Bebadis Company Limited & another v Nyota & 2 others (Miscellaneous Application E055 of 2020) [2023] KEELC 21606 (KLR) (15 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21606 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION E055 OF 2020

JO MBOYA, J

NOVEMBER 15, 2023

BETWEEN

BEBADIS COMPANY LIMITED ..... 1ST APPLICANT

DANIEL KIMANI KARIUKI ..... 2ND APPLICANT

AND

JASPAL NYOTA ..... 1ST RESPONDENT

SEDCO CONSULTANTS LIMITED ..... 2ND RESPONDENT

PAUL RUTTO ..... 3RD RESPONDENT

RULING

Introduction and Background:

1. The 2nd Applicant, who appears in person and similarly represents the 1st Applicant herein; has filed the Chamber Summons Application herein with a view to challenging the Certificate of Taxation which was issued by the Learned Taxing Master on the 11th May 2023.

2. Pursuant to the Chamber Summons Application herein, the Applicant has sought for the following Reliefs;

   i. .....Spent.

   ii. That the Taxing Master's decision in respect of instruction fees, item 1 of the Respondent's Bill of Costs dated 18th November 2022 taxed at Kshs 300,000 Only, be and is hereby set aside;

   iii. That the Taxing Master's decision in respect of Getting Up Fees, item 2 of the Respondent's Bill of Costs dated 18th November 2022, taxed at Kshs 100,000 Only, be and is hereby set aside.

iv. That this Honourable court be pleased to make an appropriate reduced award in place of the instruction fees or give directions as to taxing of the said items by another taxing master.

v. That cost of the Application be provided for

3. Instructively, the Reference vide Chamber Summons herein is premised and anchored on a plethora of grounds, which have been enumerated at the foot of the Application. Furthermore, the Application herein is supported by the affidavit of the 2nd Applicant sworn on even date, namely, the 25th August 2023.

4. Upon being served with the Reference, the 1st and 2nd Respondent filed a Replying affidavit through one, namely, Paul Ruto, who described himself as a Director of the 2nd Respondent herein.

5. Additionally, the Deponent of the Replying affidavit has exhibited a total of four [4] Documents, which have been annexed to the Replying affidavit.

6. Moreover, the instant Application came up for hearing on the 12th October 2023; whereupon the 2nd Applicant, appearing in person and the counsel for the 1st and 2nd Respondents, agreed to canvass and dispose of the Application by way of written submissions. Consequently and in this regard, the court thereafter proceeded to and set the timelines for the filing and exchange of the written submissions.

7. Subsequently, the 2nd Applicant duly filed written submissions dated the 31st October 2023; whereas the 1st and 2nd Respondents filed written submissions dated the 1st November 2023. Both submissions are on record.

Parties' Submissions::

A. Applicant's Submissions

8. The Applicant herein has adopted and reiterated the grounds contained at the foot of the Application, as well as the contents of the Supporting affidavit sworn on the 25th August 2023.

9. Furthermore, the Applicant herein has thereafter raised, highlighted and canvased two pertinent issues for due consideration by the Honourable court.

10. Firstly, the Applicant herein has submitted that the Ruling by the Taxing master, as pertains to the Bill of costs filed by the 1st and 2nd Respondents, was delivered on the 11th May 2023.

11. On the other hand, the Applicant has further submitted that immediately upon the delivery of the impugned Ruling, same felt aggrieved and dissatisfied with the taxation and thereafter same proceeded to and filed a Notice of Objection to taxation vide Letter dated the 11th May 2023.

12. Additionally, the Applicant herein has contended that the Notice of Objection, in terms of the Letter dated the 11th May 2023; was filed within 14 days from the date of delivery of the ruling on taxation and similarly that the said Notice was duly served on the advocates for the 1st and 2nd Respondents on even date.

13. Arising from the foregoing, the Applicant herein has thus contended that the Notice of Objection to taxation, was therefore mounted timeously and in accordance with the provisions of Rule 11(1) of the *Advocates Remuneration Order*.

14. Other than the foregoing, the Applicant has contended that despite requesting to be availed the reasons for the taxation or better still a copy of the Ruling of the taxing master, same was never availed up to and including the 24th August 2023.

15. Be that as it may, the Applicant has submitted that immediately upon being supplied with and/or availed a copy of the Ruling on taxation by the taxing master, same proceeded to and indeed filed the reference beforehand.

16. Suffice it to point out that the Applicant has contended that the reference before the Honourable Court was therefore filed within the requisite 14 days from the time when same was availed the reasons for taxation vide the Ruling rendered on the 11th May 2023.

17. Secondly, the Applicant herein has submitted that the Learned taxing master applied wrong principle in the course of taxing the item pertaining to Instructions fees; and Getting Up fees and thereby made a manifestly excessive award to and in favor of the 1st and 2nd Respondents.

18. Additionally, the Applicant herein has contended that as a result of the error in principle, the final award granted to and in favor of the 1st and 2nd Respondent is therefore erroneous and thus deserving of being set aside and/or quashed.

19. In support of the foregoing submissions, the Applicant has cited and relied on, inter-alia, the case of *Donald Kipkorir, Tito & Kihara Advocates v Deposit Protection Fund Board* (2005)eKLR and *Sarah Chelagat Samoi v Musa Kipkering Koskei & Another* (2016)eKLR, respectively.

b. 1st and 2nd Respondent's Submissions:

20. The 1st and 2nd Respondents' herein filed written submissions dated the 1st November 2023; and in respect of which same has similarly raised and canvassed two pertinent issues for consideration by the court.

21. First and foremost, Learned counsel for the 1st and 2nd Respondents has submitted that the reference before the Honourable court was filed out of time and in contravention of the provisions of Rule 11(2) of the *Advocates Remuneration Order*, which prescribed the timeline within which a reference ought to be filed.

22. According to Learned Counsel for the 1st and 2nd Respondents, the Ruling in respect of the Taxation was rendered in the presence of both the Applicant and counsel for the 1st and 2nd Respondents; and hence the Applicant herein was privy to and knowledgeable of the reasons for the taxation.

23. Furthermore, Learned counsel for the named Respondents has thereafter submitted that to the extent that the Applicant was knowledgeable of the reasons for taxation, same was obligated to file the reference, if any, within 14 days from the date of delivery of the impugned Ruling.

24. Be that as it may, Learned counsel for the named Respondents has submitted that the Applicant herein did not file the reference within the statutory timeline and only filed the current reference on the 25th August 2023, shortly after being served with an enforcement notice, intended to facilitate recovery of the costs which were taxed by the Deputy Registrar.

25. In view of the foregoing, Learned counsel for the named Respondents has therefore contended that the current reference has been filed and/or mounted out of time without Leave of the Honourable court and hence same is therefore incompetent and otherwise a nullity ab initio.

26. To underscore the submissions that a reference filed out of time is a nullity and thus the court is divested of Jurisdiction to entertain same, Learned counsel has cited and relied on, inter-alia, the case of *Owners Vessel Lilian S v Caltex Oil Kenya Ltd* (1989)eKLR, *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 others* (2012)eKLR, *Microsoft Corporation v Mitsumi Computer Garage Ltd*

(2001)eKLR, *Nicholas Kiptoo Arap Salat v IEBC & 2 others* (2013)eKLR and *Machira & Co Advocates v Artur K Magugu & another* (2012)eKLR.

27. In a nutshell, Learned counsel has contended that insofar as the reference was filed out of time, this Honorable court is therefore divested of the requisite Jurisdiction to hear and determine the reference, either as sought or at all.

28. Secondly, Learned counsel for the 1st and 2nd Respondents has submitted that the Applicant herein has failed to establish and/or demonstrate that the Taxing master applied a wrong principle in the course of taxation relating to "Instruction fees" and "Getting Up" or at all.

29. Furthermore, Learned counsel for the said Respondents has submitted that before the court can interfere with the discretion of the taxing master, the court must be satisfied that the taxing master applied and/or deployed a wrong principle in taxing the costs and that the error must be manifest and not otherwise.

30. Other than the foregoing, Learned counsel for the Respondents has also submitted that it behooves the Honourable court to exercise caution, restraint and necessary circumspection before interfering with the discretion of the Taxing officer.

31. Further and in any event, Counsel has added that the discretion of the taxing officer ought not to be interfered with lightly, unless manifest error is evident and/or apparent, which same has contended not to be the case herein.

32. In support of the foregoing submissions, Learned counsel for the named Respondents has cited and relied on, inter-alia, the case of *First American bank of Kenya v Shah & Others* (2002) 1 EA 64; *Karen & Associates Advocates v Caroline Wangari Njoroge* (2019)eKLR, *Joreth Ltd v Kigano & Associates* (2002) EA 92 and *Joseph Kibowen Chemior v William C Kisera* (2013)eKLR, respectively.

33. Premised on the foregoing submissions, Learned counsel for the Respondents has thereafter implored the Honourable court to find and hold that the reference beforehand is not only premature and misconceived; but is similarly devoid of merits.

Issues for Determination:

34. Having reviewed the Chamber Summons Application herein [Reference], together with the Response thereto and upon consideration of the written submissions filed by and on behalf of the respective Parties, the following issues do emerge and are thus worthy of determination;

    i. Whether the Reference by and on behalf of the Applicant was filed outside the statutory timeline or otherwise.

    ii. Whether the Applicant herein has demonstrated the requisite basis to warrant interreference with the discretion of the Taxing Officer and by extension invalidation of the Certificate of Taxation or otherwise.

Analysis and Determination:

Issue Number 1

Whether the Reference by and on behalf of the Applicant was filed outside the statutory timeline or otherwise.

35. Learned counsel for the 1st and 2nd Respondents has submitted that the Ruling as pertains to the taxation of the bill of costs was rendered/delivered on the 11th May 2023 in the presence of both the Applicant and the counsel for the 1st and 2nd Respondents, respectively.

36. Additionally, Learned counsel for the Respondents has contended that to the extent that the ruling in question was rendered in the presence of the Applicant, the Applicant herein hence became aware for the reasons of taxation and hence ought to have filed the reference within 14 days from the date of the delivery of the impugned Ruling.

37. Nevertheless, Learned counsel for the Respondents has ventured forward and submitted that even though the Applicant was privy to and knowledgeable of the reasons for taxation, as contained on the Ruling delivered in his presence, same (Applicant) did not file the reference up to and including the 25th August 2023.

38. Furthermore, Learned counsel for the named Respondents has also contended that the current reference was only filed by the Applicant, shortly after same was served with an Enforcement Notice, which was a precursor to the recovery of the costs that were awarded to the 1st and 2nd Respondents.

39. In short, Learned counsel for the named Respondents has contended that the current reference therefore violates and/or contravenes the provisions of Rule 11(2) of the *Advocates Remuneration Order* and is thus a nullity, for all intents and purposes.

40. On the contrary, the Applicant has averred in the body of the Supporting affidavit that upon delivery of the impugned Ruling, same felt aggrieved and dissatisfied with the taxation and thereafter proceeded to and lodged a Notice of Objection to taxation vide Letter dated the 11th May 2023.

41. Furthermore, the Applicant has contended that the Notice of Objection vide Letter dated the 11th May 2023; was not only lodged within the statutory timelines, but same was also served on the counsel for the 1st and 2nd Respondents on even date, namely, the 11th May 2023.

42. Additionally, the Applicant has averred that despite having lodged and mounted the Notice of Objection to Taxation within the requisite timelines, the Deputy Registrar did not avail unto him (Applicant) the reasons for the taxation at the foot of the Ruling up to and including the 24th August 2023.

43. Besides, the Applicant has submitted that immediately upon receipt of the Ruling by the Taxing master, which contain the reasons for Taxation, same proceeded to and filed the instant reference. Consequently and in this regard, the Applicant contends that the reference was filed within 14 days from the date when the reasons contained at the foot of the Ruling were availed to him.

44. Having taken consideration of the rivaling submissions, I take the position that an Applicant desirous to file a reference is called upon to lodge and serve a Notice of Objection to taxation within 14 days from the date of delivery of the Ruling on taxation. See Rule 11(1) of the *Advocates Remuneration Order*.

45. Upon the lodgment of the Notice of Objection to taxation, within the statutory timeline or such other time as the court may extend, the Deputy Registrar is called upon to supply the Applicant with the reasons underpinning the taxation.

46. Furthermore, it is not lost on this court that lately the reasons underpinning the taxation are ordinarily contained in the body of the Ruling rendered by the Taxing master/Deputy registrar. Consequently and in this regard, the taxing master is not called upon to craft and/or generate separate reasons for (sic) the taxation.

47. To buttress the foregoing position, namely, that the Taxing master is not called upon to craft and generate new reasons for the taxation, when such reasons are already contained in the body of the Ruling, it suffices to adopt and reiterate the holding of the court in the case of *Ahmed Nassir v National Bank of Kenya Ltd* [2006] EA the court held:

> " Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."

48. However, what is critical in determining whether or not the instant reference was filed out of time or otherwise is the timeline when the Applicant was availed and/or supplied with a copy of the Ruling containing the reasons for taxation.

49. From the body of the Supporting affidavit, the Applicant has averred that though same filed the Notice of Objection to taxation on the 11th May 2023; the Ruling containing the reasons for taxation was never availed to him, despite concerted efforts, up to and including the 24th August 2023.

50. Even though the 1st and 2nd Respondents have contended that the Applicant was present at the time of the delivery of the Ruling and was therefore knowledgeable of the reasons for taxation, it is worthy to underscore that the provisions of Rule 11(2) Of the *Advocates Remuneration Order*; provides that the reference shall only be filed upon being availed the reasons for taxation, in this case, upon being availed a copy of the Ruling.

51. To my mind, the contention by the Applicant that same was only availed and/or supplied with the Ruling containing the reasons for taxation on the 24th August 2023; could only be challenged if the Respondents placed before the court evidence to the contrary and showing that the ruling in question, which is a critical ingredient to the reference, was availed to the Applicant earlier than stated.

52. Notwithstanding the foregoing, it is imperative to observe that the 1st and 2nd Respondents have not sufficiently controverted the Deposition by the Applicant that the Ruling containing the reasons for taxation was only availed unto him on the 24th August 2023.

53. Pertinently, the moment the Applicant filed the Notice of Objection to taxation, the obligation to process and supply the Applicant with a copy of the Ruling containing the reasons for taxation, shifted to the Deputy Registrar of the court; and hence it behooved the Deputy Registrar to act with due dispatch and to avail to the Applicant the certified copy of the Ruling for purposes of mounting the reference.

54. Additionally, I also need to underscore that the copy of the Ruling to be availed to the Applicant, for purposes of the reference forms the basis upon which the court will evaluate whether or not the taxing master, correctly applied his/her judicial mind to the requisite principles governing taxation.

55. Having made the foregoing observation, I therefore come to the conclusion that the timeline for filing the reference to challenge the taxation is neither computed nor reckoned on the basis of whether or not Applicant was present at the time of delivery of the Ruling, but is computed from the date when the Ruling containing the reasons for taxation, is availed to the Applicant.

56. In view of the foregoing, my answer to issue number one [1], whether the reference was filed within the statutory timeline is to the effect that indeed the reference was timeously filed upon the provision of the Ruling to the Applicant herein.

57. In a nutshell, it is my holding that the reference herein accords with the provisions of Rule 11(2) of the *Advocates Remuneration Order* and thus deserves to be considered on merits.

Issue Number 2

Whether the Applicant herein has demonstrated the requisite basis to warrant interreference with the discretion of the Taxing Officer and by extension invalidation of the Certificate of Taxation or otherwise.

58. Before venturing to consider the issue herein before mentioned, it is appropriate to underscore that the proceedings before this court were commenced by way of a Miscellaneous Application and not by a substantive suit. See Section 2 of the *Civil Procedure Act*.

59. To the extent, that the subject proceedings were commenced by way of a Miscellaneous Application anchored on a Notice of Motion, it is therefore evident and apparent that the operative pleadings governing the subject matter are the Notice of Motion and the Replying affidavits, if any, filed by the Respondents.

60. It has become important to make the foregoing observations so as to appreciate that from the body of the Notice of Motion Application, which was filed by the Applicant herein, there was no value of the suit property, if at all, that was alluded to and/or reflected on the face of the Application.

61. Furthermore, given that there was no value that was reflected on the face of the Application, it is therefore instructive that the Taxing master could therefore not apply and/or adopt the provisions of Schedule 6 paragraph (a) of the *Advocates Remuneration Order*, 2014, for purposes of taxation.

62. Similarly, it is important to point out that given the nature of proceedings that were placed before the court and which ground the taxation, which is now being challenged, it is important also to underscore that Schedule 6 paragraph (1) (b) of the *Advocates Remuneration Order*, 2014; which was deployed by the taxing master, was certainly inapplicable.

63. Suffice it to point out, that the subject proceedings (which indeed constitutes a suit by dint of Section 2 of the *Civil Procedure Act*, Cap 21, L.O.K) were commenced in such other manner which has not been distinctly provided for under the Advocates Remuneration Order. Consequently, where the taxation relates to a matter which is not distinctly provided for, the Advocate Remuneration Order provides that such a matter shall be taxed vide Schedule 6 Paragraph (l) which bears the heading of "Other matters".

64. For ease of reference, the relevant clause, provides as hereunder;

> Other Matters:
>
> To sue or defend in any case not provided for above; such sum as may be reasonable but not less than—
>
> i. If undefended 45,000
>
> (ii). If defended 75,000

65. From the foregoing analysis, it is evident and apparent that when the taxing master proceeded to apply the provisions of Schedule 6 Paragraph (1) (b) in taxing instructions fees as pertains to a matter that was commenced by way of a Miscellaneous Application, there was an error which is not only apparent but glaring.

66. Secondly, it is also important to mention that though the Learned Taxing master appreciated that there was no value of the property reflected in the body of the operative pleading; same proceeded to and under the guise of discretion awarded Kes.400, 000/= only on account of Instruction fees.

67. However, it is noteworthy that before awarding Instructions fees at Kes.400, 000/- only, the Learned taxing master did not first and foremost authenticate and/or appreciate the applicable benchmark, [namely, the applicable Scale Fees] upon which the exercise of discretion would be pegged.

68. Clearly and to my mind, it was incumbent upon the taxing master to appreciate what is the Instruction fees provided for under the specific clause/paragraph; and upon taking cognizance thereof, to use the Scale fee provided as the leverage for exercising discretion either to increase or decrease.

69. In my humble, albeit considered view, one cannot purport to exercise discretion prior to and before appreciating the fulcrum/ foundation upon which discretion is premised and/or anchored.

70. To buttress the foregoing exposition of the law, it is imperative to reiterate, the holding of this very court in the case of *Patrick Karige Munge v Raphael Arc Micheal Munge* [2022] eKLR, where I held thus;

> " 35. In respect of the subject matter, prior to and or before taking into account the complexity of the matter, the level of interests of the parties and the time taken in prosecution of the matter, which are factors that will impact on the ultimate award of the Instruction fees, it was incumbent upon the taxing master to appreciate and underscore the statutory bench mark, namely, the Scale Fees, upon which the discretion will be applied.
>
> 36. Based on the fact that the scale fees was stipulated vide the Advocates Remuneration Order, which I have alluded to herein before, it is difficult, nay impossible to see how the Taxing master arrived at and awarded Kshs.5, 000, 000/= Only, on account of Instruction fees.
>
> 37. Suffice it to note that the relevant Basic fee is important and/or pertinent and acts as the benchmark which must be relied upon before the taxing officer ventures to consider whether to increase and/or decrease of Instruction Fees.

71. Other than the position that was adopted and deployed by this court in the decision (supra), the significance of appreciating and taking cognizance of the basic/applicable Scale Fees before venturing to consider whether to increase or reduce same was also highlighted in the case of *DK Law Advocates*

v Zhong Gang Building Material Co. Ltd & another [2021] eKLR, where the court observed as hereunder;

33. As was held in *First American Bank of Kenya v 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. In *Opa Pharmacy Ltd v 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."

72. Arising from the foregoing exposition, it is my conclusion that the Learned taxing master, first and foremost, did not appreciate the nature of the suit/proceedings that was before her for purposes of taxation and hence proceeded to and invoked a wrong clause/paragraph in the course of assessing Instruction fees.

73. Other than the foregoing, it is also imperative to underscore that the Learned taxing master also failed to appreciate the Basic scale fees, which would have acted as the benchmark, prior to exercising discretion whether to increase or reduce.

74. Simply put, there is no gainsaying that the manner in which the Learned taxing master conducted and proceeded with the taxation was wrought with serious errors of commission and omission, respectively. Consequently and in this regard, the assessment/taxation on account of Instruction fees is vitiated by an error in principle.

75. Notwithstanding the taxation of Instruction fees, which has been discussed in the preceding paragraphs, it is also worthy to mention that the Learned taxing master also proceeded to and awarded "Getting up fees" to and in favor of the 1st and 2nd Respondents.

76. Nevertheless, it is trite and established that Getting up fees can only apply where a suit is confirmed for hearing and/or trial. For good measure, the only suit that can be confirmed for hearing/trial is one where there is a full trial, whereby the witnesses are prepared by the concerned counsel and thereafter viva voce evidence is tendered/adduced.

77. Put differently, where a suit is commenced in such other manner prescribed by the law but in respect of which no hearing is confirmed or better still , where the suit is disposed of on the basis of affidavit evidence and submissions, (like the instant one), the basis for awarding "Getting up fees" does not arise or at all.

78. Perhaps, it is appropriate to reproduce the provisions of Advocates Remuneration Order that underscores/ underpins the award of Getting up fees.

79. For ease of reference, the relevant provisions are reproduced as hereunder;

> 2. Fees for getting up or preparing for trial
>
> In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:
>
> Provided that—
>
> i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
>
> ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
>
> iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

80. Flowing from the explicit provisions, (whose details have been reproduced herein before), it is apparent that the threshold for Getting fees, which denotes that the matter must be readied for trial, witnesses prepared and viva voce evidence tendered, was neither established nor met, in respect of the instant matter.

81. In respect of the circumstances where Getting up fees can be decreed and/or awarded, it suffices to adopt and reiterate the succinct holding in the case of *Kenya Agricultural & Livestock Research Organization (Formerly Kenya Agricultural Institute v Njama Ltd* (2017) eKLR, where the court stated and held thus;

> " 38. In the case of *MITS Electrical Company Limited v National Industrial Credit Bank Limited* Misc. Application No. 429 of 2004, Kasango J. accepted the respondent's contention that a Getting Up Fee contemplates a situation in which there is a full trial, at which evidence is adduced. The learned Judge said that Getting Up Fees;
>
> > "...clearly contemplates where counsel is involved in preparation of witnesses and witness statements etc. This was not the case here. The application was supported by affidavit and no viva voce evidence was adduced".
>
> 39. On that basis, the claim for Getting Up fees was disallowed.
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> 40. A similar position was taken by Ojwang J. (as he then was) in *Republic v National Environmental Tribunal ex-parte Silversten Enterprises Limited* [2010] eKLR, which was a case for Judicial Review.
>
> 41. I am in agreement with those decisions, and hold that because there was no trial; no preparation of witnesses who would have given viva voce evidence; and no witness statements prepared by the advocate, Getting Up fees was not awardable.

82. Additionally, the legal position relative to the circumstances where "Getting up fees" can be awarded was also elaborated upon in the case of *Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited* [2018] eKLR, where the court held as hereunder;

> "In so far as getting fee is concerned, I refer to decision in *Ramesh Naran Patel v Attorney General & another* (2012) where justice Emukule held as follows:-
>
> > "the item in the Advocates Remuneration Order-on getting up fee-contemplates involvement by counsel in the preparation of witnesses, witness statements and determination of the matter by viva voce evidence."
>
> From record, it is evident that at the time the suit was stayed, hearing had commenced. Besides the preparing witnesses' statements before the suit was set down for hearing, the Advocate must have prepared them for the hearing which commenced but was not concluded. The Advocate is therefore entitled to getting up fee. The taxing master never erred in principle while award getting up fee.

83. Consequently and in the premises, I come to the conclusion yet again, that in arriving at and awarding fees on account of Getting up, in a matter commenced by way of a Miscellaneous Application, the Learned taxing master committed a grave error, which therefore vitiates the exercise of her discretion.

84. To surmise, it is my finding and holding that the Applicant herein has clearly demonstrated the existence of errors of principle, (inter-alia errors of commission and omission) which bedevil the taxation by the Learned taxing master.

85. Instructively, by applying the wrong clauses of the Advocates Remuneration Order, 2014, the Learned taxing master arrived at Instruction fees which was manifestly excessive and thus reflecting of an error in principle.

86. Premised on the foregoing, I come to the conclusion that there is a basis that has been laid before this court to warrant interfering with the Certificate of taxation. For coherence, it is my finding and holding that the stipulations alluded to in the case of *Joreth Limited v Kigano and Associates* [2002] 1 EA 92, have been met and satisfied by the Applicant herein.

87. For coherence, the Court of Appeal distilled the principles to include; inter-alia;

i. that the Court cannot interfere with the Taxing Master's discretion 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;

ii. 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;

iii. if the Court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master 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;

iv. it is within the discretion of the Taxing Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary."

Final Disposition:

88. Having reviewed and considered the thematic issues, which were itemized in the body of the Ruling, I have come to the conclusion that the reference by way of Chamber Summons dated the 25th August 2023; is meritorious and thus worthy of being granted.

89. Consequently and in the premises, I proceed to and Do hereby make the following orders;

    i. The Chamber Summons Application dated the 25th August 2023; be and is hereby allowed.

    ii. The Certificate of Taxation at the foot of the Ruling rendered on the 11th May 2023; be and is hereby set aside, varied and/or rescinded.

    iii. That the 1st and 2nd Respondents Bill of costs, which was the subject of taxation by the taxing master, namely, the bill of costs titled 1st Respondent's bill of costs, be and is hereby remitted to the taxing master, for purposes of re-taxation.

    iv. For the avoidance of doubt, the taxation of the bill of costs, [details in terms of clause (iii) hereof], shall be taken before a Deputy Registrar other than Hon. Diana Orago, SRM.

    v. Lastly, each Party shall bear own costs of the Reference.

90. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Daniel Kimani – Applicant in person.

Mr. Desmond Otwal for the 1st and 2nd Respondents.

N/A for the 3rd Respondent.