REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 319 OF 2007

PRIME BANK LIMITED.....PLAINTIFF

-VERSUS-

GENERAL HARDWARE (K) LIMITED.....1ST DEFENDANT

KENYA UNITED STEEL COMPANY LTD.....2ND DEFENDANT

FERRO METAL FORWARDERS LIMITED.....3RD DEFENDANT

(Being a reference from the Taxation Ruling of Hon. S. Aswani Opande the Deputy Registrar of 27th November 2018)

R U L I N G

1. The Deputy Registrar Hon. S. Aswani Opande delivered his taxation Ruling, in this matter, on 27 November 2018. The two bills of costs that were the subject of that Ruling were filed by the Plaintiff and the 1st Defendant. Both bills of costs were against the 2nd and 3rd defend. The Plaintiff's Bill of Costs was taxed at Kshs. 435,570 and the 1st Defendant's bill costs was taxed at Kshs. 236,376.

2. By the Notice of Motion application dated 18th December 2018 the 2nd and 3rd Defendants have made a reference of those two taxation seeking that those taxations be varied or set aside and that this court do re-tax those bills or do send them back to be re-taxed by another Deputy Registrar.

3. By that application the 2nd and 3rd Defendant have raised two issues. The first is that the Taxing Master (the Deputy Registrar) erred in arriving at the amount of instruction which were stated to be manifestly high. The second issue raised is that there was no basis for the 1st Defendant to tax its costs against the 2nd and 3rd Defendant.

ANALYSIS

4. I have considered the affidavits and the submissions of parties.

5. I will begin by considering the second issue identified above. The 2nd and 3rd Defendant's raised a Preliminary Objection, to the 1st Defendant's Bill of Costs, before the Taxing Master. The Taxing Master delivered a Ruling on 18th January 2018 on that objection. The Ruling rejected the objection on the basis that the order for the 1st Defendant to tax its bill was made by Justice Ochieng on 29th September 2016 as follows:

> "*(1) The case is to be mentioned before the Hon. Tanui, Deputy Registrar on 5th December 2016 for further directions.*
>
> *(2) Meanwhile, the Plaintiff as well as the 1st Defendant have 30 days to file and serve their respective Bill of Costs."*

6. The Taxing Master in this Ruling on the Preliminary Objection found that he could not over rule the order of Justice Ochieng and proceeded to dismiss the Preliminary Objection of the 2nd and 3rd Defendant's, to the 1st Defendant's Bill of Costs. Strangely the 2nd and 3rd Defendant now seek to regurgitate the same objection that was before the Taxing Master and which was ruled upon. It should be noted that the 2nd and 3rd Defendants did not appeal the Ruling of the Taxing Master to their Preliminary Objection. It follows that that objection is *res judicata* having been finally determined by the said Ruling of the Taxing Master. It is defeated on that ground.

7. The first issue identified above is somewhat difficult to understand, from the perspective of the 2nd and 3rd Defendant's. I don't know whether it is by error or design but the 2nd and 3rd Defendant's made vague statements, in the affidavit in support of the application, in respect to the objection of the taxation of the instruction fees.

8. In the submissions of the 2nd and 3rd Defendant's, in even greater confusion, those Defendants' referred to other cases, between the parties, that were the subject of a consent, but that those matter did include this very matter. In those submissions the Defendants was confused by submitting that as a result of that consent the Plaintiff should have presented a block Bill of Costs (whatever that means). There is, in my view no basis presented by the 2nd and 3rd Defendant's which can justify interference with the Taxing Master's taxation. In arriving at the instruction fee the Taxing Master stated in his Ruling that he would base his taxation of this item on the amount of the Plaint Kshs. 10,275,266.82. In objecting to the instruction fee as taxed by the Taxing Master the 2nd and 3rd Defendant failed to inform the court what other figure should have guided the Taxing Master and more importantly those Defendants' failed to state where the error was in the Taxing Master basing his calculation of the instruction fee on the amount in the Plaint.

9. It has often been stated that courts should be slow to interfere with the assessment of costs by the Taxing Master. A case in point is **KTK ADVOCATES VS BARINGO COUNTY GOVERNMENT [2018] eKLR**

> *"The principles of taxation of costs were restated by the Ugandan Supreme court as follows: - **[**Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC)**]***
>
> *"Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.*
>
> ***Secondly**, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.*
>
> ***Thirdly**, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."*

10. I draw support to the above case and reject the 2nd and 3rd Defendant's prayer to re-tax the instruction fee of the Plaintiff.

11. There are other periphery issues raised in this matter.

12. The first is that the 2nd and 3rd Defendant's did not seek reasons for the taxation, before filing the application, as required by Paragraph 11 of the Advocates (Remuneration) Order of the Advocate's Act.

13. To the contrary, the 2nd and 3rd Defendants did seek, by their letter dated 28th November 2018, reasons for the taxation. What they failed to do in that letter was to pinpoint the items they objected to and which would be the subject of the reference.

14. The second issue raised is that the 2nd and 3rd Defendant's filed a reference by Notice of Motion and not by chamber summons as required under **Paragraph 11(2)** of the **Advocates (Remuneration) Order.** This is what **Paragraph 11(2)** provides

> *"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."*

15. Does filing a Notice of Motion rather than a chamber summons render the application a nullity? I dare say no, it does not. A chamber summon was in time now past heard in chambers while a Notice of Motion was heard in open court. These distinctions have increasingly become blurred.

16. To answer the question I posed above the: filing of a Notice of Motion rather than a Chamber Summons does not render the application nullity. See what was stated in the case **PAN AFRICA BUILDERS AND CONTRACTORS COMPANY LIMITED V COMMUNICATION COMMISSION OF KENYA (2006)** thus:

> *"One would then ask what is the effect of a party who moves by way of a Chamber Summons when the rules provide that he ought to have moved by way of Notice of Motion. In the absence of such a party seeking to amend such an application to ensure that they move in the correct procedure the court has discretion to adjourn a matter which in its view ought to be by Notice of Motion in to open court. This indeed was the finding in **Civil Appeal No. 284 of 1997 JOHNSON JOSHUA KINYANJUI & ANOTHER AND RACHEL WAHITO THANKE AND ANOTHER** as follows: -*
>
> ***"If an application is brought under different rules, one calling for a Notice of Motion application and another calling for a chamber summons application then the party applying has a choice to use a Notice of Motion procedure. If during the course of the hearing the party abandons the application under a rule which entitles him to apply by way of a Notice of Motion, the application does not become incompetent."***

***Order 50 rule 11 provides**:*

"Where any application which is authorized to be made in court is made in chambers the judge may either adjourn the application into court or hear it in chambers."

***Order 50 rule 10 provides**:*

"Any judge or magistrate may adjourn into court an application made to him at chambers which he deems more convenient to be considered in court."

***It can be seen that no application is to be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in court or in chambers**".*

The Plaintiff objections regarding the interested parties application having been brought under chamber summons is therefore rejected."

CONCLUSION

17. In the end the **Notice of Motion dated 18th December 2018** for the reasons set out above is found to be **unmerited. It is hereby dismissed with costs to the Plaintiff and the 1st Defendant.**

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **17TH** day of **DECEMBER, 2019.**

MARY KASANGO

JUDGE

***Ruling Read** and **Delivered** in **Open Court** in the presence of:*

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANTS**