REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS AT NAIROBI

JUDICIAL REVIEW DIVISON

MISCELLANEOUS CIVIL APPLICATION NO. 319 OF 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP. 26 LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF AN APPLICATION BY UKWALA SUPERMARKET LIMITED, UKWALA SUPERMARKET (NAKURU) LIMITED, UKWALA SUPERMARKET (KISUMU) LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE UNLAWFUL PROCLAMATION OF ATTACHMENT & DISTRESS OF MOVABLE PROPERTY AND ASSETS OF UKWALA SUPERMARKET (NAKURU) LIMITED, UKWALA SUPERMARKET (KISUMU) & APPEAL ON THE ASSESSMENT OF VALUE ADDED TAX AND INCOME TAX OF UKWALA SUPERMARKET NAIROBI LIMITED BY THE COMMISSIONER OF DOMESTIC TAXES (LARGE TAX PAYERS OFFICE).

AND

IN THE MATTER OF INCOME TAX ACT CAP 470 LAWS OF KENYA, VALUE ADDED TAX ACT, NO. 35 OF 2013 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 40, 47 AND 50 OF THE CONSTITUTION OF KENYA

BETWEEN

THE REPUBLIC .....APPLICANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

EX-PARTE

UKWALA SUPERMARKET LIMITED.....1ST EX-PARTE APPLICANT

UKWALA SUPERMARKET

NAKURU LTD……..…2ND EX-PARTE APPLICANT

UKWALA SUPERMARKET

KISUMU LTD……..3RD EX-PARTE APPLICANT

RULING

1. This ruling arises from a taxation by **Hon. E. W. Mburu (Mrs)**. By her decision dated 31st August, 2017, the learned Taxing Officer taxed the ex parte applicant's costs in the total sum of Kshs 5,257,620/= after taxing off Kshs 25,279,500.00.

2. This reference was instituted by way of Chamber Summons dated 11th December, 2017 in which the Respondent herein objects to items 1, 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 34, 35, 36, 37, 38, 39, 40, 54, 55, 56, 57 and 58 of the ex parte applicants' Bill of Costs herein. The Respondent therefore prays that the said objections be upheld and Kshs 4,857,620.00 be taxed off. However during the submissions the applicant did not contest the other items apart from item 1.

3. The grounds upon which the said application was grounded were as follows:

1. That the learned Taxing Master erred in holding that Kshs 5,000,000 was reasonable as instructions fees without ascribing to it any justifiable and reasonable grounds.

2. That in taxing instructions fees at Kshs. 5,000,000 the taxing Master exercised his discretion wrongly.

3. That the taxing master failed to appreciate and hold that fair and reasonable instructions fees under item one (1) was Kshs 1000,000 as proposed by the respondent.

4. That the taxing master failed to appreciate that the legal fees should not be unreasonable or excessive as to deter persons from accessing justice.

5. That the taxing master failed to consider the notion of "reasonableness" in the taxation of costs.

6. That the taxing master failed to consider that some of the items are Advocates-Client (Appellant) Costs.

7. That the taxing master failed to consider that some items are not to be included as costs following the court's decision that each party is to bear its own costs.

4. According to the applicant in the instant application, after the delivery of the ruling on 31st August, 2017, that the costs of the Appeal be awarded to the appellant, the appellant filed a Bill of Costs in the sum of Kshs 30,537,120.00 which was taxed and by a ruling delivered on 31st August, 2017 was taxed in the sum of Kshs 5,257,620.00 all inclusive following the filing of written submissions by both parties herein.

5. It was averred that aggrieved by the said taxation, the applicant herein now objects to the manner the items mentioned hereinabove were taxed on the basis of the grounds set out hereinabove.

6. It was submitted that the taxing master taxed the instructions fees being item 1 at Kshs 5,000,000.00 without offering any reasonable grounds for the same but based on the agency notice. According to the applicant herein, the value of the agency notice cannot be used as a pointer on the weight or complexity of the matter as the suit itself is based on getting judicial review orders. It was the applicant's case that reliance ought to have been placed on the points at issue before the Court as judicial review is strictly based on procedure hence the value in the agency notice is inconsequential for the purposes of instructions fees.

7. The applicant submitted that instructions fees in judicial review matters are to be determined under Schedule 6A(j) of the ***Advocates (Remuneration) (Amendment) Order, 2014*** under which a complex judicial review matter if unopposed attracts not less than Kshs 45,000.00 in instructions fees while an opposed application attracts not less than Kshs 100,000.00. However to award an amount over Kshs 100,000.00 the taxing master must consider such matters as the importance of the matter, its complexity, novelty of the question raised, the amount or value of the subject matter and time expended by the advocate.

8. In this case it was submitted that though the application was opposed it was not complex enough to warrant fees over and above Kshs 300,000.00 and that the suit was brought when monies due to the applicant had not been paid and a consent was indeed recorded and the Respondent agreed and paid the admitted amount while the rest of the sum was to be canvassed before the Tribunal.

9. It was therefore submitted that a fee of Kshs 5,000,000.00 was unwarranted. In support of its submissions the applicant herein relied on **Ramesh Naran Patel vs. Attorney General & Another [2012] eKLR** in which the decision in **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 65** was cited with approval.

10. In this case it was submitted that the ex parte applicant's counsel did not need to look into the nitty gritty details of ***Income Tax Act*** to handle this suit which was simply a matter of ensuring that procedure was followed and indeed it emerged that the same was followed leading to the parties compromising the suit.

11. In the applicant's view, a sum of Kshs 300,000.00 in respect of instructions fees would have been sufficient and it based its contention on **Danson Mutuku Muema vs. Julius Muthoka Muema & Others Machakos High Court Civil Appeal No. 6 of 1991** and **J. M. Njenga & Co. Advocates vs. Kenya Tea Development Agency Limited [2011] eKLR**.

12. It was submitted that whereas the amount quoted was Kshs 946,465,176.00 the ex parte applicant had previously admitted to the sum of Kshs 101,289,654.00 leaving a balance of Kshs 845,175,522.00 as the disputed amount. To the applicant the amount that was to be brought before this Court would have been Kshs 101,289,654.00 which was the amount in the distress notice and not the sum of Kshs

946,465,176.00. Since the suit was concluded via a settlement within 4 months, it was submitted that the issue of the time expended in research and preparing for hearing or witnesses does not arise.

13. It was the applicant's case that the sum directed by this court to be paid as condition for filing the reference out of time being Kshs 400,000.00 ought to be considered as adequate in light of the decision in **Republic –vs. Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna & 6 Others (2006) eKLR**, **Premchand Raichand Ltd & Another vs. Quarry Services of East Africa Ltd & Another [1972] EA 162** and **Brampton Investment Limited vs. Attorney General & 2 Others [2013] KLR**.

14. In opposing the application the ex parte applicants filed the following grounds of opposition:

> **1. The Deputy Registrar correctly assessed and reduced the instruction fee and other items by taking into consideration all the relevant matters in the case in arriving at the decision of 31st August 2017.**
>
> **2. The applicant has not expressly stated the nature of the grievances it has with the Deputy Registrar's ruling and reasons for the same dated 31st August 2017.**
>
> **3. The application is therefore an abuse of the court process and merely intended to delay the 2nd and 3rd ex parte applicants/respondents herein realization of their award.**
>
> **4. The Deputy Registrar/Taxing Master did not commit any error of principle in arriving at her decision on the instruction fees.**

15. It is these same grounds of opposition that were reiterated in the replying affidavit.

16. In support of their case the ex parte applicant relied on **Premchand Raichand Ltd & Another vs. Quarry Services of East Africa Ltd & Another [1972] EA 162, and Ochieng, Onyango, Kibet & Ohaga vs. Adopt A Light Limited HCMisc.C No. 726 of 2006 and Nguruman Limited vs. Kenya Civil Aviation Authority & 3 Others [2014] eKLR.**

Determinations

17. I have considered the foregoing and this is the view I form of the matter.

18. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that the 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 manifestly excessive as to justify an inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**.

19. Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

20. Further guidance if necessary may be obtained in the case of **Joreth Limited vs. Kigano & Associates [2002] 1 EA 92 at 99** where the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a

matter of principle. In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.

21. In **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna** (supra) **Ojwang, J** (as he then was) expressed himself *inter alia* as follows:

> **"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…The 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 manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment…A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved…Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for…The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs…"**

22. While remitting the matter for fresh taxation the learned Judge in the above matter gave the following guidelines:

> **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.**

23. I however agree that the Taxing Officer ought to disclose what informed the decision to tax the costs in one way as opposed to another. I therefore agree with the decision in **Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna & 6 Others (2006) eKLR** that:

> **"… It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant's firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria…"**

24. And that:

"…it was necessary to specify clearly and candidly how she exercised her discretion… it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs…complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction…if novelty is involved in the main proceedings the nature of it must be identified and set out in a conscientious mode….if the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming, the details of such a situation must be set out in a clear manner…"

25. In this case, the only item in contestation is the instructions fees. The Taxing Officer, appreciated that the basic instructions fees payable was Kshs 100,000.00 which may be increased depending on certain factors which she correctly set out. As was held in **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**, the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it. The taxing officer however did set out the basic fee and was aware of the principles guiding taxation of costs. She proceeded to award the applicant Kshs 5,000,000.00 in respect of instructions fees. In **Opa Pharmacy Ltd vs. Howse & Mcgeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233**, it was held:

"Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave no reason whatsoever for doubling the instruction fee. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The failure to give any reason for the choice, surely, must, therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."

26. The principles guiding taxation were similarly reiterated by the Court of Appeal of Uganda in **Makula International vs. Cardinal Nsubuga & Another [1982] HCB 11** where the Court pronounced itself as follows:

"The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it."

27. In the case of **Paul Ssemogerere & Olum vs. Attorney General - Civil Application No.5 of 2001** [unreported] the Court held:

"In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference."

28. In **Danson Mutuku Muema vs. Julius Muthoka Muema & Others Machakos High Court Civil Appeal No. 6 of 1991** which was cited in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra) **Mwera, J** (as he then was) held that whereas the Court was entirely right to give the costs within its discretion, the amount allowed being ten times the sum provided for, the Court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The Court further found that since the Taxing Officer was bound to give reasons for exercising his discretion and as none were given in his ruling save to say that he simply exercised his discretion, it was just and fair to set aside the sum he allowed.

29. This Court is aware that in **Butt & Another vs. Sifuna T/A Sifuna & Company Advocates Civil Appeal No. 45 of 2005 [2009] KLR 427**, the Court of Appeal while appreciating that the basic instructions fees was Kshs 9,000.00 in a winding up petition nevertheless awarded Kshs 150,000.00 in respect of instructions fees which was 17 times the basic instructions fees.

30. In **Kenya Union of Commercial Food & Allied Workers (K) vs. Banking Insurance & Finance Union (K) Civil Appeal No. 60 of 1988**, instructions fees was taxed downwards from Kshs 1,000,000.00 to Kshs 150,000.00 where leave to apply for judicial review proceedings was disallowed. That decision was based on the old Remuneration Order.

31. In this case the Taxing Officer considered the fact that the matter was in Court for less than 5 months and did not go to trial but noted that the parties prepared and filed responses thereto. She also noted that the matter was withdrawn after several attendances in court and that the issues and prayers were to quash the Respondent's decision to recover a total sum of Kshs 946,465,175.00 in disputed tax. She however noted that there were no novel issues raised.

32. It would seem that at the end of the day what weighed heavily on the mind of the Taxing Officer was what she termed as "the huge amount involved and the several prayers sought by the ex parte applicants".

33. In this case there were three ex parte applicants. The crux of their case was that the 2nd and 3rd ex parte applicants, Ukwala Supermarket

(Nakuru) Limited and Ukwala Supermarket (Kisumu) Limited had not at any given time been the subject of any assessment of any taxes payable nor had they received any notices or communication from the Respondents and had not been the subject of any tax audit or proceedings. Further no demand had been sent to them by the Respondents for the payment of taxes hence the agency notices, proclamation and attachments against them were illegal, unlawful and arbitrary. In other words their case was that as distinct legal persons from the 1st ex parte applicant, the assessments against the 1stex parte applicant ought not to have been visited against them.

34. Therefore whereas the figure sought was huge, the issue in dispute was clearly a simple legal issue that did not require exceptionally detailed legal research and this was rightly appreciated by the Taxing Officer. Whereas the figure in issue could rightly be taken into consideration, in public law litigation, the amount involved is not the sole determinant when it comes to costs. Whereas the amount involved may cause unnecessary anxiety to the parties and counsel may be called upon to put extra effort in the matter, at the end of the day, the other factors such as importance of the matter, its complexity, novelty of the question raised and time expended by the advocate would no doubt carry more weight in such matters.

35. In this case the effect of the decision of the taxing officer was to increase the basic instructions fees 50 times.

36. In my view the fee awarded in respect of the instructions fees in this matter was clearly manifestly excessive as to justify an inference that it was based on an error of principle. The error of principle being that the huge amount quoted justified such an increase when the issues involved were not so complex and I dare say common-place principles of distinct corporate legal personality. It is further my view that the number of reliefs sought unless they make the matter complex is not *ipso facto* a basis for the increment of fees by such wide margin.

37. Accordingly I find merit in this reference.

Order

38. In the result the decision of the taxing officer with respect to the instructions fees is hereby set aside and the figure of Kshs 5,000,000.00 is substituted with the sum of Kshs 1,000,000.00.

39. As the other items were not contested, the same remain as taxed.

40. As the parties failed to comply with the Court's directions to furnish the Court with soft copies of their pleadings and submissions, there will be no order as to costs.

41. It is so ordered.

Dated at Nairobi this 21st day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Owalla for the ex parte applicant

Miss Ochako for Miss Lumadi for the Respondent

CA Ooko