REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION No 233 of 2015

IN THE MATTER OF THE TAXATION OF COSTS

B E T W E E N:

MIGOS OGAMBO & Co ADVOCATES ……. APPLICANT

Versus

CHINA ELECTRIC WIRE CABLE IMPORT

& EXPORT CORPORATION ……..…… 1ST RESPONDENT

SINOTECH (K) LTD ……. 2ND RESPONDENT

R U L I N G

1. The Application before the Court is brought by the Firm of Migos Ogamba & Co Advocates. The Respondents are their former Clients who were involved in the Rural Electrification Programme by way of a contract dated 6th April 2007 with Gichuki Ventures Ltd.. The Respondents were parties to an Arbitration which culminated in an outcome they wished to challenge. They instructed the Applicants. The Applicants filed an application seeking an order setting aside the award and the removal of the Arbitrator.

2. Those actions gave rise to a Bill of Costs dated 27th June 2013 and lodged on the same day. That Bill was taxed and the Applicant seeks to have the Ruling of the Taxing Master (dated 21st October 2015) set aside in the Grounds set out in the Chamber Summons filed on 30th November 2015. The work carried out by the Advocates is alluded to by the Respondents in the Supporting Affidavit filed on 22nd June 2013 sworn by Yu Yang (who I assume is male) and was the General Country representative of the 1st and 2nd Applicants. At paragraph 3 he says "THAT upon delivery of the ruling we were dissatisfied with the same and advised out Advocates on record M/s Migos-Ogamba & Co Advocates to Appeal against the entire decision (Annexed and attached)" and "$. THAT thereafter our Advocates on record have filed Civil Apeal No 37 of 2001 (sic) at Nairobi. The Application was seeking to stop the enforcement of the Award of KShs 16,928,984.68. pending appeal.

3. The Ruling was Delivered by Hon Tanui Deputy Registrar or 21st October 2015. The Applicants were dissatisfied with the Ruling. On 27th October 2015, the wrote to the DR pursuant to paragraph 11(1) of the Advocates Remuneration Order for the reasons of the taxing officer's decision. That rule requires

them to obtain the Reasons. On 5th November 2015, the DR responded to the Applicant's Letter with an additional reference to Misc App 268 or 2013 and said "The reasons for the taxation are contained in the ruling delivered on 21st October 2015." The Record does not show whether or not that Ruling was provided to the Parties. However, on 12th November 2015, a Different firm B M Musau & Co Advocates wrote to the DR and asked for the two rulings to be verified as authentic. It seems they were provided with copies. The Rulings were verified on 23rd November 2015. On 30th November, the Applicants filed their Chamber Summons.

4. The Chambers Summons seeks the following orders:

> **(1) THAT** this honourable court be pleased to set aside the decision of the Taxing Master made on 21st October 2015.
>
> **(2) THAT** this honorable(sic) court be pleased to order that the Advocate/Client Bil of Costs dated 27th June 2013 be referred back to another taxing master with apropriate directons for re taxation or the same be dealt with as this onorable court may consider appropriate in the circumstances
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> **(3) THAT** the costs of this application be borne by the Respondent."

5. The Application was based on the folowing grounds:

> (1) THAT the taxing master erred in law and acted cotnrary to the clear provisions of the Advocates remuneration Order and in particular as regards to taxations of items 1 to 62 of the Advocate/Client Bill of Costs.
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> (2) THAT the taxing master erred in law and by aplying the provisions of schedule V! (1)(L) while addressing the issue of instructions fee on the suit hence fell into error thereof
>
> (3) THAT the learned taxing master failed to appreciate the nature and importance of the cause, the amount of work done by the Applicant, the value involved, the interest of the parties and the general conduct of the proceedings in awarding only Kshs.50,000 as instruction fees.
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> (4) THAT the taxing master erred in law by distinguishing the Arbitral Award from the Kshs. 16,928,984.68 which amount is the award of the Arbitrator against the Respondent.
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> (5) THAT the learned taxing master failed to areciate that the subject matter of the Aplication dated 2nd July 2010 filed by the Aplicant on behalf of the Resondent was an Arbitral Award of Kshs, 16,928,984.68.
>
> (6) THAT the learned taxing master erred in calculation of getting up fees based on an unfair figure of instruction fees.
>
> (7)THAT it is only fair and just that the taxation of the party and arty bil of costs dated 27th June 2013 be referred back to another Taxing Master with aprpriate directions thereof.

6. The Application is also Supported by the Affidavit of Senteu Marianyi Eliud. The Affidavit largely repeats the Application however, the salient points are set out in Paragraphs 9-13 of the Affidavit which set out that the taxing master erred in Law and in particular the Advocates Remuneration Order. Also that the Taxing Master failed to understand the issue before her and by distinguishing the award being appealed and stayed failed to appreciate the subject matter of the Application. It is said that as a consequence she erred in her calculations.

7. The Application was not served until 19th January 2016 and the Respondent did not respond until 16th February 2016, a month later. The Respondents first response was to file Grounds of Opposition. Ground 1 states that the Taxing Officer has not committed any error of principle in the taxation and the

amounts awarded are fair and reasonable. Ground 3 states that "On 7th December 2015, the Applicant accepted payment of Kshs.197,077from the Respondents as per the Ruling of the Taxing Master in full and final settlement of fees and cannot now purport that the said Ruling is unfair and defective. There was no evidence to substantiate that statement. Ground 4 states that the Application is bad in law, vexatious, without merit and should be struck out with costs.

8. After a further delay of almost 4 weeks the Respondent filed a Replying Affidavit sworn by a Davies Mulani. At paragraph 4, he says, "In compliance with the Taxing Master's Ruling, the Respondents issued a cheque for Kshs.314,090/= on 7th December 2015 in favour of the Applicant being settlement of the aount taxed which the Applicant acknowledged as full and final settlement of their Bill of Costs. Exhibits DM-1 and DM-2 are copes of the letter and cheque. It is noteworthy that the cheque was only issued after the Application was filed. The Deponent draws the conclusion that the "*Applicants cannot therefore on the one hand accept payment in full and final settlement of their Bill of Costs and on the other hand purport that the said Taxing Master's ruling is unfair and defective.*". In fact the challenge to the Ruling came earlier in time than the cheque was issued. Secondly, nowhere in the Letters has the Respondent asked the Applicant to accept payment in "full and final settlement of the Bill of Costs". In the circumstances both statements are factually incorrect. The Letter of 7th December 2015 states ; "cheque …. Drawn in your favour in full and final settlement of your fees as directed by the court." The words "Bill of Costs" do not appear. In the circumstances, that Ground of Opposition can be dismissed without more. In any event there is no correspondence demonstrating acceptance on those terms. The remainder of the Replying Affidavit purports to give evidence on behalf of the Taxing Master eg that she applied her mind to the relevant provisions. He even went as far as stating an insertion on a verified copy is a typographical error. One must ask, How does he know? Surely, that is a matter for the author of the Ruling? The Applicants have filed a Supplemental Affidavit.

9. Both Parties have filed Written Submissions. The Court has read them and the attached authorities. It is surprising to note that the Respondents sought to introduce new evidence, not contained in the Replying Affidavit by way of their Submissions. The file was not produced on several occasions when the matter was listed. The Court eventually had the benefit of the Parties Highlighting their respective submissions on 16th May 2016.

10. The Issues before the Court are few but nevertheless fundamental, and are as follows:

(1) Is this an appropriate case for the Court to intervene

(2) If the Court does intervene, what should it do, decide the matter or remit it for re-consideration

(3) Does the fact of payment alter the principles before the Court?

11. In ***First American Bank of Kenya v Shah and Others [2002] EA 64*** at page 69 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 inference that it was based on an error of principle".*

12. The starting point is to look at the Ruling itself. In it the Taxing Master found that the Application contained in the parent file does not contain a sum claimed. That is factually incorrect. The Application dealt with the Award in specific terms. Secondly, the Taxing Master relied upon a Ruling (INSERT) where the subject matter was applications for an injunction and declaratory Orders to support a proposition that whenever an Application relating to an Arbitration comes before the Court, no taxing officer will be able to ascertain or deduce the amount of the claim by the simple fact of an arbitration. That reasoning is fundamentally. It has no basis in law. That finding of itself is sufficiently flawed to justify setting aside the Ruling on the Taxation.

13. It is difficult to understand how the Taxing Master thought that a contested application would resolve itself without a hearing or a consent order. A contested hearing requires preparation, it is that preparation that is recognised in "getting up fees". Completely discounting that item, discounts the process of dispute resolution and therefore is a misdirection by the Taxing Master.

14. The subsequent challenge goes to whether the Taxing Master applied the correct schedules or parts of the ***Remuneration Order 2009*** in the correct way. However, having come to the decision she did in relation to the subject matter of the Bill all that follows is based upon an extremely shaky foundation and therefore cannot stand.

15. Should the Court remit the matter or carry out the taxation itself. There is authority to suggest that in simple and straightforward cases a Judge can replace the taxed figure. At page 71 of ***First American Bank of Kenya v Shah 2002*** supra Hon Ringera J (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 fee 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 KShs 105,247,351.35 and vary the order on taxation accordingly…."*

16. However, this is not a simple matter. The Bill of Costs contains 62 items each of which must be assessed based on the correct.

17. In the circumstances I order as follows:

(1) The Taxation dated 21st October 2015 is set aside

(2) Bill of Costs to be remitted to a different taxing office for reconsideration

(3) Respondents to pay the Applicant's costs on an indemnity basis. This Order is justified because they prolonged the proceedings by putting forward factual claims that were not demonstrated by their supporting evidence.

Order accordingly,

FARAH S.M. AMIN

JUDGE

Dated at NAIROBI THIS 8th day of November 2016.

DELIVERED AT NAIROBI this 24th day of November 2016

In the Presence of:

Isaiah Otieno – Court Clerk

Applicant: Mr Oganda

Respondents Mr Karani Holding Brief Mr Mulani