



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MISC. CIVIL APPLICATION NO. 88 OF 2015**

**ISSA & COMPANY ADVOCATES.....APPLICANT**

**VERSUS**

**ANHUI CONSTRUCTION ENGINEERING GROUP COMPANY LIMITED.....1<sup>ST</sup>  
RESPONDENT**

**CHINA AERO-TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATION...2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. The Application herein is a Notice of Motion dated **9<sup>th</sup> May 2016**. It is brought under Section 51 (2) of the Advocates Act, Rule 13A of the Advocates Remuneration order, Sections 3A and 63(e) of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It is supported by an affidavit dated 9<sup>th</sup> may 2016, sworn by **MANSUR M. ISSA**, an Advocate of the High Court of Kenya and practicing under the name and style of **ISSA & CO. ADVOCATES**.

2. The Application is seeking for orders:-

- **That, this Honourable Court be pleased to certify this application as extremely urgent, service of the same be dispensed with and hear *ex-parte* in the first instance**
- **That, this Honourable Court be pleased to enter judgment against the Respondents for the sum of Kshs. 174,283,035.00 being the amount certified on the Certificate of Taxation dated 17<sup>th</sup> march 2016.**
- **That, a Decree be issued in respect of the Certificate of Taxation dated 17<sup>th</sup> March 2016 and that the Applicant be at liberty to execute for recovery of the same in such a manner as a decree of this Honorable court.**
- **That the costs of this application be provided for.**

3. The Applicant's case is that, the Plaintiff offered the Respondent legal services however upon demand for the legal fees, the Respondent failed to settle the same. As a result of which, an Advocate-client Bill of Costs dated 12<sup>th</sup> February 2015, was informally filed. The Hon. Deputy Registrar dealt and taxed it unopposed at Kshs. 174,283,035. The applicant averred that the retainer is not in dispute.

4. That the Applicant is thus compelled to file this Application as a precursor to pursuing execution proceedings against the Respondents to recover the taxed sum. The Applicant further stated that, the Respondents are foreign Companies conducting business, situated within the People's Republic of

China and are in Kenya for purposes of performing a tender for the construction of the Greenfield Passenger Terminal Complex and associated works at Jomo Kenyatta International Airport. The Applicant averred that, recently it was announced to all and sundry that the Government of Kenya has cancelled the said tender. As such the Respondents have no reason to remain within the jurisdiction of this Honourable court. It is therefore the necessary for the Court to issue a decree to the Applicant to enable it commences execution proceeding against the Respondents, to avoid the same being rendered futile, superfluous and a mere academic exercise should the Respondents leave the jurisdiction of this Court during the pendency of this Application.

5. The Application was however opposed based on the Replying Affidavit sworn by **Mu Yunquing**, a General Manager in the Respondents' Company. He averred that, the aforesaid taxation arose from an *ex-parte* taxation by the Taxing Master on 17th march 2016, when the matter was come up for mention to confirm filing of submissions by the Respondent. That the Respondent Advocate on record could not file his submissions within the stipulated timeline and sought for indulgence from Mr. Issa Advocate and who confirmed his indulgence. However, in a strange twist of events, when the Counsel who held their brief sought for time as agreed with Mr. Issa, the same was opposed with the result that the Bill of Costs seeking a colossal sum of Kshs. 174,283, 035 was allowed as prayed.

6. Being aggrieved by the turn of events, the Respondent's Advocates wrote a protest letter dated 18th March 2016 to the Applicant's lawyer which was never replied to. The Respondent averred that, they filed a Notice of Objection to the taxation within the stipulated time under Rule 11(1) of the Advocates Remuneration Order, but due to the fact that reasons thereof have not been supplied by the Taxing Master, it's been difficult for them to contest the taxation. However, they are still desirous of filing the Reference to set aside the taxation Certificate on grounds inter alia that:

- **The Taxing Officer suffered an error in principle in failing to consider the items presented as against the relevant applicable schedule of the Advocates remuneration order and totally abdicated her judicial duty to tax the Bill of Costs yet the same was not consented to.**
- **The taxing Officer suffered an error in principle in making a drastic Order during a mention, which was an improper exercise of discretion leading to a gross miscarriage of justice.**

7. According to the Respondent the taxation given was grossly unreasonable in that, the subject matter was a review before the Public Procurement Review Board against the procuring entity, and was meant to merely compel the signing of a contract that had already been issued to the Respondent. Therefore there was nothing exceptional in regard to the business undertaken by the Advocate to warrant an award of a colossal sum of Kshs. 174,283,035. They disputed the allegation that the subject contract had been terminated arguing that no formal decision to terminate has been communicated to the Respondents by the procuring entity. They argued that, contracts are not terminated through the press.

8. In reaction to the allegation that they are likely to leave the Court's jurisdiction, the Respondent submitted that the same lacks foundations as they have tremendous local presence, for instance, where it bought Kshs. 6.4 billion stake from Centum and is also the main contractor in the Multibillion Shillings Two Rivers Development, an ongoing project. Further, the Respondents have the capacity to make good whatever judgment that may be entered against it upon conclusion of the intended Reference. As such, the Application herein is not urgent, is premature as the Certificate of Taxation sought to be enforced is still the subject matter of a challenge before the Court. That it is curtailing the Respondent's right to access justice and it should be rejected, as it is an abuse of the court process.

9. In response to the Replying affidavit, Mr. Mansur Muathe Issa, swore a Supplementary Affidavit dated 17<sup>th</sup> June 2016. He argued that, there are no proceedings in existence that are challenging the decision of the Taxing Master to date, even then, it is trite law that the existence of such proceedings cannot be a basis upon which the Honourable Court is barred from issuing a decree in respect of taxed costs.

10. He refuted the Respondent's allegations that the Certificate of Taxation arose out of 'ex-parte

taxation' and insisted that the Respondents sought for and were on several instances granted additional time, with final chance on 26<sup>th</sup> February 2016, to file their submissions but persistently failed for close to nine (9) months to defend the Bill of Costs. That subsequently the bill was taxed through written submissions, because the Respondents were not interested in opposing the Bill. As such, the Taxing Master was left with no option but to consider the Bill of Costs and Applicant's written submissions as unopposed and taxed the same as prayed. Thus, the Respondents cannot use these proceedings as an avenue to mount a collateral attack against the taxing master's decision.

11. In response to the allegations by the Respondents' Advocate that he agreed to indulge them, Mr Issa termed it as a figment of imagination arguing that, the Respondents are well aware or ought to be aware that the deponent is merely the client and litigant in this matter, and so any communication seeking for indulgence could only have been sought through his Advocates on record which has never been done. Hence, the contents of the 'letter of protest' were mystifying and did not merit a response from the Applicant.

12. He averred that, the Notice of Objection filed by Respondents is baseless as the fact that they willfully failed to defend the proceedings disentitles them from challenging the said decision. Furthermore, a Notice of Objection filed under Rule 11 of the Advocates Remuneration Order does not constitute a stay or act as a bar to the instant application. Therefore, whether or not the Respondents will file any ill-conceived reference against the Taxing Master's decision is an immaterial consideration in the instant Application. That the Applicant would be required to refund the money within the shortest time possible in the unlikely event that any reference is successful.

13. Similarly, the decision of the Taxing Master and the rationale behind the decision is not a relevant issue before the Court as the instant Application is not an Appeal against the Taxing Master's decision but merely an Application for issuance of a decree pursuant to the taxed costs.

14. He argued that the taxed costs were as per the lower scale of the Remuneration Order and as per the Applicant's uncontroverted Affidavit dated 9<sup>th</sup> June 2015 and written submissions dated 4<sup>th</sup> June 2015 which clearly demonstrated the following;

- **The subject matter of the request for review was in relation to a cancelled tender for the construction of the Greenfield Passenger Terminal Complex and Associated works at Jomo Kenyatta International Airport which was worth Kshs. 64,745,354,315.00;**
- **The Applicant filed a request for review on behalf of the Respondent before the Public Procurement Oversight Authority to challenge the decision to cancel the tender issued to the Respondent.**
- **The Applicant's firm successfully challenged the said decision as the Procuring entity was compelled to sign the contract with Respondents;**
- **The Respondents would have not enjoyed the fruits of the contract if not for the Applicant's hard work and toil;**
- **The Request for review was novel, precedent setting and extremely complex as compelling a Procuring entity to sign a contract was virtually unheard of at the time and the Applicant even successfully sought for the Deputy Registrar to enhance the Instruction fees;**
- **If the matter had been before the High Court the Applicant would have been entitled to a minimum of Kshs. 809,678,928.00.**

15. Therefore, the trifling of the Applicant's work and the benefit the Respondents derived from the same is another manifestation of the Respondent's deplorable conduct that nearly four (4) years after the subject matter of the taxation was concluded, they have failed to pay the Applicant a single cent towards its fees. Furthermore, the Respondents have not even refunded the firm the disbursements and filing fees. Therefore, the request for review and their inability to settle the same "flies in the face of their assertion that they have tremendous local presence".

16. In relation to the issue regarding the termination of the contract issued to the Respondents, the

Applicant argued that the Kenya Airports Authority has gone to great lengths to make it public through a press statement that they have cancelled the contract. A press release by a government body on such matter should not be taken lightly or shrugged aside as lightly as the Respondents want this Court to do. That ironically, the Respondents equally rely on a newspaper article to claim that they have tremendous local presence, a clear epitome of the application of double standards as “what is good for the goose must be good for the gander.”

17. The Applicant further argued that nobody has curtailed the Respondents’ right to access justice, save for their failure to defend the taxation despite having had an opportunity to do so. That, Justice does not exist in a vacuum and the Respondents indolence precludes them from seeking this Court’s intervention.

18. The Applicant reiterated that the Respondents have failed to plead or demonstrate any well settled legal principles that would prevent the Court from issuing a decree pursuant to a certificate of costs, as the instant proceedings are not for the execution of the amount in the taxed costs and therefore the Respondents’ opposition is therefore ill conceived.

19. As a result of the foregoing the instant application is not premature and is merited and it is in the interests of justice that the orders sought be granted.

20. I have considered the Application, the Affidavits and the rivalry submissions by the Learned Counsels. I find that several issues arise for consideration, they include but are not limited to whether:

- This Application is pre-mature;
- The Taxation Certificate arose from an ex parte taxation;
- The Respondent has filed a Reference and if so, whether it can act a stay of grant of orders sought herein;
- The sum awarded herein of Kshs. 174,283, 035 is colossal and or justifiable; and
- The Respondent has an arguable challenge.

21. In the same vein I find the following issues undisputed:

- A Certificate of Taxation for a sum of Kshs. 174,283, 035 was issued on 17<sup>th</sup> March 2016
- The Retainer herein is not in dispute; and

22. I wish confirm that I have read through all the authorities cited by the Parties and as much as I may not make reference to them individually, I have considered the legal principles therein in so far as they are relevant.

I also wish to observe right from the outset that some of the issues canvassed herein, go to the merit of the intended challenge and I will guard myself from that area.

23. The Application herein is based on Section 51 (2) of the Advocates Act. That Section gives the Court the discretion to enter judgment where a suit has not been filled for recovery of costs based on a bill of costs taxed and a certificate of taxation issued. However, that Section plainly requires that there should be no dispute to the retainer and the certificate of taxation should not have been set aside or altered by the Court.

24. These principles are down laid in several authorities which include inter alia the case of :

- **Mamicha & Company Advocates vs Kenya Knitting & Weaving Mills Limited, Milimani HCCCNo. 469 of 2004, and**
- **Hezekia Ogao Abuya t/a Abuya & Company Advocates vs Kiguru Food Complex LTD HCCC Application No. 400 of 2001**

25. Let me now address the issues herein. The first issue is whether the Application herein is premature. In this regard I note from the submissions of the parties and the Court record that, the Advocate-Clients of

costs is dated **12<sup>th</sup> February 2015**, and the Taxation Certificate **17<sup>th</sup> March 2016**. Immediately after the certificate was issued on 17<sup>th</sup> March 2016, on **18<sup>th</sup> March 2016**, the Respondents Counsel wrote a Protest letter to the Applicant. A perusal of the same reveals that, under paragraph 4 thereof the Respondent notified the “Applicant” (not his Lawyer) that they intended to file a Notice of Objection. The Respondent laments that, the said letter was not responded to but the Applicants argue that it was not worth a response as it was not addressed to the Applicants Lawyers.

Be it as it may, the matters proceeded with the filing of a Notice of Objection on 23<sup>rd</sup> March 2016. From the above analysis, it is clear there was no delay in filing the said Notice. However I shall revert to the issue as whether the Application herein is premature.

26. The next issue that I wish to address is there a reference filed. The answer is in the negative. The Respondents submitted that the failure to file one is due to the fact that they wrote to the Taxing Master to provide them with the reasons for the Taxation on **23<sup>rd</sup> March 2016** and send a reminder on **22<sup>nd</sup> April 2016** but to date they have not received the same. They annexed two letters to the Replying Affidavit marked “MY1” and “MY2” in support of the same. In that regard I find that the failure to file the intended Reference is far beyond the Respondents control.

27. The other issue I wish to address is whether an Application for reference, (if any), pending before the Court can be a bar for the Court to enter judgment as prayed for herein. In answer to this issue the Applicant referred the Court to several authorities where it has been held that indeed such proceedings do not operate as a stay. In that if because should such proceeding succeed then all that will be required would be a refund of the sum paid. The relevant cited authorities include the case of, *Njougoro & Company Advocates vs National Bank of Kenya Limited (2008) Eklr* and *Ahmednassir Abdikadir & Company Advocates vs National Bank of Kenya Limited (2007) e KLR*.

28. I wish to associate with the findings in these authorities but equally take cognizance of the observation by Azangalala J, in the case of *Nyakundi & Company Advocates vs Kenyatta National Hospital Board HCCC, No. 416 of (2004) e KLR*, that

**“ the principles that are considered when dealing with an Application under this rule (Order 41 Rule 4 of the Civil Procedure Rules) could be persuasive when the Court is considering an Application under the Advocates Remuneration Order for in both instances the Applicant seeks for Stay pending some other step in the proceedings”**

29. Finally, I address the issue of prejudice that may be suffered by either Party if the Application is or is not granted. I have considered submissions of both Parties as to their sound financial standing, although none of them provided documentary evidence in support thereof. I will have work with their averments in relation to the same, in the absence of evidence to the contrary.

30. Be it as it were, if the Application is not granted the orders as prayed, they will be prejudiced by the delay in payment of the subject sum; on the other hand the Respondent will have to seek for a refund thereof if the Reference succeeds.

31. Applying my own principle of the “**lesser evil**,” the Applicant can be compensated with costs, taking into account a possibility of the matter delaying in Court whereas it may be difficult for the Respondent claim interest on the refundable sum should the reference succeed. Which then is a lesser evil? I believe the Applicant would be in order to claim interest from the date of filing the matter herein.

32. I have also considered that in view of the fact that the Respondents have not been supplied with the reasons for the taxation and that an Objector can only file a Reference upon receipt of the said reasons, it will not be in the interest of Justice to shut them out of the seat of Justice at this stage. It’s on record they have moved without delay in their pursuit to challenge the Taxation decision and therefore to deny them an opportunity to be heard would not be in support of Article 48 of the Constitution.

33. I am also aware that the Applicant too should not be denied the right to enjoy of their hard earned legal fees whatever the amount may be. I am aware from their submissions that, not even the disbursement and filing fees has been paid, a fact not disputed. They too need Justice be and is to be seen done.

34. In fact from the record the Respondent made reference to “negotiation” hopefully a gesture of willingness to soundly consider settling whatever figure they deem owing to the Applicant. I need not replay a well known principle of Equity that, he who seeks Equity must go with ‘clean hands’.

35. However my I rest at what I have said and make the following orders which I believe will be in the interest of the parties. I disallow the Application as being premature for the reasons stated above.

36. However to protect the Applicant from any undue delay I order that:

- i. The Respondent shall file the intended reference within its 14 days of this order;**
- ii. The said Application should be set down for hearing within 30 days of this order;**
- iii. In default of compliance with the Order above under (a) and (b) above, the Application herein shall stand revived and allowed in terms of prayers 2, 3, and 4.**
- iv. The Parties are at liberty to negotiate any agreed sum outside the Court and record consent settlement of the same;**
- v. The costs of this Application abide the outcome of the Reference Application;**
- vi. Each party is at liberty to Apply.**

Those then are orders of the Court.

**DATED AND DELIVERED IN AN OPEN COURT AT NAIROBI, ON THIS 18<sup>TH</sup> DAY OF AUGUST, 2016.**

**G. L. NZIOKA**

**JUDGE**

**In the presence of:**

For the Applicant

For the Respondent

Teresia Court clerk