



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 590 OF 2014**

**OMULELE & TOLLO ADVOCATES.....APPLICANT**

**VERSUS**

**MAGNUM PROPERTIES LIMITED.....RESPONDENT**

**RULING**

1. The Application dated 21<sup>ST</sup> July, 2016 and the application dated 19<sup>th</sup> August, 2016 were heard simultaneously.
2. The application dated 21<sup>st</sup> July, 2016 seeks orders that :
  - (a) Spent
  - (b) **The Honourable court be pleased to set aside the ruling of the Honourable Deputy Registrar (Taxing master) dated and delivered on the 19<sup>th</sup> days of April, 2016.**
  - (c) **The Honourable Court be pleased to refer the matter back for taxation by an independent Taxing master.**
  - (d) **The Honourable court do make such orders as it deems fit and just/convenient to meet the ends of justice in the circumstances of this case.**
  - (e) **Costs of this Application be provided for and borne by the Applicant/Respondent.**
3. It is stated in the grounds and the affidavit in support of the application that the ruling by the Taxing Master based the instruction fees on the value of the subject matter, yet the said value was not ascertained. That the main prayers in the suit sought orders of injunction. That there was no valuation report in support of the alternative claim for Ksh.1,200,000,000/=and that the suit did not proceed to hearing and therefore getting up fees did not arise.
4. It is deponed that there were arrangements between the Applicant and the Respondent for the settlement of legal fees on a monthly basis. That the said arrangement went on for four years before the Applicant changed Advocates. It is further stated that the ruling by the Taxing Master did not take into account the monthly retainers and the payments already made.
5. The Applicant has further averred that he complied with the procedure for the filing of a reference vide letter dated 4<sup>th</sup> May, 2016.
6. The application is opposed as per the grounds of opposition dated 13<sup>th</sup> September, 2016 which state as follows:
  - (1) **The ruling and orders given on the 27<sup>th</sup> May, 2016 by the Honourable Justice Serگون stayed proceedings of the Applicant's/Respondent's Notice of motion dated 19<sup>th</sup> April, 2016 for 90 days thus the ruling on the Applicant's/Respondent's Notice of motion dated 19<sup>th</sup> April 2016 ought to be delivered forthwith in compliance with the ruling and orders given on the 27<sup>th</sup> May, 2016 by the Honourable Justice Serگون since 90 days have lapsed.**
  - (2) **The subject matter of the suit in Nairobi ELC No. 559 of 2011 – Greenview Lodge Limited v Harik Sheth and Magnum Properties Limited is Ksh 1.2 Billion as prayed for in the Plaint therein**

(3) The Advocates Remuneration Order provides that the subject matter of a suit is ascertained from the sum contained in the pleadings.

(4) The ruling delivered on the 18<sup>th</sup> February, 2016, by the Honourable Lady Justice Njuguna confirms that the Applicant/Respondent did indeed prepare for trial and therefore getting up fees in the matter in Nairobi ELC No. 559 of 2011 Greenview Lodge Limited v Harik Sheth and Magnum Properties limited was justified

(5) The alleged monthly retainers cannot be made an issue for determination after a certificate of costs was issued by the taxing master on the 19<sup>th</sup> April, 2016.

7. I have considered the application, the response to the same and the submissions made by the counsels for the respective parties.

8. On record is a letter addressed to the Deputy Registrar and is headed “**Notice of objection to taxation (Rule 11 of the Advocates Remuneration Order Rules (Cap 21) Laws of Kenya).**” The said letter then goes on to enumerate the grounds for the objection. This letter which bears the dated 3<sup>rd</sup> May, 2016 at the top and 4<sup>th</sup> May, 2016 at the bottom was received in court on 4<sup>th</sup> May, 2016 as per the court stamp thereof.

9. Paragraph (Rule)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 of taxation 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 the reasons apply to a judge by chamber summons, which be served on all the parties concerned, setting out the grounds of his objection.”**

10. The letter aforesaid was filed within time and is a valid objection to the decision of the Taxing Master. On the face of it, the letter clearly states that it is a Notice of Objection. The letter did not request for the reasons for the ruling and the Taxing Master did not respond to the same. It is now argued by the Applicant that the Taxing Master is yet to forward to them the reasons for the decision on items No. 1 (instruction fee) and No. 60 (getting up fee) as listed in the said Notice of Objection. It is further argued that as at the time the Application dated 19<sup>th</sup> May, 2016 seeking order for entry of judgment, the Applicant who had been left without any legal redress filed the Notice of Motion dated 17<sup>th</sup> May, 2016 seeking orders of stay of the Motion dated 19<sup>th</sup> April, 2016 seeking entry of judgment.

11. The letter which gave the notice of objection refers to the ruling dated 19<sup>th</sup> April, 2016. The ruling of the Taxing Master is headed “**ruling and reasons for the taxation.**” Despite the said ruling, the Applicant just sat back and waited for the reasons by the Taxing Master who did not respond to the letter.

12. I have perused the file herein in its entirety. The matter herein has been rather protracted and with multiplicity of applications. I have noted that in the ruling dated 27<sup>th</sup> May, 2016 wherein the Application for entry of judgment for the sum of Ksh.33,321,431/= taxed costs plus interest at 9% was stayed to give the Applicant a chance to challenge the taxed costs. It was also held that the law requires the Taxing Master to forward the reasons justifying the decision. The court then proceeded to give the Applicant 90 days within which to file the reference.

13. The aforesaid ruling still stands. It has not been reviewed or appealed from. This court’s understanding of the said ruling is that it gave the Applicant a leeway to file the reference herein. It has now turned out that the reference was filed five days outside the timelines given. The court having given the Applicant the opportunity to file the reference demonstrates that the hearing of the matter on merits was given preference as opposed to reliance on undue technicalities of procedure. With the matter having come this far, I find the five days delay is not inordinate and is excusable.

14. The Court of Appeal in the case of **Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya & another [2014] eKLR** set out the principles to be considered in an application like the one at hand as follows:

**“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 Remuneration 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 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 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;”**

15. In the case at hand, the ruling by the Taxing Master dated 19<sup>th</sup> April, 2016 has made no mention of the payments alleged to have been made to the Respondent. There is also no mention whether the Taxing Master in addition to considering the claim for Ksh.1,200,000,000/= also considered the other prayers particularly taking into account that the main prayer was for injunctive orders.

16. The Court of Appeal set out the principles to be followed during the taxation of instruction fees in the case of **Joreth Ltd v Kigano [2002] eKLR** as follows:

**“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment 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 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.”**

17. I have also considered the case of **Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others [2008] eKLR** where the guiding principles in taxation were stated as follows:

**“(ii) the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;**

**(iii) the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**

**(iv) so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;**

**(v) objectivity is sought, when applying loose-textures criteria in the taxation of costs;**

**(vi) where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be identified and stated; and secondly, complexity is to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**

**(vii) where responsibility borne by advocates is taken into account, its nature is to be specified;**

**(viii) where novelty is taken into account, its nature is to be clarified;**

**(ix) where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form.”**

18. With the foregoing, this court is satisfied that there are sufficient reasons as analyzed above for this court to interfere with the decision of the Taxing Master. I exercise discretion and allow the reference to have the matter re-looked at by another Taxing Master. Consequently, I allow the application as prayed.

19. The application dated 19<sup>th</sup> August, 2016 seeks orders that:

**(a) Spent.**

**(b) The Honourable court be pleased to stay application to review orders allowing bill of costs and determine this application first.**

**(c) The Honourable court be pleased to strike out the award/ certificate of costs/certificate of Taxation dated 19<sup>th</sup> April, 2016 in favour of Omulele & Tollo, advocates the Applicant/ Respondent for work done by the purported firm of Omulele & Company Advocate.**

**(d) The Honourable court be please to declare that the firm of Omulele & Tollo Company Advocates had no legal capacity in terms of Registration of Business Names Act, (Cap 499) Laws of Kenya to trade as such for lack of registration of the same.**

**(e) Costs be provided for and paid by Christopher Omulele in person.**

20. The application is based on the grounds that:

**1.The Respondent was carrying on his business in the name and style of M/s Omulele & Company Advocate which name he knew was not a business name duly registered under (Cap 499) of the Laws of Kenya.**

**2. Section 4 of the Registration of Business Names Act (Cap 499) Laws of Kenya makes it mandatory for any individual carrying on business in a particular name to be registered.**

**3. The firm name of Omulele & Company, Advocate was not registered under the law before 10<sup>th</sup> August, 2016 and owner of the business name at present is one Juma chilodi Ndege who has the legal capacity to use the name from the date of registration,**

**4. The firm of Omulele & Tollo Advocates was not a merger of two firms since the firm of Omulele & Company Advocates**

was not in existence at the time the said partnership was registered.

**5. The firm of Omulele & Tollo, advocates was registered as a new business name on 7<sup>th</sup> June, 2013 whose proprietors are Christopher Omulele and Ray Tollo . Omulele Christopher did not invite Ray Tollo into an existing business outfit known as Omulele & Company Advocates.**

**6. A court of Law addresses individuals and corporations that have legal capacity.**

**7. The orders sought will sincerely meet the ends of justice if granted.**

21. It is stated in the affidavit in support that the firm of Omulele & Tollo advocates was a duly registered business name during the year 2010 and 2012 that a search conducted in the year 2016 with the Registrar of Companies revealed that no file existed in the name of Omulele & Co. Advocates. That the Law Society of Kenya records reflect the owner of the business known as Okwlele & Co advocates is one Imbukwa Thomas Ouya

22. The application is opposed as for the grounds of opposition dated 7<sup>th</sup> September, 2016. The said grounds are as follows:

**1. That the ruling delivered on the 27<sup>th</sup> May, 2016 by the Honourable Justice Sergon ordered for stay of proceedings on the Applicant's/Respondent's Notice of motion dated 19<sup>th</sup> April, 2016 to last for 90 day and since 90 days have lapsed the ruling on the Applicant's/Respondent's Notice of motion dated 19<sup>th</sup> April, 2016 ought to be delivered forthwith failure which the hearing of any other application will have contravened the Order made on the 27<sup>th</sup> May, 2016 by the Honourable Justice Sergon.**

**2. That the present application, Notice of motion dated 19<sup>th</sup> April, 2016 is a disguised appeal of the ruling delivered by the Honourable lady Justice Njuguna on the 18<sup>th</sup> February, 2016.**

**3. That this Honourable court is functus officio with regard to the orders sought in the present application, Notice of motion dated 19<sup>th</sup> August 2016.**

**4. That the application as made is misconceived and bad in law.**

**5. That there is inordinate delay in making the application as it is an appeal against the ruling and order delivered by the Honourable Lady Justice Njuguna on the 18<sup>th</sup> February, 2016.**

**6. That the hearing of the present application will be a miscarriage of justice and unconstitutional as the Applicant/Respondent will have been denied the right to be heard if the Ruling on its Notice of motion dated 19<sup>th</sup> April, 2016 is not first delivered before other applications can be heard.**

**7. The present application is only a futile attempt by the Respondent/Applicant to deny the Applicant/Respondent the delivery of judgment on the Applicant's/Respondent's application dated 19<sup>th</sup> April, 2016 and thus the present application as made is an abuse of court process.**

23. I have perused the ruling by Njuguna, J delivered on 18<sup>th</sup> February, 2016. The Honourable Judge held that there was a retainer between the Applicant and the Respondent. The said ruling has not been appealed from. This court is therefore *functus officio* in respect of the issue of retainer. Consequently, the Applicant is *estopped* from raising any issues relating to the business name which boil down to the same question of retainer. The Application is thus a thinly veiled attempt to circumvent the said ruling by Njuguna, J.

24. Consequently, the application dated 19<sup>th</sup> August 2016 fails with costs.

25. In the final analysis, the application dated 21<sup>st</sup> July, 2016 is allowed and the application dated 19<sup>th</sup> August, 2016 is dismissed with costs.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of July, 2018

**B.THURANIRA JADEN**

**JUDGE**