REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMA RIGHTS DIVISION

MISC. CAUSE NO. 1 OF 2017

KTK ADVOCATES…….....APPLICANT

VERSUS

BARINGO COUNTY GOVERNMENT.....RESPONDENT

RULING

1. Before me for determination is the Respondent's chamber summons dated **25th** May 2018 seeking orders that:-

a. Spent.

b. Spent.

c. Spent.

d. That there be a stay of execution of the Certificate of Taxation and the consequential decree pending issuance of the objection notice to the Taxing officer and the response thereto.

e. That this Honourable court enlarges the time within which to file a written notice of objection to the taxing officer against his decision vide ruling delivered on 8th June 2017.

f. That Costs of this application be provided for.

2. The grounds in support of the application are that upon the taxation, the applicant's then Advocate filed a chamber summons on **15th** June 2017 seeking orders that:- ***(i)*** *the taxation of the bill of costs be placed before the judge for its opinion and review;* ***(ii)*** *that the items allowed be reviewed and set aside; and,* ***(iii)*** *costs of the application.*

3. The applicant states that the firm of KTK Advocates application filed on **28th** June 2017 seeking entry of judgement on the basis of the Certificate of costs was allowed but its application dated **15th** June 2017 was dismissed on **2nd** November 2017 and its subsequent application dated **11th** December 2017 seeking to review or set aside the said dismissal was also dismissed.

4. The applicants state that it has made concerted efforts to challenge the orders of the taxing officer, but has not invoked the provisions of paragraph **11 (1)** of the Advocates (Remuneration) Order. The applicant further states that the law requires the Registrar to forward to the objector the reasons for his decision and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons.

5. The applicants case is that its then advocates inadvertently failed to do a written objection to the Taxing Master, but instead filed what they believed to have been a reference. The applicant also states that the Taxing Officer has not given reasons for her decision that would form the basis of a reference before a judge.

6. In support of the application is the affidavit of **Dr. Maureen Rotich** who avers that she has been advised by their present Advocate that all the previous proceedings were *"worthless"* since their then advocates omitted a crucial step under paragraph **11 (1) & (2)** of the Advocates Remuneration Order. She also avers that the application by their previous advocate could not have been a reference since there was no notice of objection, response or lack of it by the Taxing Officer. She also averred that the law permits the applicant to seek extension of time and that they are enjoined to not only protect public funds, but also prudently use public resources.

7. At the hearing of the application, **Mr. Gordon Ogolla**, counsel for the Applicant reiterated the above grounds and argued that the previous advocates filed an application for Review under the *"misapprehension"* that they were filing a reference against the decision of the Taxing Master, hence, the said application could not legally be treated as a reference. He also argued that since no grounds of opposition or Replying Affidavit was filed by the firm of Advocates/Respondents, the Court should proceed on the basis that the application is un opposed.

8. Mr. Donald Kipkorir appearing for the firm of advocates argued that Rules of procedure are not fundamental, and, that, once a Taxing Master gives a ruling, it is for the dissatisfied party to seek for the reasons. Also, he argued that the application in question was a reference. He also submitted that the ruling rendered on **2nd** November 2017 was on merits of the application. He submitted that the application under consideration is alien in law, has no merits, and added that that the applicants remedy lies against their previous advocate.

Issues for determination.

9. Upon considering the opposing facts presented by the parties herein, I find that the following issues distil themselves for determination:-

a. Whether the Court should treat this application as "undefended."

b. Whether the application has merits.

Whether the Court should treat this application as undefended.

10. Mr. Ogolla's argument as I understood it is that since no grounds of opposition or Replying Affidavit was filed in opposition to the application, the application is un opposed. **Mr. Ogolla's** submission is premised on the provisions of Order **51** Rule **14 (1)** of the Civil Procedure Rules, 2010, which provides for filing of grounds of opposition in applications in the High Court. Sub-rule **(4)** provides that "if a respondent fails to comply with sub-rule (1), the application may be heard ex parte.

11. The use of the word *may* in the above rule is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[1]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[2] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

12. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

13. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.[3]

14. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[4] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[5] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory. The word *"may"* used in the provision under consideration is not mandatory.

15. It is important to bear in mind that exercise of judicial authority is now entrenched in the Constitution. Article **159** commands Courts to be guided by the principles stated therein among them the purposes and principles of the Constitution are to be protected and promoted. Article **159 (d)** provides that justice shall be administered without undue regard to procedural technicalities.

16. On the face our transformative constitution with an expanded Bill of Rights, which guarantees access to Courts, a pertinent question warrants consideration. Do constitutional values permit a Court to deny a litigant the Right to be heard under circumstances as cited in this application? I find it necessary to recall the dicta of Fletcher Moulton L. J. in *Dyson Vs. Attorney General**[6]***

> ". To my mind, it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad". (Emphasis added)

17. Also relevant is the case of *Richard Nchapai Leiyangu vs IEBC & 2 others***[7]** where it was held as follows:-

> "The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

18. In any event, the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[8] The inherent power, as observed by the Supreme Court of India[9]"*has not been conferred on the*

court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." **Lord Cairns** put it succinctly when he said:-

> "One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."**[10]**

19. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justiciae*, to have any determination which affects him set aside.

20. In my view, the said provision is *not* mandatory. I decline the invitation to treat the application before me as unopposed because, acceding to such a request is a draconian step that cannot pass the constitutional muster. As was held in *Agip Kenya Ltd vs Highlands Tyres Ltd**[11]*the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. I am reminded about the statement of law attributed to the Privy Council in *Ma Shwe Mya vs. Maung Mo Hnaung*[12] which has been consistently accepted by the courts as correct statement of law whereby the Privy Council observed:-

> "All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."

Whether the application has merits.

21. The crux of the applicant's case is that the applicant never requested for reasons as provided under Paragraph **11 (1)** of the Advocates Remuneration order and that no reasons were supplied, hence, the applicant seeks for extension of time to request for the reasons and to file a reference. The applicant argues that since no reasons were provided, its previous advocate was acting under a *"misapprehension"* that reasons had been provided and that any proceedings that followed were worthless exercise.

22. Curiously, the applicant has annexed to its affidavit a copy the Tax Masters ruling which is clearly entitled *"Ruling and Reasons for Taxation."* The ruling clearly provides the Taxing Masters reasons for taxation. The same ruling was exhibited to the Respondent/applicants applications dated **15th** June 2017 and **3rd** July 2017.

23. It does not escape this Courts notice that this is a matter where the Respondent/Applicant has filed numerous applications. On record is an application dated **28th** March 2017 seeking extension of time to comply with court orders. But more relevant to the issue under consideration is the above mentioned application dated **15th** June 2017 in which the applicant moved the Court seeking orders that "the taxation of costs of the bill dated **13th** February 2017 by the Deputy Registrar on **8th** June 2017 be placed before this Court for the Courts opinion and Review and that the items allowed be reviewed and set aside."

24. More fundamental to this determination is the fact that barely two days prior to filing the above application, that is on **13th** June 2017, the applicant's then Advocates **Limo R.K&** Company Advocates, wrote a letter to the Deputy Registrar of this Court. The letter is clearly entitled in capital letters **"NOTICE UNDER RULE 11 (1) OF THE ADVOCATES (REMUNERATION ORDER) CAP 16 LAWS OF KENYA.**" It was received at the Court Registry on **15th** June 2017. The last paragraph of the letter is relevant. It reads:-

> **"The Respondent herein objects to all items allowed in the applicant's bill of costs dated 13th February 2017. This notice of objection to taxation issued pursuant to the above rule is therefore to request you to kindly give reasons for so taking (sic) and the reasons for delivering the ruling earlier than scheduled without notice to the Respondent."**

25. This letter not only extinguishes the applicant's core ground that the previous advocate never requested for reasons, but raises questions on the candour of the application before me. The applicant accuses its previous Advocates of ***"acting under misapprehension"*** that they were prosecuting a reference pursuant to the above notice. As the saying goes, "whatever goes round comes back", it is now evident who is acting under a misapprehension.

26. Incidentally, two applications were filed the same day. *First* is advocates application filed on **3rd** July 2017 seeking entry of judgment in the sum of **Ksh. 17,570,907.08** as taxed by the court. *Second* is the Applicants application seeking stay of the Certificate of taxation pending the hearing and determination of reference dated **15th** June 2017. It does not escape the attention of the Court that in the said application, the Respondent clearly describes their application dated **15th J**une 2017 as a "**reference."** Yet, in the present application, the same applicant asks this court to find that what was before the Court was ***"not a reference,"*** a clear contradiction emanating from the same applicant.

27. The Ruling rendered on **2nd** November 2017 determined two applications, namely, the one dated **15th** June 2017 filed by the Respondent/Applicant herein and the firm of Advocates application dated **28th** June 2017 seeking orders that judgement be entered for **Ksh. 17,570,907.08** plus interests at court rates from **8th** August 2017 and costs of the application as taxed by the Court.

28. In their application dated **15th** June 2017, which the Applicant conveniently described as **"a reference"** but now **"more conveniently"**

says it was "**not a reference**" but **was a "misapprehension**," the applicant sought to set aside the taxation of bill of costs dated **13th** February 2017 by the Deputy Registrar on **8th** June 2017 on grounds that:- ***(i)*** the Deputy Registrar was openly biased against the applicant; **(ii)** the taxing master failed to consider the Respondents submissions dated 1st April 2017; **(iii)** the taxing master failed to exercise her discretion judiciously in arriving at the instruction fees which is highly exaggerated and exorbitant.

29. The record shows that a **Miss Munyiri**, appearing for the applicant argued the grounds in support of her application to set aside the said taxation which was a reference contrary to what the applicant now states.

30. The record also shows that **Mr. Kipkorir**, in opposition to the application argued *inter alia* that ***(i)*** *the application was defective;* ***(ii)*** *it did does not meet the mandatory provisions of Rule* ***11*** *of The Advocates (Remuneration) Order*. Citing authorities, he argued that the application does not satisfy the criteria for setting aside a bill of costs and urged the court to dismiss it and enter judgement in favour of the applicant as provided under section **51 (2)** of the Advocates Act[13]adding that the bill was properly taxed in accordance with the law and taking into account the complexity of the case and that retainer is not in dispute. From these arguments, and as the record shows, it is clear what was before the Court was *reference* contrary to what the applicant now states.

31. Further, the nature and scope of the application that was before the Court is also discernible from the ruling rendered on **2nd** November 2017. An excerpt of the ruling will clear any doubts on what was presented to the Court and whether or not it was a reference. I find it useful to quote from the said ruling extensively:-

> **The principles applicable to a review of a taxing master's decision**
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> From the record, it is clear that on 18th June 2017, the Deputy Registrar gave reasons under Rule **11** of the Advocates (Remuneration Order) 2014, Schedule 6. Having received the reasons, and being dissatisfied with the same, the Respondent now asks this court to review or set aside the taxation.
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> The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in Visser vs Gubb**[14]** as follows:-
>
> > "The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."
>
> Before the court interferes with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling.**[15]**
>
> It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision. **[16]** This means that:-
>
> > " . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.***[17]***
>
> The taxing master is required to take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant.
>
> The ultimate question raised by the **"first application"** for review/setting aside the taxation is therefore whether the taxing master struck this equitable balance correctly in the light of all the circumstances of this particular case.
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> The scope of the **"first application"** requires this court be satisfied that the taxing Master was clearly wrong before interfering with her decision.**[18]**The quantum of such costs is to be what was reasonable to prosecute or defend the proceedings and must be within the remuneration order. The determination of such quantum is determined by the taxing master and is an exercise of judicial power guided by the applicable principles.
>
> *It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with* 'unless it is found that he has not exercised his discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.'**[19]**
>
> *Guidance can also be obtained from the Canadian case of Reese v. Alberta**[20]*** *McDonald J. sets out the* ***general principles***

applicable to awarding costs, at page 44:-

> "While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. …..,the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees ….plus reasonable disbursements….

In principle, costs are awarded, having regard to such factors as:- **(a)** the difficulty and complexity of the issues; **(b)** the length of the trial; **(c)** value of the subject matter and **(d)** other factors which may affect the fairness of an award of costs. The law obligates the taxing master to take into account the above principles.

The principles of taxation of costs were restated by the Ugandan Supreme court as follows:-**[21]**

> "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."

Back at home, in Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others**[22]**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 interference 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 authorizing clause in the law, or a particularized 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……."

Paragraph four, page one of the Tax Masters headed "Ruling and reasons for taxation," the Taxing Master stated "To appreciate the nature of the contest at hand, the Taxing Master did call for the parent 1st Judge file and...."This paragraph, and indeed the entire ruling stating the reasons leaves me with no doubt that the Taxing Master addressed her mind to the complexity of the case. It should be noted that the applicant in the first application did not demonstrate that the matter was not complex.

On the allegation that the Taxing Master did not consider the Respondents submissions, I have carefully perused the record. I note that after several appearances, the Respondents counsel was asked by the taxing master to photocopy their submissions and place them in the court file. Interestingly, counsel did not do so. Instead of complying with such a clear court order, when the matter came up for mention on 30th March 2017, counsel had filed an application under certificate of urgency seeking to temporarily stop the proceedings. Understandably, the taxing master raised concerns with regard to the tactics raised by the counsel.

On 13th April 2017, counsel was again asked to photocopy their submissions and place a copy in the court file and a ruling date was fixed for 9th May 2017. When the matter came up for ruling, the taxing master noticed that counsel had not complied and proceeded to write the ruling. All this is clearly captured in he record. Clearly, counsels conduct as enumerated above is totally wanting and raises serious doubts. It is even more perplexing for the Respondents counsel to accuse the taxing master of ignoring their submissions when the same counsel defied a court directive to place a copy of their submissions in the court file. To me, such an accusation in bad faith, misleading, totally unfounded, unfortunate and unexpected from legal practitioners who are expected to uphold professional standards.

No argument has been raised either in the affidavits or before me to question the items taxed in the Bill of costs or to suggest that the amounts are inordinately too high, unreasonable, not to scale or not provided for in the Remuneration order. It was incumbent for the applicant in the **"first application"** to point out which items in the Bill of costs they are contesting, and demonstrate why and or how they were not taxed as per scale or demonstrate why in their view the taxing master improperly exercised her discretion or misapplied the law or bring the application within the purview of any of the grounds or principles enumerated in the passages cited earlier in this ruling. Simply put, there are no grounds at all to sustain the **"first application."**It is frivolous, an abuse of court process and out rightly made in bad faith, misconceived and it lacks merit.

One of the applicable principles laid down in precedents is that the Court will interfere with an award of costs by a taxing officer if such costs are so low or so high that they amount to an injustice to one of the parties. **[23]** This argument was not advanced nor was it demonstrated to be present in the present case.

I find nothing in the taxation ruling to demonstrate that the taxing master did not take into account the relevant principles. In particular there is nothing to show that the matter before the court was not complex. The case was heard by an uneven number of judges after it was certified under article **165 (4)** of the Constitution as raising substantial questions of law. Also, it is clear the Respondent has not questioned the value of the subject matter which is a relevant factor in assessing costs particularly the instruction fees. No single item in the bill has been identified as being either too high or not to scale.

In Joreth Ltd vs Kigano & Assoc.**[24]** the Court of Appeal observed 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, 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 the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

The Respondent has failed to demonstrate that the calculation of instruction fees based on the alleged value of the subject matter was erroneous and was not based on any discretionary powers vested on the taxing master. Secondly when it comes to instruction fees, there is discretionary power to take into account the subject matter of the suit, the complexity of the matter and the amount of work invested in handling the suit for the taxing master to award a reasonable fee. In the present case, it is has not been shown beyond argument that the subject matter of the case was not properly ascertained, hence there is nothing to show that the amount allowed by the taxing master on the instruction fees was excessive and not within the scale fees.

As demonstrated by the authorities cited above, this court cannot substitute its views in place of those of the taxing master. Accordingly, I find that the **"first application"** by Respondents dated 15th June 2017 lacks merit. The same is dismissed with costs to the Applicant in these miscellaneous proceedings.

I now turn to the **"second application"** dated 28th June 2017. It seeks judgement to be entered in the sum of **Ksh. 17,570,907.08** as per the bill of costs taxed on 8th June 2017. It is premised on section **51 (2)** of the Advocates Act**[25]** which provides that:-

"The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."

The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent for the taxed sum indicated in the Certificate of Taxation.

The above section in my understanding, gives the court the jurisdiction to enter judgment for taxed costs where conditions are satisfied. The first condition is that there must be a certificate of the taxing officer by whom the bill has been taxed which certificate has not been set aside or varied by the court. Secondly there must be no dispute as to the retainer. If those two conditions are satisfied, the court has a discretion to enter judgment for the sum certified to be due with costs.

The above position has been upheld in numerous decisions of this among them E.W. Njeru & Co Advocates vs Zakhem Construction (K) Limited **[26]**a position firmly grounded on the provisions of Section **51 (2)** of the Advocates Act**[27]**which I believe is the correct exposition of the law.

I find, and hold that the above two conditions have been satisfied in this case, hence there is no reason at all for this court to decline the application to enter judgement as prayed.

Accordingly, I find that the **"second application"** dated 28th June 2017 is merited. I allow the **"second application"** as prayed. Consequently I make the following orders:-

a. That *the Respondents application dated 15th June 2017 be and is hereby dismissed.*

b. That *judgement be and is hereby entered in favour of the applicant herein KTK Advocates against the Respondent*

*Baringo County Government in the sum of **Ksh. 17,570,907.08** plus interests at court rates from the date of taxation.*

c. That the Respondent herein shall bear the costs of the two applications the subject of this Ruling.

32. The U.S. Supreme Court asserted in *Nix vs. Whiteside**[28]*** that a trial is a search for the truth. The rules governing the legal profession recognize that a lawyer must be a zealous advocate for the client, putting that person's interests ahead of all others. As Lord Brougham famously described the lawyer's role in 1820:- An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."[29] Some have argued that advocacy must be limited if it obstructs the search for the truth because the lawyer's paramount obligation is to the court's ascertainment of the truth and not the client's interest in a favorable outcome.[30]

33. Lawyers must deal with a conundrum because they are required to act as officers of the court-presumably working to advance the truth-while providing loyal representation to clients who may have little to gain from its ascertainment. It is inconceivable that the applicant fiercely advanced the argument that the previous advocates never requested for reasons, that they acted under a misinterpretation of the law, yet on record is a clear letter asking for reasons, the application referred to above and the arguments advanced in court which are very clear that what was before the Court was a reference. The heading of the said letter and the paragraph cited above leave no doubt that the application before me is frivolous, baseless and an abuse of Court process.

34. Mr. Ogolla also argued that the applicant is enjoined by the Constitution to protect use of public funds and that the bill as taxed is exorbitant.

35. Whereas this Court hoists high the constitutional principle that provides for prudent use of public resources, the Court also holds the view that prudent use of public resources like a sharp sword cuts both sides. The counter argument is the question whether that filing frivolous applications as has severally happened in this case at the risk of increasing costs to the parties is a prudent use of State resources.

36. In view of my analysis and conclusions enumerated above, I find and hold that the application dated **25th** May 2018 has no merits at all. I hereby dismiss it with costs to Advocate/Respondent.

Orders accordingly.

Signed, Dated and Delivered at **Nairobi** this **24th** day of **July,** 2018.

John M. Mativo

Judge.

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[1] *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[2] Ibid.

[3] Subrata vs Union of India AIR 1986 Cal 198.

[4] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[5] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[6] {1911} KB 418.

[7] Ibid.

[8] See *Mamraj vs Sabri Devi,* AIR 1999 P & H 96.

[9] In *Raj Bahadur Ras Raja vs Seth Hiralal* , AIR {1962} AC 527.

[10] In *Roger vs Comptoir D' Escompts De Paris*, (1871) LR 3 PC 465.

[11]{2001} KLR 630.

[12] (1933) 35 Bom. L.R. 569.

[13] Cap 16, Laws of Kenya.

[14] 1981 (3) SA 753 (C) 754H – 755C.

[15] See Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others [1984] ZASCA 2; 1984 (3) SA 15 (A) and Legal and General Insurance Society Ltd v Lieberum NO and Another 1968 (1) SA 473 (A) at 478G.

[16]Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1903 TS 111.

[17]Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others 1984 (3) SA 15 (A) at 18F C G.

See also the discussion by Botha J in Noel Lancaster Sands (Pty.) Ltd. v Theron and Others 1975 (2) SA 280 (T) at 282D C 283D for a discussion of the nature and limits of the judicial function in this context.

[18] (See: Ocean Commodities Inc v Standard Bank of SA Ltd [1984] ZASCA 2; 1984 (3) SA 15 (A) at 18E-G).

[19] Per SMIT AJP in Preller vS Jordaan and Another **1957 (3) SA 201** (O) at 203C - E.

[20] {1993} 5 A.L.R. (3rd) 40.

[21]*Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC).*

[22]**{2006} eKLR).**

[23] *Premchand Raichand Ltd. and Another vs. Quarry Services of East African and Others [1972] EA 162.*

[24] Civil Appeal No. 66 of 1999 (unreported).

[25] Supra.

[26] HC Misc 486 of 2012.

[27] Supra.

[28] 475 U.S. 157, 171 (1986) ("[U]nder no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called 'a search for truth.'"); see *Williams vs. Florida*, 399 U.S. 78 (1970), stating: The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. Id. at 82; see also Kenneth Pye, The Role of Counsel in the Suppression of Truth, 1978 DuKE L.J. 921, 926 ("Efforts aimed at the ascertainment of truth must be central to the role of counsel in any system for the resolution of disputes.").

[29] 2 Trial of Queen Caroline 8 (J. Nightingale ed., 1821)

[30] See, e.g., Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REv. 1031, 1032 (1975) ("[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve."); Harry I. Subin, The Criminal Lauyer's "Different Mission ": Rejlections on the "Right" to Present a False Case, 1 GEO. J. LEGAL ETHICS 125, 128 (1987) ("[I]f stricter limits on truth-subversion were instituted, the rights of persons accused of crimes generally would be enhanced.").