REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI CIVIL DIVISION

MISCELLANEOUS CIVIL APPLICATION. NO. 393 OF 2011

KYALO MBOBU T/A KYALO & ASSOCIATES ADVOCATES …….APPLICANT

VERSUS

JACOB JUMA……..RESPONDENT

RULING

This ruling determines the reference filed on 13th August 2014 by the client Jacob Juma against the advocate Kyalo Mbobu T/A Kyalo Mbobu & Associates challenging the decision of the taxing officer Honorable A.K. Ndung'u (Mr) Deputy Registrar delivered on 30th July , 2014 in respect of an advocate/client bill of costs dated 17th September 2011.

The reference challenges items NO. 1,41,42,192, 359, 460,468, all the items consented on and comprised in a consent letter dated 16th June 2014 and filed in court on 23rd June 2014 , the deduction of the taxed off items and full credit for a sum of Ksh 605,000 paid to counsels representing the client in the suit and the gross total tabulation.

The client also seeks for an adjustment to the taxation on the contested items as proposed or as the justice of the case may require, in lieu of remitting the contested items back to a taxing offer. He also prayed for costs of the reference. The reference dated 12th August 2014 was premised on the grounds that:

a) The taxing officer erred in principle in the following aspects:-

(i) In proceeding to arbitrarily assess, without jurisdiction, proper basis or discretion, the instructions fees(items No.1) purported to exercise discretion in a capricious manner that was unjustified , oppressive and not judicial by increasing the maximum allowable instructions fees of kshs 629,500 by more than double to 1,629,500 9 translating to therefore being kshs 2,444,250.00 advocate /client fees which is grossly exaggerated, excessive and gratuitous taking into account that the matter is still pending in court and only an application has been handled.

(ii) The Deputy Registrar erred in allowing any costs under items 41, 42,192, 359, 460, 468, under the Advocates Remuneration Order.

(iii) The taxing officer erred in principle by failing to appreciate that the consented items in the bill amounting to Ksh 214,683.00, the uncontested items in the bill amounting to Ksh 215,32.00, the disbursement amounted to Ksh 13,178.00 and instead proceeded on the wrong premises that misrepresented the bill, hence wrongly allowed an unjustified surplus of kshs 5,573,682.00 in favour of the Advocate.

The Reference is further supported by the affidavit of Jacob Juma sworn on 12th August 2014.

According to the client, the taxing officer erred in law and in effect violated the provisions of the Advocates Remuneration Order by awarding full instruction fees of Ksh 629,500 on a claim for the sum of kshs 41,400,000 whereas the court case is still pending and there was another advocate on record representing him in ELC No. 312 of 2009.

I his view, the fees as allowed was not commensurate with the services rendered and is charged for the entire suit.

The client complains that the taxing master had no jurisdiction to increase the instructions fees by an extra one million, which exercise of discretion was arbitrary, capricious, excessive , unreasonable and unjustified and gratuitously given to the advocate.

It is further contended that the parties advocates had consented to some items in the sum of kshs 214,683 as per the signed consent letter dated 16th June 2014 and filed in court on 23rd June 2014 but the taxing officer ignored the said consent.

The client further 0insisted that the taxing officer should have given credit a sum of kshs 605,000 paid to the lead advocate and the lead counsel.

That some items were unsupported and that taking into all the circumstances of the case, the taxing officer should have allowed only kshs 1, 252, 919. 58 and not kshs 5,573,683.33.

The advocate opposed the Reference as filed and filed replying affidavit on 4th September 2014 sworn by Kyalo Mbobu on 28th August, 2014. Mr Kyalo Mbobu supports the decision of the taxing officer and maintains that the taxing master did provide satisfactory explanation in his ruling why he arrived at the taxed bill.

It is further deposed that the client cannot file Notice of objection as well as a chamber summons seeking to vary and or set aside the order of the taxing officer, and or alleging irregularities in the taxation of the bill.

It is further deposed that there was no dispute regarding disbursement. Further, that the suit property is valued at over 150,000,000 before valuation and not 41,400,000.Mr Kyalo Mbobu denied that the Ksh 605,000 was paid to him as the evidence available shows that it was paid to J.P Machira & Company Advocates who were instructed by the client herein.

He maintains that the instructions fees was not agreed upon hence the taxing officer was justified in increasing it having explained why he allowed it, owing to the volume and complexity of the work done and that as an advocate who had done work for the client as instructed, he should be remunerated and not impoverished. Counsel complains that by the respondent writing to the Chief Justice over the matter, he was intimidating the Deputy Registrar so that they can deviate from their just cause and urged the court to dismiss the chamber summons.

Both parties agreed to dispose of the chamber summons by way of written submissions after attempts to resolve the dispute out of court failed to bear fruit. The advocate sought leave of court on 18th December 2014 to file a supplementary affidavit and was granted 14 days but as at the time of writing this ruling, none had been filed.

On 9th February 2015 this court confirmed that indeed both parties had filed their respective submissions. The applicant/client filed his on 30th January 2015 whereas the respondent /advocate filed his on 6th February 2015.

The parties' respective submissions mirror the depositions in their sworn affidavits. According to the client , the taxing master inadvertently failed to factor in a consent filed in court on 23rd June 2014 where several items were agreed upon and adjusted accordingly. It is submitted on the client's behalf that the contested items are

- Instructions fees
- Arithmetical calculations
- Whether full credit should be given to monies paid to the advocate and his lead counsel Mr J.P Machira.

In the clients view, the taxing officer correctly estimated the value of the property as kshs 41,400,000 and therefore he was right in assessing party and party costs on the said value as kshs 629,500. The quarrel, however, is that the taxing officer proceeded to increase the instructions fees by a further 1,000.000/- which increase was in the client's view, unjustified, oppressive, excessive , unconscionable and gratuitous wrong exercise of his judicial discretion. He complains that the suit had not even been set down for hearing and that the prayers were the usual ones in the suits seeking for injunction, declaration, damages and interest at commercial rates, disclosing nothing extra ordinary in nature to warrant the exorbitant instructions fees.

The client submits that there was no material before the Deputy Registrar that guided him in arriving at the conclusion that the matter was complex. Further, that the Deputy Registrar did not apply himself to the principles in Rule 5 of the Advocates Remuneration Order which prescribes the exercise of discretion to award fees beyond the prescribed fees. That since the advocate was assisted by lead counsel in a simple claim of alleged trespass to property and loss following the trespass, there was less labour expended by the advocate. Further, that in such a suit, clear records from lands office would be readily available to identify the true owner of the land and the trespasser.

That the Deputy Registrar introduced an element of surprise, caprice and arbitrariness in the taxation process. Further, that he did not consider the submissions that the fees paid to the lead counsel should be discounted since J.P. Machira participated in the suit with full consent and authority of the advocate. He urged the court to consider Rule 79 of the Advocates Remuneration Order to award costs at a lower rate than that provided by the order since the suit had not taken off and there was a new advocate on record who will be paid full fees for the services rendered which services are a lot more than what the advocate did.

On the wrong computation of the fees, the client submits that the correct total figure should be 1,252, 919.58 and not 5,573,682.33.

In the advocate's opposing submissions, it is contended that the contested bill of costs is in respect of instructions given to the advocate by the client to defend in **HCC 312/2009, Amrittal Shah & Another vs. Jacob Juma** & 2 others which suit was highly contentious over the ownership and possession of L.R NO. 18485(IR 64014) Loresho, Nairobi which is approximately 7 acres along Kabete road, near the Kenya School of Government.

Further, that at the time when the client /advocate relationship soured, the pleadings had closed and that the advocate industriously opposed an injunction leading to the dismissal thereof vide ruling delivered on 26th July 20101 and therefore the issues for trial having been settled, the suit was for all practical purposes ready for trial.

The advocate framed three main issues for determination in the chamber summons namely:

i. Whether the exercise of the discretion of the taxing master in assessing the applicable instructions fees is proper,
ii. Whether there were any arithmetical errors of computation by the taxing master.
iii. Whether monies paid to a lead counsel J. P. Machira should be deducted from the instructions fees due to the advocate on record to wit, the applicant.

On issue No. 1, the advocate submits that the taxing master correctly exercised his discretion in assessing the instructions fees as he did and that he applied himself to the settled principles . He relied on the case of **Thomas James Arthur vs. Nyeri Electricity Undertaking (1961) EA 492** wherein it was held that:

"1) Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters which taxing masters are particularly fitted to deal with and the court will intervene only in exceptional circumstances.

(ii) The fee allowed was higher than seemed appropriate , but in a matter which must remain essentially one of opinion, it was not so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle."

The advocate has disputed the estimated value of the land as found by the taxing officer and notwithstanding the absence of a valuation report, urges this court to take judicial notice of the astronomical rise in value of the real estate in Nairobi and to find that the value thereof was at least kshs 150,000,000 and not shs 41.4 million suggested.

The issues for determination in this reference are clearly three.

(1) Whether the taxing officer applied wrong principles in assessing item 1 of the Advocates bill of costs by increasing the instructions fees by an additional 1 million shillings, having found that from the pleadings the value of the subject matter was kshs 41,400.000.

The advocate for the client submits that the taxing officer should have stopped at the figure of kshs 629,500 having found the value of property to be 41.4 million and that the extra 1 million assessed in favour of the advocate was gratuitous, capricious, unjustified and excessive as there was no justification for such an award.

On the other hand, the advocate supports the taxing master's assessment save that he urges this court to consider that there was no basis for suggesting and or basing the value of the property at 41.4 million and urges the court to find that the property was valued at 150 million.

Disposing off this aspect of submission by the advocate is essential before going further first, the advocate did not contest by way of any objection, to any of the items as taxed by the taxing officer, he, in principle, supports the assessment and that is the reason , I believe, he did not file any objection or cross reference . Even if a valuation report for the value of the subject matter of the suit which was not submitted at the time of taxation was to be availed at this stage determining the 'exact value of the property subject of the dispute and the bill of costs, this court would not be inclined to review that item of instructions fees to base it on the new value of the subject matter as there is no cross reference filed by the advocate in objecting to any of the items of the taxed bill of costs. Furthermore, the review strictly speaking, based on a new and important matter could only be made before the taxing officer before taxation by an amendment to the bill and not before this court by way of submissions as those are matters which the taxing master had already pronounced himself on by disregarding the value given by the advocate in the bill.

The other reason for dismissing that contention by the advocate is that the value of the subject matter of a suit for purposes of the taxation of a bill of costs whether party and party or advocate client under the Advocates Remuneration Order ought to be determined from the pleadings, judgment or settlement. But if the same is not so ascertainable, the taxing officer is entitled to use his discretion to assess such

instructions fees as he considers just, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances, as espoused in Schedule V1A 1 of the Advocates Remuneration Order.

If the advocate, therefore, having quoted the value of the property as 150 million was unable to persuade the taxing master to award him instructions fees based on that figure and opted not to oppose/object to the assessment by the taxing master, he is estopped from raising the objection at this stage.

Back to the main issue of the instructions fees, the client does not object to the kshs 629,500 awarded based on what the taxing master considered to be the value of the subject matter and which he stated, was clear from the pleadings, was kshs 41,400.000. He however laments that there was no justification for awarding he extra one million and contends that the extra award was manifestly excessive and merits interference by this court.

In the matter of **Kipkorir Tito & Kiara advocates vs. Deposit Protection Fund (2005) e KLR 528,** the Court of Appeal held as follows concerning interference with the taxing officer's discretion in matters of taxation:

" 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 with and the court will interfere only in exceptional circumstances."

This was also the common thread in the cases of **First American Bank of Kenya vs Shah & others (2002) 1 EA 64; Nyangito & Co. Advocates vs Doinyo Lessos Creameries and Preinchand Raichand Ltd & another vs. Quarry Services of EA Ltd & another (1972) EA 162 and TJRC vs. Chief Justice of the Republic of Kenya & another (2014) e KLR.**

The question therefore is , was the taxing officer justified in increasing the instructions fees by an extra one million, having established that basic instructions fees was kshs 629,500 based on the value of the subject matter as gleaned from the pleadings.

Schedule VIA (a) of the Advocates Remuneration Order provides that:-

1. **Instructions fees.**

"The fee for instructions in suits shall be as follows; unless the taxing officer in his discretion shall increase or (unless otherwise provide) reduce it;

a) to sue in any proceedings, whether commenced by plaint, Petition, Originating Summons , or Notice of Motion) in which no defence or other denial of liability is filed; where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and that value exceeds but does not exceed sh……..sh……shs…….

over 750,000/- 13,500

plus 1% of the amount

over shs 750,000"

In defended cases, the above mentioned sum of Ksh 13,500 stands increased to Ksh 36,000 up to a value of Ksh 750,000, over the that amount the instruction fees is to be calculated at one per cent on the amount over 750,000. It is the above formula which the taxing officer used to arrive at Ksh 629,500 instruction fees.

On the extra one million the taxing master stated:-

"There were further prayers in the plaint seeking injunction, declaration, damages and interest at commercial rates. This no doubt adds to the weight, complexity, interest and importance of the matter to parties. In my discretion, and considering the above, I allow a further kshs 1,000,000 in instructions fees."

Rule 5 of the Advocates Remuneration Order provides that:

"(1) in business of exceptional importance or unusual complexity an advocate shall be entitled to receive and shall be allowed as against his client a special fee in addition to the remuneration provided in this order.

(2) In assessing such special fee, regard may be hard to –

a. ***The place at or the circumstances in which the business or part therefore is transacted.***
b. ***The nature and extent of pecuniary or other interest involved;***
c. ***The labour and responsibility entailed; and***
d. ***The number, complexity and importance of the documents prepared or examined".***

The principles of taxation were set out in the Court of Appeal's decision **in Premchand Reichand vs. Quary Services of EA Ltd & others EALR (1972) EA** 162 as follows:-

"(i) (a) That costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;

(b) That a successful litigant ought to be fairly reimbursed for the costs that he has had to incur

(c) That the general level of remuneration of advocates must be such as to attract recruits to the profession and

(d) That so far as practicable there should be consistency in the awards made.

(ii) <u>The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party;</u>

(iii) In considering bills taxed in comparable cases allowance may be made for the fall in value of money.

(iv) A part from a small allowance to the appellant for the responsibility of advising the undertaking of the appeal there is no difference between the fee to be allowed to an appellant as distinguished from a respondent.

(v) The fact that counsel from overseas was briefed was irrelevant: the fee of a counsel capable of taking the appeal and not insisting on the fee of the most expensive counsel must be estimated (Simpson Motor Sales v Herdon Corporations (2) followed……"

No doubt, the power to tax costs is discretionary and if I was to come to the conclusion that the taxing officer erred in principle, the correct course of action would be to refer the bill back for taxation by the same or a different taxing master- **See Steel Constructions Petroleum Engineering (EA) Ltd vs. Uganda Sugar Factory (19770) EA 141** Where Spry JA at page 143 stated:

"…….Although a judge undoubtedly has jurisdiction to retax a bill himself he should as a matter of practice do so only to make corrections which follow from his decision and that general rule is that where a fee has to be reassessed on difference principles, the proper cause is to remit to the same or other taxing officer. I would agree that, as a general statement, that is correct adding only that it is a matter of juridical discretion".

The Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002 1 EA 92** was categorical that the judge sitting on a reference against the assessment of instructions fee by the taxing officer ought not to interfere with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.

The Joreth case also gave some guidelines or principles to be applied by a taxing officer in exercise of his discretion to increase the instructions fees. That the taxing officer must demonstrate in his ruling the reasons for increase of fees:-

I. ***Care and labour required by the advocate.***
II. ***Specify the number and length of the papers to be perused,***
III.***The nature and importance of the matter ,***
IV.***The value (where ascertainable) of the subject matter***
V. ***Interest of the parties***
VI.***Novelty of the matter.***

And in **Ramesh Naran Patel vs. Attorney General & Another (2012 e KLR** Emukule J observed that each of the elements must however be broken down cogently with specifity (and generalizations), as stated in the case of **Republic vs. Minister for Agriculture Exparte Samuel Muchiri W/Njuguna (2O06) e KLR .**

In the instant case, the taxing officer in awarding the instructions fees further stated; citing from the **Joreth ltd vs. Kigano** Case (supra):-

" ***The instructions fees is an independent and static item, it is charged once only and it is not affected or determined by the stage the suit has reached".***

The record shows that the taxing officer did not consider the stage the suit had reached, when he made an award of instructions fees. I agree with him to that extend.

From the above established legal principles, it is trite that the taxing officer has the power and discretion to either increase or reduce instructions fees. Such discretion, however, must be exercised judiciously and not capriciously. It must also be based on sound principles, since taxation of bills of costs is not an exact science. It is a matter of opinion as to what amount is reasonable, given the particular circumstances of the case, as no two cases are necessarily the same. And as was correctly observed in the **Joreth vs. Kigano** (supra) case and Ramesh Naran Pater ***vs. Attorney General & another*** (supra) case, the taxing officer must apply the laid down principles and specify, not generalize his or her justification for increasing or reducing the instructions fees.

Applicable statutory law /instructions fees for contentious matters are charged under Schedule V1 of the Advocates Remuneration Order 2009. In the proviso to Schedule VI the taxing officer, in exercise of his discretion in matters arising during proceedings, ***shall take into consideration the other fees, and allowances of the advocate, if any in respect of the work to which such allowance applies, the nature and importance of the cause, the amount involved, the interest of the parties, the general conduct of proceedings, a direction by the trial judge, and all relevant circumstances(emphasis added)***.

The applicant's contention is that the taxing officer failed to take into account relevant factors and well settled principles of law in considering the quantum pertaining to item 1 of the Bill of Costs (instructions fees and consequently awarded an extra (gratuitous, oppressive and unconscionable additional) one (I,000,000,000) million to the basic instructions fees which is manifestly excessive and exorbitant and or unjustified and that in so doing committed an error in principle.

The subject matter in the primary suit was a claim for injunction, declaratory orders, damages and interest at commercial rates. In the dispute the client was sued as defendant involved a prime piece of land in Karen within Nairobi County whose conservative value was provisionally given as Ksh 41,400,000,

which figure the taxing officer applied in setting the basic instructions fees at Ksh 629,500 and in increasing that instructions by an extra one million, the taxing officer stated that he had considered that there were other prayers on record.

The applicant contends that the work involved did not go beyond the ordinary work of counsel to warrant increase of instructions fees as provided for in Schedule VI in **Republic vs. Minister of Agriculture & 2 others Exparte Samuel Muchiri W Njuguna & others (2006) e KLR** the court held**:**

"The complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute, the substantive proceedings, must be described with specifity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry, and was inordinately time consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be clarified, assessed and simplified , the details of such initiative by counsel must be specifically indicated apart of cause from the need to show if such works have not already been provided for under a different head of costs."

At page 15 of the above case, the court added:-

> ***" If follows in my view, that the responsibility entrusted to counsel in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field. I have to state that there was nothing novel in the proceedings on such a level as would justify any special allowance in costs".***

Still on the issue of increase of instructions fees, the court in **First American Bank of Kenya Ltd vs. Gulab P shah & 2 others (2002) IEA 64 Page 70-71** stated:

> ***"As regards the increase of instructions fees, I accept that this is a matter of discretion of the taxing master. However, the discretion must be exercised rationally. Now the only reason given by the taxing officer there to increase the fees is that the defendants had done some research on the law and they had put a well researched defence. I am of the opinion that if a defendant does research before filing a defence informed by such a research he had done no more than expected. The research is not necessarily indicative of the complexity of the matter. It may well be indicative of the advocate's unfamiliarity with basic principles of law. Such unfamiliarity should not be turned into an advantage against the adversary."***

In the view of the applicant client, the suit was an ordinary one involving the usual prayers for injunctions, damages, declarations and interest at commercial rates, which regrettably ,the taxing office after determining that the value of the subject matter could be determined from the pleadings as Ksh 41,400.000 went overboard and increased the figure to Ksh 629,500 by an extra one million, on account of those prayers for injunction, declarations, damages and interest at commercial rates.

Indeed, beyond making a general observation to that effect, the taxing officer did not describe or specify the nature of forensic responsibility placed upon counsel when defending such a suit. He did not also mention any novelty involved in the main proceedings and the nature thereof. The taxing officer did not even mention whether the suit involved in his view, large volumes of documentation that had to be clarified, assessed and or simplified and the details if such initiative specifically indicated. He did not specify what research if any was necessary or was proven to have been undertaken by the advocate to justify the increase on the instructions fees.

In my humble view, fees changeable by advocates are facilitative of access to justice for all irrespective of status as espoused in Article 48 of the Constitution that:-

> "*The* ***state shall ensure access to justice for all persons, and, if any fee is required, it shall be***

reasonable and shall not impede access to justice".

The above Constitutional provision breathes life into the case of Premchand **Raichand vs. Quary Services EA Ltd No. 3 (1972) EA 162** where the Court of Appeal held:-

a. ***That costs should not be allowed to rise to a level as to confine access to the courts to the wealthy;***
b. ***That a successful litigant ought to be fairly reimbursed for the costs he has to incur.***
c. ***That the general level of remuneration of advocates must b such as to attract recruits to the profession; and***
d. ***So far as is practicable there should be consistency in the awards made."***

The advocate/respondent opposed the reference vehemently contending that he did voluminous complex work, argues applications for injunctions successfully and attended court severally and perused heavy documentation to justify the increase in the instructions fee.

Indeed, that may be so, as shown by the lengthy itemized bill of costs whose specific items on court attendance, research and perusals have not been objected to, substantially.

However, it was expected that the taxing officer would apply himself to those facts and make formal specific pronouncements regarding what he considered as relevant factors and or principles that guided him in exercising his judicial discretion to increase the instructions fee by one million Kenya Shillings, especially in a case where already the value of the subject matter could be ascertained from the pleadings .

As was held by Emukule J in **Ramesh Naran Patel vs. Attorney General & another (2012) e KLR,** drawing inference from the guidelines set out on the **Joreth vs. Kigano & another** (supra) case that:

"the taxing officer's discretion in exercise of his discretion to increase the instruction fee are clear. He must demonstrate in his ruling the reasons for increase of fees-

i. ***Care and labour required by the advocate;***
ii. ***Specify the number and length of the papers to be perused;***
iii. ***The nature and importance of the matter;***
iv. ***The value (where ascertainable) of the subject matter.***
v. ***Interest of the parties;***
vi. ***Complexity of the matter, and***
vii. ***Novelty of the matter.***

Each of these elements must however be broken down cogently with specificity (and not generalization) , as stated in the cases cited above and in particular, <u>Republic vs Minister for Agriculture, Exparte Samuel Muchiri W' Njuguna</u>".

In this case, in my view, the taxing officer erred in principle in generalizing the complexity, importance and nature of the matter, interest of the parties, the weight care and labour required by the advocate and the novelty of the matter. It was not sufficient to state as he did that:-

"there were further prayers in the plain seeking injunction, declarations , damages and interest at commercial rates. This no doubt adds to the weight, complexity, interest and importance of the matter to parties. In my discretion, and considering the above, I allow a further kshs 1,000,000 in instructions fees".

It will be noted that the advocate did not even pray for such an increase. He did not seek for it other than estimating the value of the suit property to be more than kshs 150,000.000. That could be the reason why the client is so furious with the Ksh 1 million extra that he calls it gratuitous. It was an unsolicited discretion as the advocate did not urge the taxing officer to invoke the discretion having provided the

estimated value of the suit property. The client's legitimate expectation was that of getting a fair and just verdict on the same as 41.4 million was not a liquidated claim separate from the other prayers. Furthermore, since there was no separate prayer for an increase, the client did not have an opportunity to respond to the issue as to whether or not the advocate was entitled to the same.

The taxing officer was under a duty to state why he believed the matter was complex, weighty, important and or generated what amount of interest to warrant an increase especially where the value of the subject matter could be ascertained from the plaint as correctly found by him when awarding the figure of Ksh 629,500 based on Ksh 41,400,000. Most probably, what the taxing officer had in hind sight while taxing the bill was that the Ksh 629,500 was manifestly low compared to the labour in the suit. However, in my view, it was erroneous for him to fail to specify or justify the labour and instead base the increase on generalizations. This has nothing to do with trivializing the work done by the advocate as the respondent client would have wished this court to find in this case. Even if the taxing officer was to allow costs at a lower rate or reduce such instructions fees, he could only do so with reasons as espoused in Rule 79 of the Advocates Remuneration Order. I do not find that the case subject matter of this reference was of such trivial nature as to warrant a reduction of the advocate's fees, in as much as I do not find it to have been extraordinarily complex.

For those reasons, I find that decision by the taxing officer to award to the advocate extra additional instructions fees of Ksh. 1 million was erroneous and proceed to set it aside. The award of Kshs 629,500/- is sustained.

On the second issue of whether the taxing officer should have set off 605,000 paid to the lead counsel M. J.P Machira, the evidence on record is clear that it was the client/applicant who sought the services of an extra hand, Mr J.P Machira, to provide support and lead in the defence of the case against the applicant client. There is no evidence that Kyalo Mbobu advocate ever requisitioned for support of another advocate and or that he agreed to share his legal fees with another advocate. This court does appreciate the vagaries of litigation, particularly in land matters, which may have justified the client seeking for an extra hand. But that choice was in his absolute discretion. In the circumstances it would be unfair and unjust to deny an advocate his hard earned costs, even if a matter had not been fully heard and or concluded simply because another advocate was coming on record to do much more work than what the previous advocate did in the circumstances with the help of an additional advocate.

Instructions fees being a static fee, as correctly observed by the taxing officer, it would be out rightly wrong for this court to interfere with the discretion of the taxing officer solely because it thinks the award is too high or too low, unless such award whether too low or too high amounts to an injustice to one of the parties.

In a letter dated 12th August 2011 by the client to his advocate the respondent herein, the client stated at paragraph 2 thus:

"***REF: HCC ELC 312/2009 ASHOK R. SHAH & ANOTHER VS JACOB JUMA & 2 OTHERS***

My verbal instructions to Ms Havi & Company advocates on this matter was regarding him acting as lead counsel the way Mr Machira acted in the injunction of application. This does not amount to change of advocates and agreement between yourselves and I on this matter, In any case I pay for extra costs myself"

The above letter was in response to the advocates letter dated 1oth August 2011 wherein the advocate was categorical ***that " what JP Machira had earned as his fees was none of our business that was his fees".***

In the letter dated 8th August 2011 from client to the advocate herein, the client at paragraph 2 states

" I have so far spent Kenya shillings six hundred thousand in legal fees on this matter and <u>I shall not deduct Machira advocates from your earlier agreed instructions fees with myself".</u>

The client also by his letter of 12th August 2011 to the advocate at paragraph 5 makes it clear that "***the payment to Mr J.P Machira & Advocates as alluded to in our letter are self explanatory. He justifiably earned it by successfully arguing the lifting of the injunction granted to the plaintiff earlier in this suit".***

In the receipts showing payments made to J.P Machira & Co advocates, the acknowledgement are clear that the monies were received from the client as ***" further deposit on legal fees."***

There is no mention that the money was being received as a share in the legal fees agreed between the client and Mr Kyalo Mbobu advocates jointly with Mr. Machira advocate (lead counsel).

In addition there is no evidence that Mr. J.P Machira advocate was being paid a token. It was legal fees for work done.

There is also no evidence that the law firm of Machira & Company and Kyalo Mbobu & Company advocates were partners, though for purpose of the suit, they acted jointly.

What this court deciphers from the conduct of the parties is that in the absence of any specific agreement, Mr Machira was instructed by the client who was prepared to pay him the extra fees for providing lead support to Mr Kyalo Mbobu advocate.

There is also no evidence that the client paid fees to Mr Kyalo Mbobu advocate with conditions that the advocate must share it with Mr J.P Machira advocate.

There would be indeed, no illegality if the two advocates were to share legal fees but in this case, there was no such agreement and neither has the client procured the affidavit evidence of Mr J.P Machira advocate to clarify whether there was such agreement, whether oral or in writing.

Section 3(4) of the Evidence Act is clear that:

"A fact is not proved when it is neither proved nor disproved."

In this case, the burden of proving that there was such agreement that the fees payable to Mr Kyalo Mbobu would be inclusive of what was to be paid to Mr. J.P. Machira advocate lay on the client, under Section 107 of the Evidence Act that he who alleges must prove. That burden was not discharged, in this case, on a balance of probabilities.

After considering the matters before the court, this court does not believe that there was such an arrangement to share the fees paid to the advocate with J.P. Machira advocate.

Nothing prevented the client, who was the boss/employer and or retainer for the two advocates to insist that the fees payable to Kyalo Mbobu advocate would be all inclusive for the two advocates.

For those reasons, this court is unable to find any merit in the clients' contention that the taxing officer should have deduced Ksh 605,000/- from the amounts due to Kyalo Mbobu advocate, the sums of money paid to J.P Machira advocates. I dismiss the claim and sustain the finding by the taxing officer that there was no evidence to show that the advocate herein is the one who instructed J.P. Machira to come and assist the advocate, Mr. Kyalo Mbobu. I find that the client instructed Mr. Machira advocate to provide support and lead the defence team at the client's own expense and it would be unfair and unjust to unnecessarily burden Mr. Kyalo Mbobu advocate with an order that he takes responsibility and shares his fees with Mr. J.P. Machira advocate.

The third issue concerns the inclusion of the alleged unjust surplus contained in the consented items but which the taxing officer is alleged to have failed to take into account.

This court notes that on 23rd June 2014 by a consent dated 16th June 2014 and signed between the

applicant client and the advocate, the parties agreed to alter the various 431 items in the bill of costs.

The taxing officer did write to the parties on12th August, 2014 clarifying that there was an oversight on the part of the parties in failing to have the said consent adopted by the court, that is why the consented to items were never taken into account in the tabulations. It is true that there is a consent filed by both parties on 431 items but there is no evidence of adoption of that consent as an order of the court. That cannot be an oversight on the part of the parties. It is the duty of the court to give effect to consents filed by the parties. The court in this case did not do so. In my view, the taxing officer ought to have seen the consent on record and adopted or acknowledged it before concluding his taxation. That was an inadvertent error which this court can correct by adopting the said consent and which I hereby adopt as the order of the court.

The above issue has been conceded to by the advocate as an arithmetical error hence there is no prejudice in adopting the said consent. Accordingly, those items as per the consent that should have been adjusted in the bill but were not, this court accordingly makes an order that they be adjusted as appropriate to accord with the consent and order herein adopting the consent between the parties.

The applicant client having framed the three issues above for determination as the contentious issues, I consider the objection to items Nos. 41,42,192,359,460,468 abandoned and say no more.

In the end, I make the following orders:

(1) The client's reference dated 12th August 2014 is allowed to the following extend:-

a. The additional instructions fees of one million (1,000,000,000) awarded on item No. 1 of the bill of costs dated 12th September 2011 by the taxing officer is hereby set aside and struck out;
b. The prayer that full credit for the sum of Ksh 605,000/- paid to J.P Machira advocate for representing the client in the suit is hereby dismissed. The credit of Ksh 300,000/- given by the taxing officer to the client as conceded by the advocate is sustained;
c. There shall be adjustments to the taxation on the items consented to as per the consent dated 16th June 2014 and filed on 23rd June 2014 as herein adopted by the court.
d. The awards on items No. 41,42,192,359,460 and 468 having been abandoned by the client are sustained as awarded by the taxing officer;
e. All other items as taxed by the taxing officer, wherein there was no challenge are sustained as taxed;
f. The Ruling of A.K. Ndung'u dated 30th July 2014 on taxation and Certificate of Taxation dated 8th September 2014 by F. Wangila, Deputy Registrar for 5,573, 682.33 are accordingly varied and set aside. The taxing officer is hereby directed to tabulate and recalculate the advocate's bill of costs dated 12th September,2011 and taxed on 30th July, 2014 and issue a fresh Certificate of Taxation in accordance with the orders herein.
g. Each party to bear their own costs of this reference as each of the parties has equally succeeded in their quest.

Dated, Signed and delivered at **NAIROBI** this 27th day of May 2015

R.E ABURILI

JUDGE

27/5/2015

Ruling read and pronounced in open court as scheduled

In the presence of Mr Muthee advocate holding brief for Miss Kanini for the Advocate/Applicant/Respondent.

No appearance for the Respondent/ Client/Applicant

Court Assistant: Virginia Kavata.

R.E ABURILI

JUDGE