



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**MISC APP NO. 267 OF 2016**  
**TRANQUILITY DEVELOPMENT LIMITED.....APPLICANT**  
**VERSUS**  
**ANDREW BARNEY KHAKULA T/A J.S.**  
**KHAKULA & CO. ADVOCATES.....RESPONDENT**

**RULING**

1. This Ruling relates to a Chamber Summons Application dated 16<sup>th</sup> May 2016, brought under Rule 11 of the Advocates (Remuneration) Order. It is seeking for stay of the execution of the Certificate of Costs arising out of the ruling of the Taxing Officer delivered on 21<sup>st</sup> April 2016. The Applicant further seeks that the decision in the said ruling in relation to the Instruction fees and Value Added Tax (VAT) be set aside, and the Consolidated Bill of Costs dated 24<sup>th</sup> January 2014 and 27<sup>th</sup> July 2013 be remitted to a different Taxing Officer for Taxation. That, the decision rendered in relation to item one (1) of the Respondent's Consolidated Bill of Costs and the Quantum awarded therein be set aside or in the alternative, be re-taxed. The costs of this Application be provided for. The Application is supported by the grounds thereon and an Affidavit sworn by Zoher Husein Pirbhai dated 16<sup>th</sup> May 2016. However, the Application was opposed vide a Replying Affidavit sworn by Andrew Khakule dated 9<sup>th</sup> August 2016, and filed on 11<sup>th</sup> August 2016.

2. The Background facts of the matter is that, the Respondent filed two Bills of Costs dated 28<sup>th</sup> January 2014 and 27<sup>th</sup> July 2013 respectively, vide MISC Applications No. 30 and 31 of 2014. The Taxing Officer considered the same and rendered a ruling thereon on 21<sup>st</sup> April 2016. The Applicants are aggrieved with the Taxing Officer's decision in relation to the Instruction fees, VAT, and on the Retention fees and wants it set aside and the Consolidated Bills of costs remitted to a different Taxing Officer.

3. The Application was opposed based on the Replying Affidavit dated 9<sup>th</sup> August 2016, sworn by Andrew Barney Khakula, who deposed that the Affidavit disputing the retainer is full of falsehoods and is ridiculously calculated to mislead the Court from the crux of this matter which is the payment of the legal fees, as the retainer was never part of the issues for determination by the Deputy Registrar. That the Applicant has not shown any legal grounds upon which the Court can interfere with the Taxing Officer's discretion in awarding Kshs.17,741,543.12. The law on payment of VAT is settled and the Applicant's arguments have no basis whatsoever. The Application, the Chamber Summons is fatally defective and devoid of any merit and should therefore be struck out.

4. I have considered the Application, the Affidavit in support, Replying Affidavit thereto, and the submissions made by the Parties. I find the following issues have arisen for determination;

*i. Whether the Applicant has filed a proper Reference under Rule II of the Advocates (Remuneration) Order.*

*ii. Whether the Taxing Officer erred in awarding the Instruction fees, VAT, and the disputed Retainer.*

5. As regard the first issue, the Respondent submitted that, Rule 11 (1) of the Advocates (Remuneration) Order requires the aggrieved Party to file a Notice of Objection to the Taxing Officer's decision within 14 days stating the disputed items. That, in the present case, the Applicant wrote a letter dated 22<sup>nd</sup> April 2016, merely asking for reasons for the Taxation. It does not state the items objected to, and therefore it does not amount to the Notice of Objection envisaged under the Advocates (Remuneration) Order. That failure to file a Notice of Objection therefore renders the Reference herein fatally defective. The Case of **Ufundi Cooperative Savings Credit Society VS Njeri Onyango & Co. Advocates 2015 eKLR** was cited. The Respondent also argued that failure to follow the Procedure laid down under Rule II(1) of the Advocates (Remuneration) Order leads to the striking out of the Reference, the case of **Hezekiel Oira t/a H. Oira Vs Kenya Broadcasting Corporation 2015 eKLR** was cited.

6. The Respondent argued that, the Applicant was also required to file the Reference in **HCCC ELC Misc. Application No. 30 & 31 of 2014**, instead, he prepared a form of "record of Appeal" and filed a fresh Miscellaneous Application herein. In that regard, the Application herein is incompetent, and fatally defective, as there is no way a Judge can review a Taxing Officer's decision filed in another cause other than the original matter giving rise to the Taxing Officer's decision. Reference was made to the case of **Machira & Co. Advocates VS Arthur K. Magugu & another 2012 eKLR** to support the submissions that a Reference is different from an Appeal. Unfortunately, the Applicant did not respond to all these issue regarding the incompetence of the Reference.

7. I shall now deal with the issue of the disputed items herein. As regards the Instruction fees, the Applicant submitted that, the Taxing Officer erred in principle in awarding Kshs.15,000,000 as instruction fees when the suits were withdrawn before the hearing and determination thereof. Thus, the decision of the Taxing Officer ran foul of the Principles of Taxation set out by the Court of Appeal in **Premchand Raichand Ltd & Another VS Quarry Services of East Africa Ltd & Others. EALR 1972 EA 162**, where the Court held that, costs cannot arise to such levels so as to confine access to Courts to the wealthy. The Applicant faulted the Taxing Officer for failing to consider that, the value of the subject matter could not be determined from the pleadings, Judgement or settlement. That, as much as an Advocate must be paid, it must be commensurate to his work. (Reference was made to **Moronge & Co. Advocates Vs KPA 2014 eKLR**). That the instant matter, is a classic case of unjust enrichment of an Advocate as the award herein is manifestly excessive.

8. The Applicant submitted that, as the value of the subject matter could not be ascertained, the Taxing Officer should have used her discretion, taking into account matters of the interest of the Parties and the general conduct of the proceedings. The Applicant suggested that Kshs.100,000 would be appropriate as Instruction fees. Finally the Applicant argued that, the Taxing Officer awarded Kshs.10,000,000 in both costs obvious of the fact that the suits were consolidated, where upon she could only award instruction fees in one Bill of Costs. Reference was made to the case of **Kagwiri Kangethe & Co. Advocates Vs. Nairobi Mamba Village Ltd (2015) eKLR** and Judicial Hints on Civil Procedure 2<sup>nd</sup> Edition. The Applicant termed the double award of the instruction fees as a fundamental error that should not stand.

9. In response submissions the Respondent argued that, the Instruction fees is an independent and static item, making a reference to the case of **Joreth Ltd VS Kigario & Associates CA No. 60 of 1999**. That, it is charged only once and it is not affected or determined by the stage at which the suit reached. The Respondent further submitted that a Court will normally not interfere with the discretion of the Taxing Officer in Taxation matter, unless there is an error in Principle of assessing the costs. The case of; **Kipkorir Titoo VS Kiara Advocates VS Deposit Protection Fund Board CA No. 220 of 2004** was

referred to.

10. However, the Applicant maintained that, the Taxing Officer was guided **by the pleadings under Paragraph 17 of the Plaint in NBI ELC NO. 878 of 2013.** The cases of **Ochieng Kibet & Ohaga Advocates VS Adopt A Light Ltd, HCC MISC NO. 729/2006** and **Joreth Ltd (Supra)** were cited to buttress the point that the factors to consider in assessing the costs, is inter alia the value of the subject matter. That it is the injunctive order it obtained in the subject suit that was able to keep more than 20,000 members of the public from taking possession of the Applicants land measuring 3.05 Ha and where the Applicants had invested over 250 million which is the evidence of the magnitude of the subject matter. Therefore to argue that, the Respondent is unjustly enriching itself is to cry foul. That the Applicant cannot rely on the services of the Respondent and refuse to pay. The case of **Moronge & Co. (supra)** was distinguished as the Kshs.25 Billion therein was not proved, whereas the value of 7.5Ha of land herein is ascertainable.

11. In relation to the issue of Value Added Tax, the Respondent argued that the **Muthoga Gaturu Co. Advocates Vs Naciti Engineers Ltd HCCC Misc Cause No. 51 of 2001** held that legal services are taxable under the VAT Act therefore the Advocate is entitled to the same.

12. Finally, the Respondent submitted that as regards the issue of the retainer, the same was not argued before the Taxing Officer therefore it was not an issue for determination. That the Affidavit disputing retainer was sneaked into the Court's File after the Taxing Officer had delivered her ruling is an afterthought. That, by dint of the Provisions of Rule 13A, the Court has no jurisdiction to determine an issue that was not presented for determination before the Taxing Officer. The attempt to introduce the disputed retainer by the Applicant at this stage is therefore an abuse of the Court process. Reference was made to the Case of **Salem Ahmed Hassan Zaidu VS Faud Hussein Humeidon (1963) EA 92.** The Respondent submitted that, the Applicant "*blows hot and cold*" on whether the Taxing Officer had jurisdiction to make a finding on retainer. They complain that the Taxing Officer was mute on the retainer on one hand and on the other hand argues that the Taxing Officer does not have jurisdiction to make a finding on the retainer.

13. I have considered the entire Application alongside the Affidavit sworn in support and opposition thereto. I have also considered the annexures to the said Affidavits, and the rival submissions by the respective parties, and I draw out the following issues for consideration;

***(i) Whether the Reference herein is filed properly and competent.***

***(ii) Whether the disputed issue/item on Retainer was an item under contest, and whether it has been introduced after the Taxation of the Bill of Costs.***

***(iii) Whether the Taxing Officer erred in awarding a sum of Kshs.15,000,000 as instruction fees.***

***(iv) Whether the issue of V.A.T was also founded on an error in principle.***

14. As regards, the first issue herein, I have already analysed the submissions of the Respondent thereon, and noted that the Applicant did not address this issue. I note that Rule II of the Advocates (Remuneration) Order makes provisions for filing of a Reference. It states;

Rule II(1) provides;

***"Should any Party object to the decision of a Taxing Officer, he may within 14 days after the decision in writing to the Taxing Officer of items of taxation to which he objects".***

Rule II (2) provides;

***"The Taxing Officer shall forthwith record and forward to the Objector reasons for the decision on those items and the Objector may within 14 days from the receipt of the reasons apply to a***

***Judge by Chamber Summons, which shall be served on all the Parties' concerned setting out grounds of his objection".***

15. The Respondents faults the Reference herein for failure to file ***"a Notice of Objection"*** to the Taxing Officer's decision.....". It is submitted that in this matter the Applicant merely wrote to the Taxing Officer requesting for reasons for her ruling. It is further argued that the said letter did not clearly state the items objected to. The question then arises; Does this letter constitute ***"a Notice of Objection"*** envisaged under Rule 11(1) of the Advocates (Remuneration) Order. The Respondent invited the Court to hold that, failure to file a Notice of Objection by the Applicant renders the Reference fatally defective as there is no proper Reference before the Court for determination. There are several authorities relied on by the Respondent and which I have already analysed herein.

16. As already stated, the Applicants have not opposed the Respondent's submissions that, the entire Chamber Summons Application is incompetent as a result of non-compliance with the provisions of Rule 11 of the Advocates (Remuneration) Order. I have gone through the entire Affidavit sworn in support of the Application and the annexures thereto. There are a total of Ten (10) annexures. None of which is a Notice of Objection. I have therefore not had the benefit thereof. However, I have noted that the Applicant has deposed under Paragraph 16 of the Supporting Affidavit that they have annexed a letter dated 22<sup>nd</sup> April 2016, which the Applicant wrote to the Taxing Officer requesting for reasons for the Ruling. The letter is allegedly marked as "ZHP9". However upon perusing the said annexures, I find that, the said letter is not on record. The last annexure is marked "ZHP7". Once again I have not had the benefit of the said letter. It is therefore clear to the Court that, the provision of Rule 11(1) of the Advocates (Remuneration) Order have not been complied with.

17. Based on the legal principles cited herein and the submissions of the Respondents, which I hereby uphold, I find that there is no competent Reference before the Court. I actually note tht, the Applicants was fore warned by the Respondents vide Paragraph 9 of the Replying Affidavit where it was deponed that;

***"That the Applicant's Chamber Summons is fatally defective and devoid of any merit and thus should be struck out".***

The Applicant did not deem it fit and appropriate to respond. The Respondents then submitted heavily on the issues under Paragraphs 5 to 15 of their submissions, even there, there was no response. ***"Equity assist the vigilant and not the indolent"*** and ***Equity looks on that done which ought to be done"***.

18. The upshot of all this is that I hereby find that, the Chamber Summons Application dated 16<sup>th</sup> May 2016 is incompetent due to non-compliance with Rule 11(1) of Advocates (Remuneration) Order. In that regard, I don't have to delve into the other issues raised therein in relation to the Instruction fees, VAT and Retainer. I shall reserve them for their day in Court once properly presented. I thereof strike out the Chamber Summons Application with costs to the Respondent.

19. Ordered Accordingly.

**Dated, delivered and signed on this 30<sup>th</sup> day of June 2017 at Nairobi.**

**G. L. NZIOKA**

**JUDGE**

**In open court in the presence of:**

Mr. Bundotich holding brief for Osundwa for the Applicant

Mr. Khagula for the Respondent

Teresia – Court Assistant