REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL &ADMIRALTY DIVISION

MISCELLANEOUS CAUSE NO. 605 OF 2011

IN THE MATTER OF THE ADVOCATES ACT,

CAP 16 OF THE LAWS OF KENYA

IN THE MATTER OF TAXATION OF COSTS BETWEEN

ADVOCATE AND CLIENT

NAMACHANJA & MBUGUA ADVOCATES :::: APPLICANT/RESPONDENT

VERSUS

IGAINYA LIMITED :: RESPONDENT/APPLICANT

R U L I N G

INTRODUCTION

1. The Chamber Summons application before the court is dated 4th February 2014 and is field by the Respondent/Applicant herein called "**the Applicant**" or Igainya) under Order 49 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act; Section 50 of the Advocates Act and Rule 11 of the Advocates Remuneration Order.
2. The application seeks the following orders:-

    1. ***The finding of the Principal Deputy Registrar of this court that the Respondent/Applicant herein IGAINYA LIMITED is liable to pay the costs payable by the clients of the Applicant/Respondent's Advocate in HCC 495 of 2009 of this division be set aside;***

    2. ***The Order of the Principal Deputy Registrar that the Respondent/Applicant do pay the Applicant/Respondent's Advocate Kshs. 3,351,723.18 or any other sum be set aside;***

    3. ***Costs of this application be provided for.***

3. The application is premised on grounds set out therein and is supported by affidavit of **Isaac Wanjohi** dated **4th February 2014** with its annextures and a **Supplementary Affidavit** of the same person dated **28th March 2014**. It is the Applicant's case that the Learned Principal Deputy Registrar (hereinafter referred to as "**the Registrar**") had no jurisdiction to entertain and determine the objection that the Applicant herein was not a client of the Respondent Advocates. The Applicant states that having correctly found as a fact that the Applicant was not a client of the

Advocate, the Registrar erred in proceeding to tax the Bill of costs despite objection without referring to the issue of whether or not the Bill should be referred to the Judge for determination. It is further alleged that the Registrar erred in taxing the bill without giving any opportunity to the Applicant's Advocate to respond to any of the items of the said Bill. It is also contended that the Registrar erred in failing to appreciate that, despite her finding that the Applicant was under the agreement between it and the Advocate liable, the Applicant not having been a party to the suit HCC No.495 of 2009 was unlikely to be knowledgeable of all the services rendered to the Respondents client and consequently was prejudiced or was likely to be prejudiced in the said taxation. Finally, it is alleged that the Registrar's decision to tax the bill against a third party, the Applicant, was not supported by any provision of the law or the rules and is consequently misconceived and an abuse of court process.

4. The application is opposed by the Applicant/Respondent (hereinafter called the Respondent) vide a replying affidavit of **Collins Namachanja** dated **11th March 2014** with its annexture. Mr. Namachanja described himself as a partner in the law firm of Namachanja & Mbugua, and that he was competent to depone to the affidavit. In brief response to the application Mr. Namachanja deponed as that the decision of the Taxing Officer on the Bill of Costs dated 28th June 2011 filed by Namachanja & Mbugua Advocates the Applicant/Respondent ("N&M") in this application, was delivered on 27th January 2012 when N&M was awarded the sum of Kshs 2,889,111.54 being instruction fee; Kshs 462,036.60 in VAT and Kshs 575/- in respect of disbursements, making a total sum of Kshs 3,351,723.18. A copy of the ruling is annexed to the Supporting Affidavit of Isaac Wanjohi and runs from page 16 to 20.
5. Mr. Namachanja in his supporting affidavit dismissed the grounds in support of the application. On ground no. (a), that the "*Registrar had no jurisdiction to entertain and determine the objection that Igainya was not a client of N&M"*, Mr. Namachanja deponed that no such objection was raised before the Registrar. The objection raised by Igainya is captured in its written submissions dated 3rd October 2011. See page 205 to 211 of "CN 1". It has nothing to do with the Registrar lacking jurisdiction. Counsel submitted that this is a new issue that Igainya is now raising. On ground no. (b), that "*having correctly found that Igainya was not N&M's client, the Registrar erred in taxing the Bill despite objection without referring to the issue of whether or not the Bill should be referred to the Judge for determination"*, the Counsel submitted that, there was no objection before the Registrar as alleged, nor was there a request that the matter should be put before a Judge for determination, and that this is a new issue that Igainya is now seeking to introduce. On ground no. (c), that "*the Registrar erred in taxing the bill without giving any opportunity to the Applicant's Advocate to respond to any of the items of the said Bill"*, Counsel submitted that this is factually incorrect. The submissions filed by Igainya's Advocates dated 3rd October 2011 and the reply dated 25th October 2011 were in response to the Bill. Even the ruling of the Registrar took note of the particular items that Igainya took issue with. At page 3 of the ruling, the Registrar notes ***"as the Respondent has not objected to any other items apart from the instructions fees which are items 1, 52 and 54, the court proceeds to tax as follows:-…".***
6. Counsel observed that, Igainya had all and was given all the opportunity needed to respond to the Bill of Costs. The Registrar cannot be faulted in any way. On ground no. (d), that "*the Registrar erred in failing to appreciate that, despite her finding that the Applicant was under agreement between it and the Advocate liable, the Applicant not having been a party to the suit HCC No. 495 of 2009 was unlikely to be knowledgeable of all the services rendered to the Respondents client and consequently was prejudiced or was likely to be prejudiced in the said taxation"*, Counsel submitted that this argument does not hold water at all for the following reasons:

- Igainya had counsel on record to represent it. Counsel must have understood what the issues were because there was no indication before the Registrar that Igainya did not understand what the Bill was all about. If it had any reservations, they should have raised them prior to their Counsel engaging in the taxation exercise.
- The Bill of costs was itemized, showing all the services rendered. It was very easy for Igainya to read and understand. There was also the option for Igainya to peruse the court file in HCCC No. 495 of 2009 if there was need.
- The record does not bear out any prejudice suffered by Igainya at all as alleged. Igainya has never disputed that it was the one to pay N&M's legal charges. The taxation process was simply to

determine how much N&M were to be paid by Igainya.

7. On ground no. (e), that *"the Registrar's decision to tax the bill against a third party, the Applicant, was not supported by any provision of the law or the rules and is consequently misconceived and an abuse of court process",* Counsel submitted that it is within the realm and jurisdiction of the Registrar to tax bills of costs, which is a matter of law and practice. The Registrar took note of the provisions of the Share Purchase Agreement dated 8th February 2011, and specifically clause 8, as the basis upon which she proceeded to tax the bill against Igainya. A copy of the Share Purchase Agreement is annexed to the Supporting Affidavit of Isaac Wanjohi and runs from page 1 to 8.
8. With specific reference to the Supporting Affidavit of Isaac Wanjohi sworn on 4th February 2014, Mr. Namachanja submitted that Clause 8 of the Share Purchase Agreement (see page 7 of annexure to Supporting Affidavit) provided for the payment of legal costs of drawing the Share Purchase Agreement and for the cases in court against the vendors by Igainya. Paragraph 4 is a clear admission that Igainya was to pay the legal charges as provided in clause 8 of the Share Purchase Agreement ("SPA"). Counsel submitted that the SPA specifically referred to HCCC No. 495 of 2009. Recital D of the SPA provides that,

   "The parties have agreed that the Purchaser shall procure the unconditional release and discharge of all personal guarantees given to Grofin by the Vendors and their respective spouses, namely Anim Ngu Muthi, Janet Muthoni Kabiru and Hellen Wangu Gatiramu and a consent order to the effect that the Guarantors have been discharged recorded in High Court Civil Suit No. 495 of 2009 in Milimani Commercial Courts and have also agreed that IL will drive the suit going forward and that it will take over any liabilities arising from the suit."

   And with regard to reference to N&M Advocates, Clause 1 of the Agreement defines "Vendor's Advocates" to mean "***Namachanja & Mbugua Advocates of P.O Box 16301-00100 Nairobi."***

   Accordingly, Counsel submitted that paragraph 5 of the Supporting Affidavit is factually incorrect.

9. Counsel submitted that a reading of clause 8 of the SPA together with recital D leaves no doubt that N&M was to recover their fees from Igainya. It is on the same understanding and premise that Igainya's directors, Engineer Isaac Wanjohi and Engineer Mutonyi held meetings with N&M to discuss the fees payable. See correspondence exchanged to that effect in "CN 1" from page 223 to228. As noted before, Igainya has never disputed the fact that its directors met N&M to discuss N&M's fees payable on the basis of clause 8 of the SPA.
10. Referring to paragraph 7 of the supporting affidavit, Counsel submitted that it is a correct observation that the SPA made reference to arbitration as a means of resolving disputes, but the arbitration would relate only to disputes between the parties to the SPA. Counsel submitted that there was no basis upon which Igainya refused to pay the fees due to N&M. In fact, having started discussions on settlement of fees, they are now estopped from making any arguments against their paying fees. As per clause 8 of the SPA, the moment the SPA was executed, Igainya became liable to settle N&M's fees without recourse to its clients. In terms of Recital D of the SPA, Igainya assumed all liabilities flowing from HCCC 495 of 2009, including any outstanding legal fees.

    Because Igainya had agreed to settle N&M's fees, and because the SPA was clear on that point, the approach taken By N&M to tax its Bill of Costs against Igainya was the most sensible and reasonable approach in the circumstances. There was no need to tax the Bill against N&M's clients when Igainya had stepped into their shoes and agreed to settle. Counsel observed and submitted that the Taxing Officer after looking at the SPA, said ***"The agreement for sale of shares dated 08/02/2011 between the parties as indicated defines the purchaser as 'Purchaser means IL or any nominees of the purchaser IL stands FOR IGAINYA LIMITED OF P.O BOX NO. 40370-00100 NAIROBI which expression is IL. At part D of the agreement it states that IL will take over/drive the suit and take every liability arising from the suit in 495/2009. Clause***

8 – legal fees – clearly states at line 4 'shall be borne by the purchaser.'

Counsel observed that the issue here was clearly not one of retainer. It was who was liable to pay. The agreement says it all. It is IL. Counsel concluded that the Taxing Officer correctly interpreted the provisions of the SPA, especially the import of clause 8.

11. Mr. Namachanja submitted that the Bill of Costs as drawn represented all the services rendered by N&M and for which payment was sought. Igainya had counsel on record during taxation of the Bill of Costs and filed their submissions and legal authorities in opposing the Bill of Costs. The injustice of this matter is Igainya blatantly and without shame refusing to pay N&M, even after engaging in discussions. This is well after it had secured its position in getting everything done in its favour under the SPA. Counsel drew the attention of the Court to the written submissions of Igainya dated 25th October 2011, submitted in reply to N&M's submissions dated 5th October 2011, running from page 229 to 232 of "CN I". In those submissions, Igainya submits in part at page 230, paragraphs 1 and 2, in the following manner:

"In our humble submissions…we wish to state that the Respondent does not dispute the fact that it entered into an agreement with the 2nd-5th Defendants to pay their costs aforesaid. What the Respondent is disputing is whether the Applicant is the right party to enforce the contract in view of the fact that the said Applicant is not a party to it. In other words, who between the Applicant and the 2nd – 5th Defendants should enforce the contract?"

And at page 231 of "CN 1", paragraph 2 of the submissions,

"The agreement to pay the costs of the suit was between the 2nd-5th Defendants and the Respondent. The Applicant was merely the advocate who acted for the 2nd – 5th Defendants. If there is any breach of contract on the part of the Respondent the right party to seek redress is the 2nd – 5th Defendants in the suit and not the Applicant herein… This does not mean however, that the Applicant is not entitled to its fees. That is not what the Respondent is saying. The Respondent's argument herein is simply that the mode adopted by the Applicant to recover its fees is unprocedural and cannot be sustained and/or upheld by this honourable court."

Counsel asked the Court to uphold the decision of the Registrar as there is no substantive or credible attack against any portion of the Registrar's ruling.

12. In his supplementary affidavit, Isaack Wanjohi countered Mr. Namachanja's allegations and stated as follows:

a. ***That no Advocate and client relationship between Namachanja & Mbugua Advocates and Igainya Limited existed.***
b. ***That no instructions were at any time given by Igainya Limited to Namachanja & Mbugua Advocates to render any services to them in H.C.C No. 495 of 2009.***
c. ***No services were in fact rendered by the said advocates to Igainya Limited.***
d. ***Igainya Limited was not a party in H.C.C No. 495 of 2009.***
e. ***That Igainya Limited is a separate legal entity from the 9th and 10th Defendants, parties in H.C.C No 495 of 2009.***
f. ***That there was lack of privity of contract between the Namachanja & Mbugua Advocates and Igainya Limited in the Share Purchase Agreement (SPA) dated 8th February 2011. A Photostat copy of the said Submissions is exhibited at pages 1 to 7.***

13. Mr. Wnajohi deponed that in view of the foregoing the Learned Taxing Officer's jurisdiction was only limited to matters connected with or concerning the taxation of items in the Bill of Costs before her. Where fundamental issues had been raised on whether or not the Applicant was duly retained, or whether or not Igainya Limited was a party to H.C.C No. 495 of 2009 or whether or

not there was privity of contract between the Applicant and Igainya Limited, those issues ought to have been determined by a High Court Judge. In the circumstances, the Applicant's assertion in paragraph 7 (a) and (b) of the Replying Affidavit that the issue of jurisdiction was never raised is misconceived as it is evident that the learned Taxing Officer had no jurisdiction *ab initio* to hear and determine the said Bill of Costs. Mr. Wanjohi deponed that, when the said Bill of Costs came up for hearing on 3rd October 2011, the Applicant acknowledged the Respondent's Preliminary Objection and sought leave to file a response thereto by way of Further Written Submissions. The relevant sections of the proceedings are exhibited ***at pages 13 to 14***. Procedurally, the Learned Taxing Officer ought to have appreciated, which she failed or neglected to do, that before the taxation of the Bill, the grounds raised in opposition aforesaid ought to have been referred to a Judge of the High Court for determination as the Registrar did not have jurisdiction to determine them. In view of the foregoing, the deponent stated that it is not true that Igainya Limited ***"had and was given all the opportunity needed to respond to the Bill of Costs"*** as the said response was only available to Igainya Limited after determination of the issues raised in the Preliminary Objection by a Judge. In the circumstances, the deponent reiterated that the learned Taxing Officer's decision to tax the bill against Igainya Limited, a third party, was not supported by any provision of the law or the rules and is consequently misconceived and an abuse of the court process.

14. That in reply to paragraph 8 of the said Replying Affidavit which touches on the Share Purchase Agreement (SPA) dated 8th February 2011, Mr. Wanjohi deponed that the Learned Taxing Officer had no jurisdiction in the first place to make a finding on the said agreement as jurisdiction is a preserve of a Judge of the High Court. In the circumstances, the decision of the Learned Taxing Officer should be set aside forthwith as it is null and void *ab initio*. In view of the fact that this honourable court is now properly seized of the case it should make a finding on the issues raised as regards the Share Purchase Agreement (SPA) dated 8th February 2011 namely:

a. ***whether a party can sustain a Bill of Costs against another party who is not a party to a suit, the subject of taxation.***
b. ***whether a third party not privy to a contract between two parties can enforce such a contract.***

SUBMISSIONS

15. With the leave of the court, parties filed written submission to the application. I have considered those submissions which are very elaborate from both parties. From the consideration of those submissions this Court finds that the following issues emerge for consideration.

a. whether the taxing officer had jurisdiction to entertain and determine the objection that the Applicant herein was not a client to the Respondent herein;
b. whether Advocate-Client relationship existed between the Applicant and the Respondent;
c. whether the Respondent can enforce the terms of the PSA to which is not a signatory to;

16. On the issue number one as to whether the taxing officer had jurisdiction to entertain and determine the objections raised by that the Applicant herein**,** the Applicant submitted that the jurisdiction of a taxing master to tax Bill of Costs is provided for in the Advocates (Remuneration) Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. This is provided for under **paragraphs 2, 10** and **13** of the remuneration order. In support of this view the Applicant cited the case of ***Mugambi & Co Advocates –vs- John Okal Ogwayo & another [2013] eKLR***, where the issue was that there was no advocate/client relationship between the Advocate and the Clients, and so the Advocate was not entitled to any costs from the Clients that could be taxed. In the Clients by their application were challenging the retainer claimed by the Advocate. In that case, **Waweru J.** held that the taxing officer did not have jurisdiction to hear and determine the Client's chamber summons dated 28th February 2011 to strike out the Advocate's bill of costs because the issue being canvassed in the application was whether or not the Advocate was entitled to costs in the first place from the Clients. He further stated thus:

The jurisdiction of a taxing officer is provided for in the Advocates (Remuneration) Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. See paragraphs 2, 10 and 13 of the remuneration order.

Where the very fundamental issue whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer, that issue ought first to be determined by the court. "Court" is defined in section 2 of the Advocates Act, Cap 16 as the High Court. "Court" is thus not the taxing officer or a deputy registrar of the court.

The court in the case came to that conclusion that where an issue is raised as regards to retainer, that issue ought to be determined by a court as defined in Section 2 of the Advocates Act. In that definition, a taxing officer/master or a deputy registrar is not a court. Therefore, it was submitted for the Applicant that, when the Applicant herein raised the issues regarding to retainer and whether the Respondent could claim rights under PSA, these are substantial matters that the learned Deputy Registrar ought to have referred to court with competent jurisdiction to determine the same before she could exercise her jurisdiction.

In response to this issue the applicant submitted that in considering this aspect, the Taxing Officer was of the view that what was in issue between the parties was not whether there was a relationship of client/advocate, but it was a question of who was to pay the Advocates' legal costs. In the Taxing Officer's ruling, it is stated ***"…it is not about retainer, but liability."*** The Taxing Officer cannot be faulted for following the clear wording of clause 8.

I have considered this issue. This Court is of the view that a proper interpretation of Clause 8 of the Agreement had nothing to do with a retainer but was one of liability to pay the Advocates fees, and in that respect Igainya is liable to pay the Advocates legal costs.

17. The second issue is whether Advocate-Client relationship existed between the Applicant and the Respondent. The Applicant addressed this issue and stated that the Applicant was not a party to H.C.C No.495 of 2009; and that the Applicant was a separate entity from 9th and 10th Defendants. The Applicant submitted that it was not disputed that the Applicant, Igainya Limited was not a party or made a party to the said H.C.C NO 495 OF 2009. In the circumstances, it was submitted that the said Bill of Costs was misconceived as an advocate/client Bill of costs could not succeed in recovery of advocate's fees in a suit where the Respondent in the said Bill of Costs was not a party to the suit, the subject of taxation. **Section 2 of the Advocates Act** defines a "client" to include:

"Any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity has power express or implied, to retain or employ, and retains or employs or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs."

The Applicant submitted that a client-advocate relationship arises when a client retains an Advocate to offer legal services specifically or generally. In **BLACKS LAW DICTIONARY, 6th Edition, 1990,** the word retainer has been explained as follows:

"In the practice of Law, when a client hires an attorney to represent him, the client is said to have retained the Attorney. This act of employment is called the retainer. The retainer agreement between the client and Attorney sets forth the nature of services to be performed, costs, expenses and related matters."

Further, in **STROUDS JUDICIAL DICTIONARY of words and phrases, 1986, Vol 4 at page 2283,** it is posited that to retain is "to keep in pay", "to hire." Finally, in **WORDS AND PHRASES LEGALLY DEFINED, 2nd Edition, Vol. 4 by JB Saunders,** it is explained that:-

"The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitors retainer by that client, consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment."

18. The Applicant did not instruct the Respondent herein to act on his behalf and therefore, could not become liable to pay a person to whom he did not instruct. No Advocate- Client relationship existed between the Applicant and the Respondent. The Applicant further submitted that it was a separate legal entity from the 9th and 10th Defendant and that the Applicant was not enjoined as a party to H.C.C NO. 495 2009 by virtue of the consent filed in court on 17th February 2011 *inter alia* enjoining the 9th and 10th Defendants.
19. The Applicant also submitted that the Respondent cannot enforce the terms of the PSA to which it is not a signatory to since there is no privity of contract and costs in Clause 8 relate to costs arising out of disputes in the Agreement. The Applicant submitted that the Respondent's herein Bill of Costs as against the Applicant in H.C.C 495 of 2009 is purportedly predicated on an Agreement for Sale of Shares dated 8th February 2011. Clause 8 of the said Agreement provides in part as follows:

"Legal costs in relation to the negotiations leading up to the sale of the Shares and to the preparation, execution and carrying into effect of this Agreement and any documents thereof and of cases in court against the Vendors and their spouses in their capacity as directors of and guarantors for the Company shall be borne by the Purchaser."

20. The Respondent herein relied on the said clause to claim entitlement to legal fees from the Applicant. It is submitted for the Applicant that the said claim and ultimately, the Bill of Costs herein was misconceived for the reason that basic contractual law requires that there must be a privity of contract between parties to the contract in question. In the said agreement, there is no privity of contract between the Applicant and the Respondent. The said Agreement for Sale of Shares was made between the Respondent on one part and the 1st - 5th Defendants on the other part. The Respondent was not a signatory to the said agreement at all and therefore could not purport to benefit from it. The Respondent was not a party to the said Agreement, Clause 8 of thereof is not operative and/or enforceable in favour of the Respondent.
21. It was also submitted that the said costs in Clause 8 of the Agreement relate to costs arising out of a dispute between the parties in the Agreement and not in H.C.C 495 of 2009 or any other suit. The dispute in H.C.C 495 OF 2009 relates to a claim of Kshs 55,000,000.00.96 from a purported loan given to the Defendants by the Plaintiff. It had nothing to do with the transfer of shares which is the subject matter of the said Agreement for Sale of Shares. Besides, there is no dispute between the parties pertaining to the Agreement for transfer of Shares to justify the Applicant's Bill of Costs which is the subject of these proceedings.

22. The Respondents on their part submitted that Igainya has focused on the argument that there was no client/advocate relationship between themselves and the Advocates pursuant to which the Advocates' Bill of costs could be taxed. However, the Advocates' position has been that pursuant to clause 8 of the Agreement for Sale of Shares, Igainya agreed and undertook to settle the legal costs of the Advocates. A copy of the Agreement for Sale of Shares runs from page 20 to 27 of the Advocates' Documents. Paragraph 4 of the Supporting Affidavit of Isaac Wanjohi partially admits this, that ***"Clause 8 of the said Agreement provided that legal costs of drawing the said Agreement and of the vendors in new capacities as directors of the said company shall be borne by the Applicant."***

The Respondent submitted, and rightfully so in my view, that the issue here really is not about whether there was client/advocate relationship, but who is liable to meet the legal costs of the Advocates on the basis of the terms of the Agreement for Sale of Shares dated 8th February 2011. This is precisely the approach taken by the Taxing Officer. At page 2 of the Taxing Officer's ruling, the Taxing Officer's finding was ***"…court has also looked at the authorities submitted. The issue here is clearly not one of retainer. It is who is liable to pay…"***. In this reference,

Igainya has not demonstrated any way in which the ruling of the Taxing Officer was wrong on this particular aspect.

23. Indeed, the Advocates have at all times explained the basis upon which the Bill of Costs was filed. At no point has it ever been on the basis that the Advocates represented Igainya in any matter. The basis has been demonstrated to be clause 8 of the Agreement. By virtue of Igainya assuming liabilities flowing from the terms of the Agreement, it is my finding that they assumed the position of the Advocates' clients who were the vendors of the shares in the Agreement.
24. Referring to the interpretation of the said clause 8 of the Agreement, I accept the Taxing Officer's interpretation thereof as read together with recital D of the Agreement, that Igainya was liable to pay legal costs. See finding of the Taxing Officer at page 2 of the ruling, which is at page 17 of the Supporting Affidavit of Isaac Wanjohi sworn on 4th February 2014. Recital D of the Agreement of the Agreement reads ***"The parties have agreed that the Purchaser shall procure the unconditional release and discharge of all personal guarantees given to Grofin by the Vendors and their respective spouses…and a consent order to the effect that the Guarantors have been discharged recorded in High Court Civil Suit No. 495 of 2009 Milimani Commercial Courts and have also agreed that IL will drive the suit going forward and that it will take over any liabilities arising from the suit."*** Under clause 1 of the definitions in the Agreement, "Purchaser" means "IL" and "IL" refers to Igainya Limited.

    I find that it was clear to all the parties during the drafting of the Agreement that liabilities under clause 8 would include legal costs incurred by the Advocates in the preparation of the Agreement as well as representing their clients in HCCC No. 495 of 2009.

25. I have also considered the Parties submissions before the Taxing Officer. Igainya never came out outrightly to claim that it is not liable to meet the legal costs due. Some excerpts from Igainya's submissions filed through its Advocates on record dated 25th October 2011, at pages 229 to 231 support this view:

    Igainya agrees that it was to take over liabilities arising from the suit, but states that it was not enjoined in the suit. Paragraph 3, page 1 of the submissions.

    Igainya submits that its obligations is only towards the 2nd to 5th Defendants and not the Advocates. Last paragraph on page 1 of the submissions. It needs to be borne in mind that the 2nd to 5th Defendants were the clients of the Advocates and also Vendors of the shares under the Agreement. They were also directors in EM Communications Limited, the company in which their shares were held.

    Page 2 of the submissions, paragraph 1, last sentence, it is submitted that ***"In our humble submissions in reply thereto, we wish to state that the Respondent (Igainya) does not dispute the fact that it entered into an agreement with the 2nd – 5th Defendants to pay their costs aforesaid. What the Respondent is disputing is whether the Applicant is the right party to enforce the contract in view of the fact that the said Applicant (Advocates) is not a party to it. In other words, who between the Applicant and the 2nd – 5th Defendants should enforce the contract?..."***

    Page 3 of the submissions, paragraph 2, Igainya submits that,

> ***"The agreement to pay the costs of the suit was between the 2nd -5th Defendants and the Respondent. The Applicant was merely the Advocate who acted for the 2nd- 5th Defendants…This does not mean however, that the Applicant is not entitled to its fees. That is not what the Respondent is saying. The Respondent's argument herein is simply that the mode adopted by the Applicant to recover its fees is unprocedural and cannot be sustained and/or upheld by the honourable court."***

26. It is with the understanding of clause 8 and Igainya's obligation and liability to pay that Igainya's

directors, Engineer Isaac Wanjohi and Engineer Mutonyi held a meeting with the Advocates to discuss the Advocates' legal costs. This was after the transaction had been completed and all the documents pursuant to the Agreement had been forwarded to Igainya. At page 143 of the Advocates' Documents is a letter dated 24th March 2011 forwarding the documents and asking for payment of fees.

27. With regard to the meeting held between Igainya and the Advocates to discuss the question of legal costs payable, Emails at page 223 of the Advocates' Documents are self explanatory with email of 1st April 2011 from Eng. Wanjohi saying that the Advocates' fees was a subject for discussion in a meeting;

Email from the Advocates of 14.4.2011 at page 224;

Letter dated 18th April 2011 at page 226 and letter dated 31st May 2011 at page 225. The letter at page 225 refers to the meeting held on 6th May 2011.

Letter dated 3rd June 2011 from Isaac G. Wanjohi at page 227 and the Advocates response thereto dated 6th June 2011 at page 228, all on the subject of fees payable.

28. The issue then is, having been established that Igainya was to pay, how should the Advocates' fees payable be ascertained? In my view, apart from opting to tax the Bill of Costs, the Advocates saw no other reasonable, cost effective and efficient mode to ascertain how much was due to the Advocates from Igainya. It was also not in the contemplation of the parties as suggested by Igainya, that the Advocates would first have to follow up the 2nd -5th Defendants for payment before resorting to Igainya. Igainya's suggested mode of how the Advocates should get their fees is contrary to the provisions of clause 8 of the Agreement. Paragraph 8 of Isaac Wanjohi's Supporting Affidavit states what in Igainya's view, are the options the Advocates should have pursued to get paid: Firstly to render a fee note for services rendered to the Advocates' clients, and if the said clients defaulted to settle the fees within the prescribed time, to file and Advocate/Client Bill for recovery of costs against the Advocates' clients. Apart from the fact that this suggestion is contrary to the agreed arrangement under the Agreement, it actually mirrors what the Advocates did on the understanding that Igainya had stepped into the shoes of their clients who had been discharged from all liability to pay legal costs after the signing of the Agreement. The argument also misses out on the fact that the Advocates were acting in their professional capacity in rendering legal services, and not as parties to the Agreement.
29. Liability having rested with Igainya to pay legal costs in terms of clause 8, and Igainya having taken over the liabilities of the Advocates' clients in HCCC No. 495 of 2009, I find that the Advocates' approach in taxing the Bill of Costs directly against Igainya was not unprocedural nor unreasonable. It was the most cost effective way to summarily determine the amount due in case of a stalemate.
30. Further, in the totality of the matter and with the overall picture in mind, that ultimately, Igainya was to pay legal costs no matter the route followed, I find that Igainya did not and has not suffered any prejudice arising from the taxing of the Bill of Costs.
31. I have carefully considered the Taxing Master's decision which in my finding I uphold. In the case of **First American Bank of Kenya v Shah and Others [2002] 1 EA 64**, the Court held that ***" The High court was not entitled to upset a taxation merely because, in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer's decision unless 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…"***

At paragraph g/h, the Court continued that, ***"Though the High Court had the jurisdiction and the discretion to reassess the bill itself, the normal practice where the Taxing Officer's decision disclosed errors was to remit it back to the Taxing Officer for reassessment unless the court was satisfied that the error did not materially affect the assessment."***

In this particular case, the error complained of, if any, does not relate to the actual taxing of the bill

of costs and the amount awarded to the Advocates. This is a proper case for this Court to consider the Bill of Costs without remitting it back to the Taxing Officer.

In the case of **Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory [1970] EA 141**, the Court of Appeal held at paragraph G that ***"where a judge has a discretion to retax a bill himself, where a fee has to be reassessed on different principles it should generally be remitted to the same or a different taxing officer."***

32. Again, I find that the Bill herein does not call for reassessment at all, and if it does, then it has nothing to do with the fact that the Taxing Officer applied different principles in making the assessment. And then in the case of **Thomas James Arthur v Nyeri Electricity Undertaking [1961] EA 492** , it was held that "***where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases."*** No question has been raised by Igainya that the amount of the Bill is excessive. And I have already found that the Taxing Master had the jurisdiction to tax the Bill.
33. The upshot of the above is that the Applicants Notice of Motion herein is dismissed with the following further orders:-

a. ***This Court upholds the Order of the Principal Deputy Registrar (Taxing Master) that the Applicant herein do pay the Respondent's herein Advocates Kshs. 3, 351, 723.18 and the said amount which is held in an account in the joint names of the Advocates in Commercial Bank of Africa shall be released to the Respondent herein within 7 days from the date of this Ruling.***
b. ***Costs of this application shall be for the Respondent/Advocates herein.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Wawire for the Applicant

Mr. Namachanja for the Defendant

Teresia – Court Clerk