REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. 936 OF 2010

B E T W E E N:

KAMUNYORI & COMPANY ADVOCATES..……......…………... APPLICANT

Versus

MULLY CHILDREN'S FAILY TRUST

REGISTERED TRUSTEES ……………….………….......... RESPONDENT

R U L I N G

1. The Application before me seeks review of a taxation. It is a long running matter and this is the fourth such application on the same file. The Parent Suit is ***High Court Case No 388 of 2004*** . The Bill of Costs has been amended and re-amended the first version being dated 30th September 2010 and the final version ("Further Amended Bill of Costs) being dated 4th September 2012. The Applicant is an Advocate who practices under the name of Kamunyori & Company Advocates. The Respondent is a body corporate incorporated under the ***Trustees (Perpetual Succession) Act 1964 Laws of Kenya***. The Respondent was the Third Defendant in ***Civil Suit No 388 of 2004*** ("the Parent Suit"). The Applicant acted for the Respondent until it became apparent after amendment of the Plaint that he may be required to be a witness at which point he retired. The Retainer was in place from 30th August 2004 and the Hearing of the Main Suit commenced on 30th July 2008. By all accounts the Parties were on good terms during that period.

2. The Application is filed on 16th October 2014 was dated 14th October 2014 and served upon the Respondent on 17th October 2014. The Application asks the Court to review the Taxing Master's Ruling and award on the issue of the amount of the payments made by the Client to the Advocate and how they are calculated. The Orders sought by the Application are that:

> *(1)The decision of the taxing officer to tax the Further Amended Bill of Costs dated 4th September 2012 at Kshs 80,842/- as contained in her Ruling dated 10th September 2014 be set aside*
>
> *(2)The Honourable Court awards a fees of KShs 296,482/= in respect of the said Further Amended Bill of Costs which is inclusive of the amount of Kshs 216,000/- the taxing officer erroneously found as having been paid to the applicant*
>
> *(3)The costs of this application be provided for.*

3. The Grounds on which the Applications relies are set out thus:-

> *"a.* ***THAT*** *the taxing officer erred in finding that the application herein had been paid Kshs 342,000/= which included two contested amounts that is Kshs.201,000/ and Kshs. 15,000/= totaling Kshs. 216,000/=*
>
> *b.* ***THAT*** *the taxing officer erred in ignoring the Applicant's Submission with regard to the alleged payments of the two amounts*
>
> *c.* ***THAT*** *the taxing officer erred in not requiring the Respondent to prove strictly that the sum of Kshs.216,000/= aforesaid in respect of the subject matter at hand ie HCCC No 388 of 2004*
>
> *d.* ***THAT*** *the taxing officer erred in ignoring the principle that he who alleges must prove*, which meant that it was for the Respondent to prove and it should have proved the allegation that the payment of the said amount was in respect of ***HCCC No. 388 of 2004*** had been paid.
>
> e. **THAT** the taxing officer erred in finding "***that the unexplained payment of Kshs.216,000/= was in respect of the said suit…"*** .
>
> At the end of the Chambers Summon there is a manuscript annotation reading "*if any Party so served does not attend at the time and place above mentioned the court shall proceed to issue such orders as it shall deem fit to grant).*" It should be mentioned that that annotation is virtually illegible.

4. The Application is supported by the Affidavit of John Kirk Nyaga Kamunyori sworn on 14th October 2014. After setting out the background, At paragraph 5 the Applicant says; "***THAT*** *after various submissions and Rulings both by two taxing officers and a High Court Judge, I was required to make a Submission dated 19th June 2013 that illustrated inter alia, the amount that I am sure had been paid to me in respect of my acting for the Respondent in* ***HCCC 388 of 2004****"*. A copy of that Submission is exhibited at A2. At Paragraph B the Applicant sets out the payments that were referable to the Parent Suit, they amount to Kshs 126,000/=. The Applicant also explains that he worked for the Respondent on other matters. By way of comparison the Applicant also sets out the payments referred to by the Respondent. Those amount to Kshs 950,519/=.

5. At paragraph 6 of the Supporting Affidavit the Applicant said, in relation to the payments alleged that, "*the applicant (ie myself) cannot place cheques number 00450 for Kshs15,000.00 and Number 101828 for Kshs201,000/=. However the burden is on the respondent to prove that they were paid as a part of legal fees in connection of the subject matter of this taxation –* ***Civil Suit No 388 of 2004****. It is manifest that the respondent has misinformed your honour in connection with cheques numbered (i)-(v) above and the cash payment numbered (vi) above, and the same must be said of these two cheques (for Kshs 201,000/= and Kshs.15,000/= respectively), unless the respondent convincingly proves otherwise."*

6. It was following those Submissions that the Hon Deputy Registrar gave her Ruling of 10th September 2014. The Applicant quotes from the Ruling in his Affidavit and exhibits a copy.

7. The Respondent filed a Replying Affidavit sworn on **2nd November 2014** by Charles Mutua Mulli, the Chief Executive and founder of the Respondent. He says that he is advised by his Advocates that the application is without merit. He also complains that this is the fourth reference in this taxation and it is proving expensive. He says that the sums in question of Kshs 201,000/= and Kshs 15,000/= were indeed paid and were made specifically with reference to the Parent Suit. He explains that the Parties had a cordial relationship and the Advocate would attend a meeting at his office and then receive a payment by cheque. He does not say whether that process applied to all the matters being handled by the Applicant or only in relation to the Parent Suit. He again asserts that the two payments referred to were paid in relation to the Parent Suit and he Exhibits a copy of Cheque No 101828 in the sum of Kshs 201,000/= dated 6th September 2010 and a letter dated 11th May 2007 entitled simply "**REF**: **PAYMENT OF**

LEGAL FEES".

8. The Respondent in its Replying Affidavit states that the Application is without merit and raises a challenge to award because the taxing officer had allowed the claim for costs in items 136 – 183 which had not been expressly ordered by the Judge previously. The Affidavit exhibits a copy of the Ruling of Hon Mr Justice Kimondo. In his Ruling dated 2nd May 2014 the Learned Judge directed the Deputy Registrar to reconsider her previous award on three points. He said:

> "*I thus set aside the award by the taxing master* <u>*on a very narrow review*</u> *as follows (emphasis added):*
>
> *a) The taxing master shall not re-open the question of value of the subject matter.*
>
> *b) The review shall be limited to a consideration whether the advocate had been paid Kshs201,000/= or had been paid a sum of Kshs1,196,519/= as per the respondents affidavit in reply. In short, should the respondent be granted credit from sums paid? Should the applicant refund some monies to the respondent?*
>
> *c) The taxing master shall not re-open taxation on any item not raised by any of the parties. In that regard, the only items remitted for reconsideration are:*

Getting up fees.

> *1) Items 2, 27, 29, 32, 86, 94, 99, 103, 105, 107, 112, 124, 143, 156, 159, 162, 173*
>
> *2) Reconsider items 136 to 183 regarding the reference to the High Court noting that the High Court did not expressly award costs"* (paragraph 8, pages 7-8).

9. Therefore, it is clear from the above that the Learned Judge placed limitations upon the role of the taxing officer and also on the subject matter to be addressed, In her Ruling following that Direction, the named taxing officer, in relation to Item 136-183, ruled that; " *I note that in the ruling dated 21st February 2012 no costs were awarded. However the Judge did not expressly order that no costs should be awarded – costs follow the event.* ***<u>Section 27 of the Civil Procedure Act</u>*** *applies. Therefore item 136 to 183 remain as taxed by myself."* She then goes on (page 6) to deal with the issue of payments to the Applicant. She said "I consider the evidence before me and I held that Kshs126,000/= was paid, I now have to make a finding whether the advocate had been paid Kshs201,000/= or whether he was paid Kshs1,196,519.60/=. She then set out the amounts averred to have been paid by the Respondent which added up to Kshs1,076,519.60/=,She even recognised that there was an element of double counting in relation to the sum of Kshs120,000/= which explained the discrepancy between the evidence and the sum of Kshs1,196,519/= originally claimed to have been paid by the Respondent.

10. When the matter came up for Oral Submissions before me on 28th November, 2014, the Parties were finally in agreement that the Award should be set aside, although they differ in on what are the reasons. The Respondent submits that the Application is defective because the Court cannot simply replace the award made by the Deputy Registrar with a different award.

11. As to applicable principles, the first question to ask is whether the Court can and should interfere with the decision of the taxing officer. In **<u>First American Bank of Kenya -vs- Shah and Others (2002)</u>** EA 64 Hon. Ringera J. (as he then was) set out the principle at p.69 as follows;

> "*First, I find that on the authorities 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."*

12. In relation to the two items in dispute the Taxing Master set out her decision making process very clearly. First in relation to the costs of the reference she held. "*With regard to item 136 to 183 the Judge directed me to reconsider those items noting that the High Court did not expressly award costs. The applicant argued that **Section 27of the Civil Procedure Act** applies. That since the Court did not order that costs should be awarded costs should follow the event…I note that is (sic) the ruling dated 21st February, 2012 no costs were awarded. However, the Judge did not expressly order that no costs should be awarded- costs follow the event**.** **Section 27 of the Civil Procedure Act** applies. Therefore item 136 to 183 remain as taxed by me.* "

13.With respect to that reasoning, I cannot see any reason or grounds to interfere with that decision. The learned Judge had the opportunity to clarify his order in his ruling dated 21st February, 2012 by his Ruling dated 2nd May, 2013. He did not say that item should be omitted, he simply said it should be reconsidered and it was. He did not say he meant that neither Party should receive its costs. In those circumstances, the Deputy Registrar was free to exercise her discretion and she did so by applying ***Section 27*** of the ***Civil Procedure Act***. ***Section 35*** of the Evidence Act provides: ***Admissibility of documentary evidence as to facts in issue.***

> *(1) In any Civil Proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say;*
>
> *(a) If the maker of the statement either*
>
> *(i) had personal knowledge of the matters dealt with by the statement, or*
>
> *(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters, and*
>
> *(b) If the maker of the statement is called as a witness in the proceedings;*
>
> *Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which is the circumstances of the case appears to the court unreasonable.*

14. In relation to the issue of payments received by the Advocate, the Hon. Deputy Registrar said. " *Justice* Kimondo in his Ruling dated 21st *February,2012 stated that there was no proper evidence before the taxing master to confirm that the said amount of Kshs1,196,519.60/=, was paid. The Ruling by Hon. Njora was set aside. I considered the evidence before me and held that Kshs 126,000/=, was paid. I now have to make a finding whether the advocate has been paid Kshs201,000/= or whether he was paid Kshs1,195,519.60/-."* She then set out the evidence of payments before her. In relation to the payment of Kshs 201,000/=, it is recorded clearly that it was a payment made on 6th September 2010 by cheque number; 101828 and the purpose of payment was " ***not disclosed ."*** After setting out in tabular form, the Parties respective evidence and position, namely that on the Applicant's case, the sum of Kshs126,000/= was paid, and on the Respondent's case that sum of Kshs1,076,519.60/=, was paid. She recorded the discrepancy between Kshs1,196,519.60/= originally put forward and Kshs1,076,519.60 was the double counting of the figure of Kshs120,000/= from the letter dated 24th September 2005. At page 8 of her Ruling the Hon. Deputy Registrar says,

*"I have very carefully evaluated the evidence of payment. The amount paid with respect to **HCC No. 388 of 2004*** are as follows;

*Total Kshs126,000/=. The amounts not accounted for… Kshs 216,000/=. The rest of the payments were for other matters. It would have been helpful if the letter forwarding the cheques to the advocate **had specifically described the matter for** which legal fees and professional fees had been paid."* Having stated that the evidence is lacking, she then went on to say: " *Having said so, I find that the unexplained payments of Kshs216,000/= were in respect of said suit*." That amount plus the amount of Kshs126,000/=, confirmed as having been paid in the parent suit adds up to Kshs342,000/-. The Respondent has not produced any accounting records that could and would have assisted the taxation.

15. Having said that the sum of Kshs216,000/=, was not accounted for, and that further evidence would have been helpful, the Hon. Deputy Registrar makes the quantum leap to finding that nevertheless those sums are attributable to the parent file. That means she made a finding that (a) they were paid and (b) received in relation to the parent suit. She then goes on to decide that the correct treatment is a straightforward addition. The Hon. Deputy Registrar does not explain why, given there was a dispute, she preferred the evidence of the Respondent over the evidence of the Applicant. ***Section 107*** of the Evidence Act Cap 86 provides under the heading; "Burden of proof."

> *(i) Whoever desires any court* to give judgment as to any legal right *or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(ii) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

16. In this case, on the question of payments made to the Advocate, the Client/ Respondent relies on documentary evidence filed by the Respondent. The taxing officer noted that there were payments that could not conclusively be attributed to the parent suit. She then went on to find that issue proved in the opposite. How can a lacuna in the evidence one minute become a proven fact in the next ? That is an illogical outcome.

17. Further, the Deputy Registrar then proceeded to simply add the two figures. She did not address her mind to whether there was any duplication in relation to payments said to be made – as she had done in relation to the schedule of payments. In the circumstances it cannot be certain that she discounted that possibility.

18. In the circumstances, I have no hesitation in finding that the Deputy Registrar did misdirect herself on a matter of principle on the law of evidence in placing reliance on allegations of payment which have not been proved before her. I therefore set aside the Ruling in that limited aspect.

19. The Applicant then argues that the Court should replace the Deputy Registrar's Ruling and finding with one of its own. The Respondent complains of delay and numerous applications. At page 71 of **First American Bank of Kenya -vs- Shah 2002** supra Hon. Ringera Judge (as he then was) said " … *I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instructions fees and then consider not increasing it as there are no factors to warrant increase. I am convinced in my mind that that would be a waste of Judicial time in the circumstances of this case. It would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in reference on taxation to determine the matter with some finality. I should therefore determine the basic instruction fees to defend a claim for Kshs105,247,351.35/= and vary the order on taxation accordingly."*

19. In **Kamunyori & Co. Advocates -vs- Development Bank of Kenya Limited Misc Application**

No. 975of 2003, Hon. Ochieng Judge dealt with a similar issue on a referral on the taxation. He said, " *Had it been the only issue for consideration, I would have proceeded to calculate the instruction fee, instead of referring the Bill back to another taxing officer, for taxation.*

But in this case, the taxing officer has not expressed any view on the clients submission to the effect that the advocate was only entitled one- half of the instruction fee.."

20. In this case two separate taxing officers have dealt with the issue of the amount of payments made by the Client to the Advocate. In the first Ruling the taxing officer found the figure of *Kshs1,195,519.60/=* was paid. That was set aside on review on the basis that she misdirected herself. The matter was referred back. That referral gave the Respondent leave (with the knowledge that its evidence was considered inadequate), to make an application and file additional, clear and cogent evidence going to the issue. Apart from swearing an Affidavit to introduce the documents into evidence, nothing further was done. The Applicant did amend its Bill of Costs on 4th September, 2012. Yet again the matter was taxed by a different officer and again it was referred to Justice Kimondo who provided guidance to the Respondent that the issue turned on the evidence that it had filed . The Respondent did not file additional evidence on that issue. It is safe therefore to assume that there is no further evidence available. In the words of the taxing officer. " *It would have been helpful if the letter forwarding the cheques to the advocate had specifically described the matter for which legal fees and professional fees had been paid."* That suggests that the evidence was not probative. In the circumstances, that figure of Kshs 216,000/= cannot be said to have been proved.

21. The Respondent complains of the repeated referrals and the fact that the matter has been back and forth four times. The Respondent is not without fault in this regard as cognet evidence would have clarified the issue. Given that there is only one issue to be resolved and the age of this case indicates that the interests of justice will be served by an early resolution, I take the course recommended by Justice Ringera and set aside the award and replace it with the sum *of Kshs296,842/= (80,842/=+216,000/=).*

22. As costs follow the event unless there is no good reason to order otherwise, I allow the application with costs.

DATED: 27TH JANUARY, 2016

Ruling delivered in Open Court after matter listed for a second time and there was no appearance.

SIGNED AND DELIVERED AT NAIROBI THIS 8th DAY OF February 2016.

FARAH S. M. AMIN

JUDGE.

In the Presence of;

Court clerk: Joseph Kabugi

No Appearance for Applicant.

No Appearance for Respondent.