REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION NO. 135 OF 2014

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF ADVOCATE AND CLIENT BILL OF COSTS

BETWEEN

OCHIENG' ONYANGO KIBET & OHAGA ADVOCATES......APPLICANT

VERSUS

ANDY FORWARDERS SERVICES LIMITED...........1ST RESPONDENT

PETER MUTHOKA...2ND RESPONDENT

RULING

[1] The application that is the subject of this Ruling is the Chamber Summons application dated **20 August 2015**. It was filed herein by the Respondents on **21 August 2015** pursuant to **Sections 1A, 1B, 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**; **Order 50 Rule 6** of the **Civil Procedure Rules, 2010**; **Paragraph 11(2)** of **the Advocates (Remuneration) Order, 2009** and all other enabling provisions of the law. The orders sought thereby are:

> **[a]** That the Court be pleased to deem the application for Reference against the Taxing Master's Ruling dated and delivered on **31 July 2015** as duly filed within time or alternatively to extend/enlarge time to cover the delay in filing the said Reference;
>
> **[b]** That the Court be pleased to vacate and set aside in its entirety the Ruling of **Hon. Sandra Ogot, Deputy Registrar**, dated and delivered on **31 July 2015**, taxing the Amended Advocate-Client Bill of Costs dated **13 October 2014** at **Kshs. 3,975,851.06** and refer the matter for fresh taxation;
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> **[c]** That the costs of the application be provided for.

[2] The application was premised on the grounds that by a Ruling dated and delivered on **31 July 2015**,

the Deputy Registrar, **Hon. Sandra Ogot,** taxed the Amended Advocate-Client Bill of Costs dated **13 October 2014** at **Kshs. 3,975,851.06**; and that the Respondents were unaware thereof until **18 August 2015** for the reason that the Ruling date had been mis-diarized by their Counsel as **31 August 2015.** The Respondents now contend that they were therefore unable to timeously lodge their Notice of Objection within the period stipulated in **Paragraph 11 of the Advocates (Remuneration) Order.**

[3] It was further averred that the Deputy Registrar misdirected herself in law in arriving at a decision that is untenable in law, by exercising her discretion on grounds that were both unclear and unreasonable in allowing Instructions Fees in the sum of **Kshs. 3,000,000/=.** The Respondents urged that they be given an opportunity to challenge the taxation; and that no prejudice will be occasioned to the Respondent if the orders sought are granted.

[4] The application was supported by the affidavit of the 2nd Respondent, **Mr. Peter Muthoka**, sworn on **20 August 2015**, in which it was deposed that throughout the entire period in question, their Advocates genuinely believed that the Ruling was scheduled for delivery on **31 August 2015**; and that they only became aware of the said Ruling after receiving a letter dated **17 August 2015** from the Applicant. It was averred therefore that the failure by Counsel for the Respondents to attend Court for the Ruling was not deliberate, but was occasioned by an inadvertent error in capturing the scheduled Ruling date in their diary. It was further deponed by the 2nd Respondent that the Respondents are extremely aggrieved by the said Ruling in its entirety and accordingly instructed their Advocates on record to file a Reference; and that unless the orders sought are granted, irreparable and substantial loss will be occasioned to them.

[5] Annexed to the Supporting Affidavit are a set of documents marked **PM-1**, which is a letter from the Respondents' Counsel to the 1st Respondent, advising that the Ruling on Taxation would be delivered on **31 August 2015**; and **PM-2**, which are copies of Counsel's diary and the court attendance sheet, show that the Ruling on Taxation was reserved for **31 August 2015**. **Annexure PM-3** is a copy of the Deputy Registrar's Ruling on Taxation dated **31 July 2015**; while **Annexure PM-4** are letters from the Applicant to Counsel for the Respondents dated **17 August 2015**, advising them of the Ruling; and a letter by Counsel for the Respondents to the Deputy Registrar dated **18 August 2015** requesting for reasons for the taxation pursuant to **Paragraph 11(2) of Advocates (Remuneration) Order**.

[6] The application was opposed by the Applicant, and in that regard, the Applicant relied on the Replying Affidavit sworn by **Mr. James Ochieng' Oduol, Advocate,** on **10 September 2015**, in which it was averred that the Applicant's Amended Bill of Costs dated **13 October 2014** was taxed *inter partes* and with the full participation of the Respondents' Advocate; and that the Ruling date of **31 July 2015** was duly notified to the parties' Advocates. Counsel further averred that the Ruling on Taxation sought to be set aside was delivered on **31 July 2015**, whereby the Applicant's Amended Bill was taxed at **Kshs. 3,975,851.06;** and that any Reference therefrom needed to be filed in accordance with **Paragraph 11** of the **Advocates (Remuneration) Order**. It was further deposed that the Respondents cannot possibly challenge the Ruling of the Taxing Master without first applying to have the Certificate of Costs set aside; and therefore that the application is incompetent.

[7] Mr. Ochieng Oduol further averred in his Replying Affidavit that the affidavit in support of the Motion, sworn by **Peter Muthoka**, is incompetent as he cannot possibly depose to facts not within his own knowledge, in connection with the purported mis-diarization of the Ruling date, granted the provisions of **Order 19 Rule 3(1)** of the **Civil Procedure Rules**. In addition thereto, it was the contention of the Applicant that no affidavit had been filed by the concerned Advocate to explain the failure to file a Reference within the time prescribed; and that the affidavit of the 2nd Respondent is in law incompetent in that regard.

[8] It was further deposed by Counsel for the Applicant that since only two issues were in contention at the taxation, namely **Item 3** (Instructions Fees) and **Item 5** (Getting Up Fees), **Grounds 5, 6, 7, 8** of the Respondents' Chamber Summons to the effect and purport that the Deputy Registrar misdirected herself are not only unfounded but also manifestly frivolous and condescending of a judicial decision. She further deposed that the Ruling on Taxation reveals that the Taxing Master exercised her discretion in line with the applicable law and the leading authorities on the subject, notably the case of **Joreth Ltd vs. Kigano**

& Associates [2002] 1 EA 92.

[9] In a Supplementary Affidavit filed by the Respondents on **13 June 2016,** the 2nd Respondent averred that **High Court Civil Case No. 149 of 2012** in respect of which the Applicant was instructed to act for the Respondents, was compromised before it got to full hearing and a Settlement Deed executed by the parties. That it was consequent to the settlement of the suit that the Applicant demanded payment of its fees from the Respondents, and thereafter proceeded to file its Bill of Costs dated **2 April 2014**. The Respondents further averred that the Settlement Deed dated **7 February 2013** confirmed that the parties had in good faith decided to negotiate, settle and agree on the terms of the settlement; and therefore that the Deputy Registrar erred in both law and fact in failing to consider that there was a settlement reached between the disputing parties. A copy of the Deed of Settlement was exhibited as an annexure to the Supplementary Affidavit.

[10] Learned Counsel urged their respective clients' positions by way of written submissions, which were highlighted on **10 July 2017**. The Applicant's written submissions were filed on **20 April 2016**, while the Respondents' written submissions were filed on **13 June 2016**. I have carefully perused the same as well as the Bundles of Authorities filed therewith. Granted the prayers sought in the Respondents' Chamber Summons dated **20 August 2015**, the issues for determination, in my view, are:

> **[a]** Whether the Respondents have established a case for the enlargement of time for filing a Reference; and if so,
>
> **[b]** Whether sufficient cause has been shown to warrant the setting aside of the decision of the Taxing Master dated **31 July 2015**as prayed in the Reference.

[11] On enlargement of time for filing a Reference, **Paragraph 11 of the Advocates (Remuneration) Order** is the enabling provision. It provides that:

> **"(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 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 shall be served on all the parties concerned, setting out the grounds of his objection.**
>
> **(3) Any person aggrieved by thedecision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**
>
> **(4)The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."**

[12] Thus, whereas the Court has the jurisdiction, pursuant to **Paragraph 11(4)** aforementioned, to enlarge time fixed under sub-paragraph (1), the discretion thereby bestowed must be exercised judiciously, and upon good cause being shown in that regard (see **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**). Thus, it is now trite that some of the factors to consider are:

> **[a]** Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

[b] A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;

[c] Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

[d] Whether there is a reasonable explanation for the delay;

[e] Whether there will be any prejudice suffered by the other side if the extension is granted;

[f] Whether the application has been brought without undue delay.

[13] In this connection, the Respondent's contention is that it mis-diarized the Ruling on Taxation for **31 August 2015** instead of **31 July 2015**. The documents annexed to the Supporting Affidavit and marked **PM-1** and **PM-2** confirm this contention. Moreover, the letter dated **18 August 2015** does buttress the contention of the Respondents that as soon as they got to know of the existence of the Ruling, they took steps to request for reasons for the decision pursuant to **Paragraph 11(2)** of the **Advocates (Remuneration) Order**, albeit belatedly. There being nothing to show that this was a deliberate omission, I am persuaded that good cause has been shown as to why the timelines provided for in **Paragraph 11** of the **Advocates (Remuneration) Order** were not complied with by the Respondent.

[14] It may have been an act of negligence on the part of Counsel to mis-diarize the Ruling date, but it is recognized that, even with the best of intentions, blunders do occur. And that is why in the case of ***Philip Chemowolo& Another v Augustine Kubende, [1982-88] 1 KAR 103*** **Apaloo, J.A.** *(as he then was),* expressed the viewpoint that:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

[15] In the premises, I am satisfied that good cause has been shown by the Respondents for extension of time; that the delay of four days is not inordinate; and that the application as well as a Notice of Objection were promptly filed by the Respondents upon their learning of the existence of the Ruling on Taxation. In the premises, I find merit in **Prayer No. 1** of the Respondent's Chamber Summons dated **20 August 2015** and would grant and issue orders in terms thereof, with the result that the Reference vide the instant Chamber Summons is hereby deemed properly filed.

[16] On whether sufficient cause has been shown to warrant the **setting aside of the decision of the Taxing Master** dated **31 July 2015**, it is now trite that taxation is a matter that is best left to the Taxing Officers. In **Thomas James Arthur vs. Nyeri Electricity Undertaking [1961] EA 92**, it was held that:

> **"...questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases."**

[17] This principle was restated in **First American Bank of Kenya vs. Shah & Others [2002] 1 EA 64,** by **Ringera, J.** (as he then was), as follows:

> **"...this 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 so 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**

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. 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."

[18] Thus, the key issue for determination in respect of Prayer 2 of the application, is whether the Deputy Registrar committed an error of principle in her taxation of the Applicant's Amended Bill of Costs dated **13 October 2014** to warrant the setting aside of the taxation in its entirety, as prayed by the Respondents. According to the Respondents' Counsel, **Mr. Ahmednassir, SC**, the Deputy Registrar misdirected herself in law and thereby arrived at a decision that was not only unreasonable in the circumstances but also untenable in law. The cases of **Moronge & Company Advocates vs. Kenya Airports Authority [2014] eKLR** and **Kipkorir Titoo & Kihara Advocates vs. Deposit Protection Fund Board [2005] eKLR** were cited in support of the foregoing argument. In particular, it was argued that the amount of **Kshs. 3,000,000** that was awarded as Instructions Fee was so manifestly excessive and exorbitant as to amount to an error of principle. Accordingly, the Respondents invited the Court to set aside the entire award, and to proceed to use its discretion to assess the Instructions Fee taking into account the value of the subject matter as contained in the Deed of Settlement in line with established precedent such as **Joreth Limited vs. Kigano& Associates [2002] 1 EA 92; Orion East Africa Limited vs. Permanent Secretary Ministry of Agriculture & Another [2013] eKLR** and **First American Bank ofKenya Limited vs. Gulab P Shah & Others [2002] 1 EA 64**.

[19] On his part, Learned Counsel for the Applicant, **Mrs. Oduor,** was of a contrary view. In her submissions, she took the view that the Taxing Master properly exercised her discretion by taking into account all the relevant factors that she was supposed to take into account; such as the importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances. Citing the case of **First American Bank of Kenya vs. Shah** (supra), Counsel urged the Court not to upset the taxation merely because it would have awarded a higher or lower amount; contending that the broad attacks on the Taxing Master's Ruling had not demonstrated any errors of principle in the taxation to warrant setting its aside.

[20] I have given careful consideration to the Ruling of the Taxing Master dated **31 July 2015**, the submissions and authorities cited by Learned Counsel for the parties in the light of the grounds and evidence relied on herein in support of the Reference. I have also perused the record of the proceedings todate, and note that although Prayer 2 of the Respondent's application seeks the setting aside of the entire award, only two items were in dispute before the Deputy Registrar, namely: the Instruction Fee for which an amount of **Kshs. 13,862,000** was claimed per **Item No. 3**, and the Getting Up Fee of **Kshs. 4,620,666.67** per **Item No. 5** of the Amended Bill of Costs. This conclusion is borne out of the proceedings of **10 June 2015** and is explicit in the Ruling on Taxation itself. Obviously, not the entire Bill is in contest. Indeed, **Mr. Ahmednassir,** in his submissions before me expressly stated that only the two aforementioned items were in contest. Accordingly, I will confine my consideration to the Deputy Registrar's Ruling in respect of only those two items. It is noteworthy too that the Getting Up Fee was entirely disallowed and was therefore taxed off and therefore is no longer in contention, granted that Counsel for the Applicant did not file a Reference challenging that decision.

[21] In her Ruling, the Taxing Master set out the two disputed items and considered them separately. In respect of Instruction Fee, she set out the relevant excerpts of the cases of **First American Bank of Kenya vs. Shah** (supra) and **Joreth Limited vs. Kigano& Associates** (supra) on the applicable principles; and with those principles in mind, she reviewed the submissions that were made before her by Counsel for the parties. She was in no doubt therefore that the Instruction Fee ought to be pegged on the value of the subject matter, for which reason, and upon perusal of the pleadings, she came to the following conclusion:

"...In this instance looking at the Amended Plaint filed by the Applicants herein for the

Respondents in the parent suit, their prayers for judgment included 4 declarations, a permanent injunction, general damages and compensation and costs of the suit. Nowhere was there a monetary claim to state that the subject matter of the suit can be ascertained from the pleadings. The same could also not be ascertained from judgment since the matter was settled before the matter could be concluded; nor could it be ascertained from the settlement since the Applicant indicated in their submission that the settlements were private and they were not privy to that information."

[22] In effect therefore, the Deputy Registrar came to conclusion, on the basis of the submissions and the applicable case law, that the subject matter was not ascertainable and therefore that she was at liberty to use her discretion in determining the reasonable amount to award as Instruction Fee. She proceeded to cite and set out the principles laid down in the case of **Premchand Raichan Ltd & Another vs. Quarry Services of East African Ltd & Others [1972] EA 162**, namely:

[a] That costs should not be allowed to rise to such levels as to confine access to the courts to the wealthy;

[b] That a successful litigant ought to be fairly reimbursed for the costs that he has had to incur;

[c] That the general level of remuneration of advocates must be such as to attract recruits to the profession; and

[d] That so far as practicable there should be consistency in the awards made.

[23] The Deputy Registrar further took counsel from the words of **Warsame, J** (as he then was) in **Ochieng Onyango Kibet & Ohaga Advocates vs. Adopt a Light [2007] eKLR** and warned herself that:

"The award in a particular case must not disturb the general economic equilibrium of the society where we live. Generally speaking high awards are constant threat to the interest of the general public and the right to access justice by the litigants. The scale of fees was intended to assist in securing uniformity of practice. And it is for that reason that we stress public importance of keeping legal fees within reasonable limits."

[24] It was with the foregoing in mind that the Deputy Registrar came to her conclusion that:

"It is clear from the aforementioned that the Instruction fees should not be so exorbitant that access to court is considered a privilege of the wealthy only; on the other hand, an advocate must be fairly reimbursed for costs incurred and that the same should be such that it attracts recruits to the profession. Bearing this in mind, and also considering the nature and importance of the cause, the Respondents reputation were on the line and I believe that this matter was of great importance to them; the amount of work involved in my opinion would include research into Company Law and other aspects of law as well and include perusal of voluminous material in preparation of the case. So in exercise of my discretion and taking into consideration the other fees and allowances to the advocates in respect of the work done to which any such allowances applies, the nature and importance of the matter, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances, I determine that Kshs. 3,000,000/= is sufficient as Instruction Fees."

[25] It is manifest therefore that the Taxing Master properly guided herself on the applicable law and principles for determining Instructions Fees. It cannot therefore be said that she exercised her discretion on grounds that are unclear, unreasonable or legally untenable. She clearly took into account the principle that costs should not be too high as to amount to a punitive measure. Indeed issues around quantum of costs have been held to be issues with which the Taxing Officers are particularly well fitted to deal. (See **Thomas James Arthur vs. Nyeri Electricity Undertaking [1961] EA 92**, (supra). Thus, on the whole, I am satisfied that the Taxing Master was guided by the principles set out in the case of **Joreth Limited vs Kigano & Associates [2002] EA 92** in which the Court of Appeal held that:

"In so far as instructions fees are concerned, the value of the subject matter of a suit for purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking into account amongst other things:

[a] Nature, complexity and importance of the cause

[b] Interest of the parties

[c] General conduct of the proceedings

[d] Any direction on the same from the Judge or other relevant factors"

[26] I note that the main argument raised by Counsel for the Respondents was that since there was a Deed of Settlement, the Taxing Officer was obliged to use that Deed in determining the value of the subject matter as opposed to the pleadings. It is noteworthy however that although that Deed of Settlement, dated **7 February 2013** was available to the parties before the Bill of Costs was amended on **13 October 2014,** neither party availed it to the Taxing Master, for in her Ruling, she stated that:

"Nowhere was there a monetary claim to state that the subject matter of the suit can be ascertained from the pleadings. The same could also not be ascertained from judgment since the matter was settled before the matter could be concluded; nor could it be ascertained from the settlement since the Applicant indicated in their submission that the settlements were private and they were not privy to that information."

[27] Indeed, that the Deed of Settlement was availed for the first time as an attachment to the 2nd Defendant's Supplementary Affidavit filed herein on **13 June 2016**. This was way after the Reference was filed, and no explanation was proffered by either the 1st or 2nd Defendant as to why this was the case. As for the Applicant, its excuse was that instructions had by then been withdrawn and that they were therefore not privy to the Deed of Settlement. Be that as it may, it is notable that copy is not only undated, but also appears not to have been signed by only some and not all of the intended signatories. Accordingly, the Deputy Registrar cannot be faulted for her decision. It could very well be that another Taxing Master would have come to a different award, but that is no reason for faulting the exercise of discretion in this instance. As was stated by **Ojwang J**, (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others, Ex parte Muchiri W'njuguna & 6 Others [2006] eKLR:**

"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 ... merely because it thinks the award was 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..."

[28] The foregoing being my view of the matter, I would decline Prayer 2 of the Respondents' application dated **20 August 2016.** The Reference therefore fails and is accordingly dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2017

OLGA SEWE

JUDGE