Taxing Master's exercise of discretion, and cited the decisions in **First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64, Republic vs Commissioner of Domestic Taxes ex parte Ukwala Supermarket Limited & 2 Others (2018) e KLR** and **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) e** KLR in this regard. The *ex parte* Applicant urged the Court not to interfere with the assessment of costs by the Taxing Master.

21. On the getting up fees, the *ex parte* Applicant submitted while relying on Schedule 6A paragraph 2 of the Advocates (Remuneration) Order 2014, that this fee contemplates involvement by counsel in the preparation of witnesses, witness statements and determination of the matter by *viva voce* evidence, as held in **Mits Electrical Company Limited vs National Industrial Credit Bank Ltd, (2005) e KLR.** However, that all the evidence in the instant judicial review application was contained in affidavits, and getting up fees should therefore not be allowed, as held in **Republic vs National Environmental Tribunal ex parte Silverstein N. Enterprises Limited, (2010) e KLR.**

22. I have considered the rival arguments by the Interested Party and *ex parte* Applicant. It is not disputed in this respect that the applicable law as regards taxation of Party and Party Bill of Costs is Schedule 6A of the Advocates (Remuneration) Order 2014, which provides for party and party costs of proceedings in the High Court. Paragraph 1(j) of the said Schedule provides as follows as regards instruction fees in constitutional petitions and prerogative orders :

> **"To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—**
>
> **(i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000**
>
> **(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than100,000**
>
> **(iii) to present or oppose application for setting aside arbitral award- 50,000."**

23. Paragraph 2 of the said Schedule provides as follows as regards getting up fees:

> **"In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:**
>
> **Provided that—**

(i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

(ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;

(iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph."

24. In addition, the applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer's decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in **First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69** by Ringera J. (as he then was) who delivered himself thus;

> **"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".**

25. These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) 1 EA 92,** wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

26. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) e KLR** :

> "1. **the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;**
>
> 2. **the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;**
>
> 3. **the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**
>
> **4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;**
>
> **5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;**
>
> **6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**
>
> 7. **where responsibility borne by advocates is taken into account, its nature is to be specified;**
>
> **8. where novelty is taken into account, its nature is to be clarified;**
>
> **9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form."**

27. These guidelines were also applied by Odunga J. in **Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd, [2014] eKLR,** and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

28. I have perused the ruling by the Taxing Officer dated 18th July 2018, and note that she properly applied Schedule 6A of the Advocates Remuneration Order, and noted that the basic instruction fee was Kshs 100,000/=. She also noted that she has discretion to increase the amount taking into account factors such as the nature and importance of the cause or matter. The Taxing Officer also considered the principles as regards taxation of costs outlined in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (supra)**

29. While taxing on the item on instruction fees, the taxing master in her ruling gave the following reasons:

> **"The prayers sought by the Ex parte Applicant fell under Schedule *6 A (i) (ii)* of the *Advocates Remuneration Order 2014*. The Ex parte Applicant in the said Application was merely seeking for declaratory and prerogative orders. No monetary value was claimed in the Application. In determining an instruction fees, it must be related to the value of the work done by an advocates should be fairly, appropriately and justly rewarded for their fees bearing in mind the skill they exercised. I have**

carefully considered the factual and legal issues with a view to gauge complexity of issues, importance of the matter, the amount involved, perusal of entire paper work, studying and preparing for the matter, responsibility shouldered based on the nature and importance of the subject matter.

Bearing in mind all the aforesaid factors and the reasons herein and in exercise of discretion vested in me, I am fully convinced that the amount sought by the Applicant is grossly excessive, astronomical and a figurement of imagination……..

….My analysis of the Application has shown that it was of great importance as it sought to review the decision of the Public Procurement Administrative Review Board awarding the Interested Party herein a tender for supply of various pharmaceutical products. The Application, though partly founded on the provisions of the constitution, raised pertinent issues touching on the provisions of the Public Procurement and Asset Disposal Act. It follows, in my view that the responsibility entrusted to Counsel in the proceedings was quite difficult, and called for nothing but extra diligence. The application was filed in the year 2017 and concluded in the year 2018. I have perused the proceedings which involved a considerable amount of documentation and perusal of a wide range of pleadings and exhibits.

The Application also involved some high level of research to enable the Interested Party present a strong defence on their quest to retain the tender……..

On question of increase on the aforesaid basic fee and this being a Party and Party Bill of Costs, I am of the view that Kshs. 650,000/= is reasonable instruction fees taking into account the time taken in this matter, scope of the work done and the nature of the dispute herein. (Kshs 2,789,400/=) is hereby taxed off."

30. It is my finding that while the Taxing Master did take into account most of the relevant considerations, it is apparent that the factor of the value of the subject matter was not considered. The value of the subject matter in dispute may not be the determinant factor in deciding the quantum of costs payable, however it was held in **Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd (supra)** and **National Oil Corporation Limited v Real Energy Limited & another [2016] eKLR** that the same may be taken into account in considering the interest and importance of the matter to the parties. This is particularly relevant in judicial review applications such as in the present case which have as their basis commercial arrangements involving public bodies.

31. In the premises I find that the decision of the taxing master in awarding instruction fees of Kshs 650,000/= was in error of principle, as a relevant factor in the exercise of the discretion to increase the minimum instruction fee namely the value of the subject matter, and which is specifically provided for in Schedule 6A paragraph (1)(j) of the Advocates (Remuneration) Order 2014, was not considered.

32. As regards the taxation of item on getting up fees and award of Kshs 166,666.66/= by the taxing master for this item, paragraph 2 of Schedule 6A of the Advocates (Remuneration) Order 2014, only requires denial of liability in a case for getting up fees to payable. In addition, a close reading of the paragraph shows that contrary to the ex parte Applicant's arguments, the matter need not proceed to full hearing, and it is sufficient that it is ready for and has been confirmed for hearing. It is not disputed that the present application was contested and proceeded to hearing.

33. The *ex parte* Applicant did not in this regard contest the item on the Interested Party's Bill of Costs dated 4th April 2018 that a replying affidavit to the its Notice of Motion was prepared and filed by the Interested Party's Advocate, who therefore clearly contested the application. It is also on record that the parties filed submissions and attended Court on various dates for hearing, which items were not contested by the *ex parte* Applicant.

34. A trial in this regard need not be only by way of *viva-voce* evidence, and a trial is conducted pursuant to the directions of a court, including by way of affidavit evidence and submissions, which is allowed in judicial review applications. It is notable in this regard that **Mits Electrical Company Limited vs National Industrial Credit Bank Ltd, (suprs)** involved costs of an application for contempt of Court and not full trial, and the *ex parte* Applicant did not provide the decision it cited of **Republic vs National Environmental Tribunal ex parte Silverstein N. Enterprises Limited,**in support of its arguments.

35. Lastly, the taxation of the getting up fees at one-third of Kshs 500,000/= is clearly contrary to the applicable provisions of paragraph 2 of Schedule 6A of the Advocates (Remuneration) Order 2014, which provides for the allowable minimum being one-third of the instruction fees. In this case the Taxing Master had awarded instruction fees of Kshs 650,000/= and not Kshs 500,000/-, and the taxation of the item on getting up fees was thus also in error.

36. In the premises I find that the decision of the taxing master in awarding instruction fees of Kshs 650,000/= and getting up fees of Kshs 166,666.66/= was made in error, and justifies interference by this Court. I therefore find merit in the Interested Party's Chamber Summons dated 2nd August 2018 and accordingly order as follows:

I. The Taxing Master's decision in the ruling delivered on 18th July 2018 taxing instruction fees at Kshs 650,000/= and getting up fees at Kshs 166,666.66 with respect of item 1 and item 2 respectively of the Interested Party's Party and Party Bill of Costs dated 4th April 2018, be and is hereby set aside.

II. The Interested Party's Party and Party Bill of Costs dated 4th April 2018 shall be remitted to another Taxing Master in the Judicial Review, Constitutional and Human Rights Division of the High Court at Nairobi, for the re-taxation of item 1 and item 2 only.

III. Each party shall meet their respective costs of the Client's Chamber Summons dated 2nd August 2018.

37. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2019

P. NYAMWEYA

JUDGE