REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 368 OF 2016

MURIU MUNGAI & CO. ADVOCATES…….APPLICANT

VERSUS

CHINA CIVIL ENGINEERING CONSTRUCTION

CORPORATION (K) LIMITED…….....….....RESPONDENT

R U L I N G

Introduction and outline of pleadings filed

1. There are for determination by the court, two applications being the Advocates application by Notice of Motion dated 23/10/2017 and the clients chamber summons dataed 11/9/2017.

2. On 6/11/2017 the court observed and ordered that the application by the advocate can rightly be viewed as an opposition to that by the client and directed that both be heard together. However after filling submissions and when the parties attended the court to urge the matter counsels urged the court to give priority to the Advocates Application, because, in their view, if it succeeds then there remains no need to urge the client's application. This court retains its duty to manage this dispute and its resolution and reiterates that the Advocates application be viewed as an opposition to the clients Application (reference) and both shall thus be heard together.

3. For that reason, I appreciate the clients Application to be a challenge to the taxing officers decision by which it taxed the advocates bill of costs in the sum of Kshs.148,856,561.90 on the 30/8/2017. The reasons advanced on the face of the Application can be summarized that there having been a retainer agreement between the parties, taxation of the bill of costs was forbidden by operation of section 45 of the Advocates Act and secondly and on a *'without prejudice'* basis, that the sum taxed is manifestly excessive as the taxing officer wrongly determined the value of the subject matter at USD 80,000,000 whereas the plaintiff only sought declaratory injunctive orders and that reliance on the decision in ***Governors Ballon Ltd vs Skyship Company Ltd[2015] eKLR*** was erroneous occasioning grave error in principle while assessing instructions fees. Those facts are reiterated in the supporting affidavit of CHEN ZENGCAI which then exhibited the retainer agreement, the plant in the suit were legal services were given and the resultant decree, the correspondence exchanged between the parties, the bill of costs and the ruling on taxation. That application was apparently lodged together with a Notice of Objection by which it is disclosed that the client objects to the entire decision of the taxing officer.

4. As said before that application is deemed opposed by the Advocates Application dated 22/10/2017, and Grounds of opposition dated the same day. The gist of the opposition in the two documents is to the

effect that the application is premature and therefore defective on grounds that having been filed on the same day with the Notice of Objection, it failed to grant to the taxing master an opportunity to give her reasons for the taxation, failed to single out which items are objected to and for having been filed in the same file on which taxation was undertaken.

5. On the merits it is contended that the client having been represented all along at the proceedings before the taxing master did not raise the issue of the retainer Agreement hence to allow it at this level would be to allow the client to set up a new case at an appellate stage to fill in the gaps left during the preceding before the taxing master. It is added that the retainer agreement does not amount to a fee agreement contemplated under Section 45(1) of the Advocates Act and none was ever entered into fixing the quantum of fees payable and that there was no error in principle disclosed and demonstrated.

6. The client did file a Replying Affidavit to the Notice of Motion by the advocate in which the primary issue sought to be clarified is the existence of the retainer agreement, the fact that it was availed to the former advocate who did not raise it at taxation and that it is an issue of law that ought to have been taken up and, that failure to take it up was a mistake of counsel for which the client ought not to be punished. On the propriety of the chamber summons having been filed contemporaneously with the Notice of objection, it was contended that the reasons by the taxing master are on the face of the ruling and that the advocate moved in haste and took out a certificate of costs within the period the taxing master was expected to have given her reasons. Pursuit to the court orders of 6/11/2017, parties did file and exchanged written submissions supported by decided casers. The client's submissions are dated 17/11/2017 and filed in court on the 1/12/2017 and are bound together with the list of some 8 authorities while the Advocates filed submissions dated 21/11/2018 and filed the same day together with a bundle of some 16 authorities and a supplementary list of some 2 authorities. I have had the chance to read and greatly benefited for the submissions filed as supported by decided cases.

Analysis of the dispute and issues for determination

7. The all important issue is whether or not the taxing officer in taxing the advocates costs, as she did, applied the law or whether the decision on taxation was marred by errors in principles applicable to the judicial duty in taxation of costs. However, before I delve into that question, there are preliminary issues, largely adverted to in the application seeking to strike out the Reference in limine which I must deal with Preliminary and before the merits.

8. These are the questions of the competence of the chamber summons, for being filed contemporaneously with the Notice of Objection; failure to single out the items objected to and the fact that it was filed in the same file where taxation was conducted as opposed to being filed in a new and fresh file. I propose to deal with the three issues seriatim may be starting with the easiest of the three.

Where to file a reference?

9. Mr. Kongere in his submission conceded that no specific provision of the law mandate that the reference be filed in a separate file but added that it is just good practice that it be filed in a separate file. I think the counsel must have been adverting the decision by my brother, Samson Okongo J, in ***Cyrus Minda t/a Minda & Co. Advocates vs Yenus Kerubo Oruta [2013] eKLR***.

10. I fully respect the view expressed by my brother in that decision but upon reading that decision it is apparent that the judges attention was never drawn to the provisions of section 51(2) as read with the Advocate (Remuneration) Order. Had that been brought to his attention it would been possible for the Judge to find that what the law requires is that the certificate of costs that has become final be converted into a judgment for the sum taxed without the need to file a fresh suit.

11. But this is a reference not an appeal. I consider that the law recognizes that a taxing officer engaged in taxation of costs acts on behalf of the court. He performs, as it were, delegated duty of the court in the same fashion a judge of the court of Appeal acts on behalf of the full bench in determining an application under Rule ……of that court's Rules. When one is dissatisfied with the decision arrived at by the single

judge, he needs not appeal and cannot appeal to the full court but seeks to be heard by way of a reference.

12. That reference, if the practice of the Court of Appeal is anything to go by is not filed in a different file but in the same file the single judge dealt. To me that is the tidy and neat procedure anticipated under Rule 11(1) & (2) of the Advocate Remuneration Order. It is the notice of objection that initiates a reference just like a Notice of Appeal initiates an appeal to the court of Appeal. The Notice must be filed in the file in which the taxing officer dealt and it therefore follows that it is the same file being referred to the judge to review and satisfy itself that in performing his duties on taxation the taxing officer acted within the law.

13. I do find that there is no legal dictate to file a reference in a separate file but equally that it is most desirable efficient and tidy that the reference is filed in the same file where taxation was conducted.

Is it mandatory to set seriatim every item objected to:-

14. Rule II(i) of the Advocate (Remuneration) Order is explicit that an aggrieved party gives a Notice in writing to the taxing officer of the items of taxation to which he objects. That provision, to this court, gives the objecting party latitude to be precise on the objected items.

15. In this case the Notice of objection reads:-

> **"….The respondent herein objects to the entire decision of the taxing master…."**

16. I understand the Notice to say that there was objection against all the 26 items in the bill of costs. That to me is permissible just as it is permissible to object to a single item. To the extent that there is objection to the entire decision on taxation, I find nothing objectionable to the notice as to invite the very draconian remedy to strike out the objection and thereby leave the dispute by the client undetemed. In any event there was never an allegation that the advocate had been misled or prejudiced in any way.

Is it fatal to file the Chamber Summons Contemporaneous with the Notice of Objection?

17. I read the provisions of Rule 11(1) 2(2) to demand that the basis of objection and therefore the dispute be isolated precisely just like in a every pleading the Respondent and court are expected to discern with ease what the dispute is all about.

18. For that reason the requirement for the taxing officer to give reasons is informed by the appreciation that judicial officer is entitled to give a verdict and avail reasons later. It is therefore not untoward for a taxing to just make calculations and give an award without stating why, for example, he has awarded instructions fees of so much.

19. In such a scenario, it would require that the parties to the dispute get the reasons for the determination so as to appreciate a decision, so as to accept the decision or challenge it. That, and only in such situation, would it be necessary to seek and be entitled to the reasons. However, where as in this case, the taxing officer has address her mind to the arguments offered by the parties on items 1, 14 & 17 and gave reasons for coming to the decision she reached, there would be no justification at all to demand such reasons from the taxing officer unless it is to just go by the letter of law without seeking the spirit to understand and basis for the need to ask for reasons. If find that to file the Chamber Summons at the same time with the Notice of Objection, in the circumstances of this matter, should be appreciated as a way of seeking to achieve the courts overriding objective to deal with the matter with promptitude. It should not be a reason to fault or defeat the objection.

20. The other way to look at the matter is what possible prejudice could have been occasioned to the Advocate by such contemporaneous filling. I am unable to identify any such prejudice. Instead I hold that where the ruling is self-speaking on the reasons for the decision, and with a view to expedite dispute resolutions, and in the spirit of promptitude as a constitutional dictate and principle in dispute resolution, it is commendable that a party files the Application for reference at the same time or so soon after filing

the Notice of Objection without the need to wait for the fixing master to reiterate the reasons otherwise on the text of the decision.

21. Looked at differently, the three objections taken are the kind, I think, the constitution would deem undue procural technicalities that the court is entitled to overlook so as to go to the substance of the dispute.

23. Having said so, the next two questions that go to the merit of the propriety taxation and the decision objected to are:-

> **i. Whether the retainer agreement between the parties barred the Advocate from failing a bill of costs?**
>
> **ii. Whether in coming to the decision the taxing officer ran into error of principles applicable?**

The retainer agreement

23. There is indeed in existence a retainer agreement between the parties duly executed as envisaged under section 45 of the Advocates Act.

24. At the relevant clause, the agreement provides:-

> **"2 (ii) In respect of any contentious matters that may necessitate MMC to attend court or any other judicial or quasi judicial body, whether to defend or to prosecute on behalf of the client, the client shall pay MMC Advocates such fees as shall be agreed by the parties within the allowable legal limits. The client shall additionally settle any court filing fees and other disbursements in respect of such matter".**

25. I read and understand the agreement to grant leeway to the parties to consider each contentious matter individually and negotiate an agreement on quantum of fees based on the allowable legal limits. Those allowable legal limits can only be read to mean the remuneration allowable according to the Order in force at the material time together with all outgoings being court fees and attendant disbursements.

26. The law is that where parties have agreed on a sum chargeable as fees then there is no need to engage in the process of taxation which is essentially intended and purposed to determine the exact sum payable. If parties agree on a glotial sum, provided it does not offend the requirements under section 46 of the Advocates Act, it would be an endeavor towards inefficient employment of judicial time to ask the court to find out what the fees is. In that event the person seeking to have the costs taxed would be asking the court to re-write an unquival contract between the parties. In such a case, the only open a venue to come to court is to sue for the sum agreed on any outstanding part thereof but not to seek taxation of the same due.

27. This is what the court of Appeal said in ***Omulele and Tolo Advocates vs Mount Holdings Ltd [2016] eKLR.***

> **"….as long as the advocates has been diligent, his entitlement to the <u>fixed sum is so outright that he need not tax his costs or give statutory notices to the client</u> prior to his pursuit of the same".**

28. In this matter as much as there was a retainer agreement, as far as contentious matters were concerned, the same was a general agreement without a fixed sum for any specific matter leave alone HCC No. 2 of 2016. To that extent, it was not possible fair or reasonable to insist on any sum as being due and owing from the client prior to taxation. That is what the law envisages under section 49 (a) Advocates Act where no judgment can be entered prior to taxation.

29. I therefore find that there was an agreement for general retainer but there was never a fixed sum agreement for fees regarding Mombasa HCCC No. 2 of 2016 so as to prohibit the advocate, or indeed the client, to seek to have the costs taxed pursuant to section 45 (6). The bill of costs was therefore validly, properly and legally lodged and taxed and neither the advocate nor the taxing officer can be faulted for having engaged in the taxation of the bill of costs dated 19/4/2016 and filed in court on the 20/4/2016.

Did the taxing officer commit any error in principle?

30. The taxing officer was perfectly right in her appreciation of the law applicable to the taxation before her. She cannot be faulted for having applied the provisions of schedule 6(1) b of Advocates (Remuneration) Order 2016. That provision is expressed as follows:-

> **"To sue in any proceedings described in paragraph(a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and –**
>
> | **That value exceeds** | **But does not exceed** | |
> |---|---|---|
> | **Kshs.** | **Kshs.** | **Kshs."** |

31. The operative word is that the subject matter if expressed in pecuniary terms must be determinable from the pleadings, judgment or settlement.

32. In this matter, there was indeed a pleading by the plaintiff at paragraphs 5, 6 & 7 that the defendant was threatening to damage the plaintiffs wayleave measuring about 12.5 meters in width which served its investment put up at a cost of USD80,000,000. For that threat the plaintiff sought against the defendant (now the client here) an order of declaration for exclusive use of wayleaves granted by Kenya Airports Authority, a permanent injunction and a technical evaluation to establish the safety standards to be employed by the defendant in construction over the disputed wayleave section.

33. Granted that the plaintiff revealed what was its investments costs, the dispute, as a matter of facts, was how the defendant would proceed with its construction works without endangering the plaintiffs pipes and thereby endangering the entire public in the case of a pipe getting punctured and an inferno being ignited.

34. That suit having been filed in January 2016 was settled by consent in March 2016, some 2 to 3 months later. The consent decree exhibited to the Application for reference show it all. It shows that the parties agreed on how to allow the defendant proceed with the construction while protecting and safeguarding the pipeline against intrusion or just damage to the pipeline on the wayleave area.

35. The material availed by the plaintiff (pleading) and the decree (settlement or judgment) reveal that there was never a dispute about the investment of USD80,000,000/=. The dispute was about the wayleave area and the plaintiffs fear that the defendant could trespass thereon and damage pipes and occasion an injury not only to the plaintiffs gas pipes but to the general public. This comes out clearly from the plaint at paragraphs 13 and 15. Where it is pleaded and averred.

> "**Paragraph 13**
>
> **"The actions by the Defendant and her authorized agents are clearly illegal and are apt not only to cause economic loss to the Plaintiff were the pipeline to rapture but they also pose a real and imminent danger to the surrounding area which is densely populated and thus could result in a catastrophy.**
>
> **Paragraph 15**

The Plaintiff's claim as against the Defendant is therefore for an order of injunction to stop the construction works within the wayleave granted to them by KAA as the same poses great danger to the public as the excavation works are too close to the public and may cause the pipeline to rapture".

36. My finding on the subject matter in dispute in HCCC No. 2 of 2016 is that it did not concern the investment of some USD80,000,000 but the extent to which the defendant would access and deal with the wayleave granted to the plaintiff by the Kenya Airports Authority.

37. Therefore, when the taxing officer held that "*the value of the subject matter could be determined from the pleadings and the same is USD80,000,000/=*", she fell into error and that error ought to be corrected by this court upon the reference filed by the client. If find that there was an outright error in principles and therefore I set aside the taxation and direct that the file be remitted back for taxation by a taxing officer at Mombasa High Court other than Hon. D. Wasike, Deputy Registrar.

38. I award the costs of the Reference to the client/Applicant.

Dated and delivered at Mombasa this 16th day of February 2018.

P.J.O. OTIENO

JUDGE