REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISCELLANEOUS CAUSE NUMBER 180 OF 2013

IN THE MATTER OF THE ADVOCATES ACT CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE ADVOCATE AND CLIENT BILL OF COSTS

KAGWIMI KANG'ETHE & CO ADVOCATES……APPLICANT

VERSUS

MUTURI INVESTMMENT LIMITED…....…….….RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Chamber Summons application dated and filed on 16th February 2015 was brought pursuant to the provisions of Advocates Act and the Advocates Remuneration Order, Rules 1, 11(1) and (2). It sought the following orders:-

1. **THAT the Court be pleased to review the Taxing Mater's Award of 24th February 2014.**
2. **THAT costs be in the cause.**

THE RESPONDENT'S CASE

2. The application was supported by the Affidavit of Yuji Mwangi Muturi, a Director of the Respondent Company that was sworn on 16th February 2015. A Supplementary Affidavit by the same deponent was sworn on 24th April 2015. It was filed on 28th April, 2015 which was on the same date the Respondent's Written Submissions also dated 24th April 2015 were filed.
3. A brief background of this case was that the Applicant herein represented the Respondent in **HCCC No 199 of 2005 Muturi Investments Limited vs National Bank of Kenya Limited** and **HCCC No 624 of 2005 Nairobi Mamba Village vs National Bank of Kenya Limited** which were consolidated on 6th November 2006. Subsequently, the Applicant filed two (2) Bills of Costs being **HC Misc No 180 of 2013** and **HC Misc No 181 of 2013** in respect of the two (2) matters respectively.
4. The Respondent was dissatisfied with the taxation of Item Nos 1, 2 and 4 of the Applicant's Bill of

Costs dated 22nd May 2013 that was taxed in the sum of Kshs 4,343,905/= on the grounds that the Taxing Master erred in principle by misconstruing what constituted the subject matter and using wrong principles in assessing Item No 1 of the Applicant's Bill of Costs, the Taxing Master erred in principle in rounding off figures in respect of Item No 1 and awarding the Applicant Item No 4, the Taxing Master erred in principle in the manner she taxed the Applicant's Bill of Costs on consolidated suits and that her Award was flawed with arithmetic errors.

5. The Respondent thus prayed that the court grants it the orders it had sought in its Reference.

THE APPLICANT'S CASE

6. In opposition to the said application, on 31st March 2015, George Kang'ethe, the Applicant's advocate swore a Replying Affidavit. It was filed on even date. The Applicant's Written Submissions were dated and filed on 18th May 2015.
7. The Applicant argued that the Respondent's application lacked merit as the latter had not advanced valid reasons to warrant a review of the Taxing Master's decision that was rendered on 24th April 2014.
8. It contended that it was entitled to charge instructions fees and disbursements incurred in **HCCC No 624 of 2005** separately as the matter had proceeded independently until 6th November 2013 when it was consolidated with **HCCC No 199 of 2005** and that it addressed the issue of consolidation at the time it drafted and filed its Bill of Costs. It averred that the Respondent was estopped from raising the issue of costs that were payable as the Respondent never raised the said issue before the Taxing Master.
9. It was the Applicant's further contention that the Taxing Master did not err in principle as had been contended by the Respondent and that she had arrived at the right decision after considering all the relevant factors that had been placed before her. The Applicant therefore urged the court to dismiss the Respondent's present application with costs to it.

LEGAL ANALYSIS

10. As a preliminary issue, the court wishes to point out right at the outset that while the Applicant argued that the Ruling of 25th February 2014 alluded by the Respondent was non-existent as the same was delivered on 24th February 2014 and that the Respondent had not commenced and/or filed a competent Reference within fourteen (14) days as was required by Rule 11 (2) of the Advocates Remuneration Order, the court was more inclined to accept the Respondent's explanation that the date it had indicated as the date of the Ruling was a typographical error. Indeed, this was a technical defect that would not warrant this court from hearing and determining the Respondent's application on merit.
11. In addition, in view of the fact that parties compromised the Respondent's application dated 5th December 2014 in which it had sought to have time extended to file its Reference out of time, the Applicant was estopped from denying the competence of the Respondent's present application.
12. Turning to the more substantive issues, the court noted that the Respondent was seeking a review of the Taxing Master's decision on the following grounds:-

a. **THAT the Learned Taxing Master erred in principle by misconstruing what constituted the subject matter in assessing item 1 of the Bill of Costs.**
b. **THAT the Learned Taxing Master used the wrong principles in assessing the appropriate fees under item 1 of the Bill of Costs.**
c. **THAT the Learned Taxing Master erred in principle in rounding off figures in respect of item 1 of the bill after establishing the amounts due according to her assessment.**
d. **THAT the Learned Taxing Master erred in principle in awarding the advocate costs in respect of item 4 of the Bill of costs without giving reasons to justify it.**
e. **THAT the Learned Taxing Master erred in principle in the manner in which she taxed Bills on consolidated suits.**
f. **THAT the Learned Taxing Master's computation was flawed with arithmetic errors.**

13. The court found it prudent to address the submissions under the different items for ease of reference.

I. **ITEM NO 1 OF THE APPLICANT'S BILL OF COSTS**

14. It was the Respondent's submission that there was no monetary value that was discernible from the Plaint in **HCCC No 199 of 2005** contrary to what the Taxing Master found when she stated as follows:-

"I have perused the Parent file being HCC. (sic) **No 199 of 2005 between Muturi Investments Limited vs National Bank of Kenya Limited. The value of the subject matter is Kshs 163,143,500.70."**

15. It was their contention that the Taxing Master had correctly interpreted what constituted value of the subject matter when she gave her Ruling relating to **HC Misc 181 of 2013** for the reason that **HCCC No 199 of 2005** had also sought an order for an injunction, a declaration and an Order for accounts and that it was only in the Counter-claim that the subject value could be ascertained.
16. In that Ruling of 24th February 2014 delivered to in **HC Misc No 181 of 2013** , the Taxing Master rendered herself thus:-

"I have perused the parent file carefully. In the Plaint the prayers do not disclose the value of the subject matter… Had the Plaintiff disclosed that he was seeking an amount of Kshs. 163,509,478.70 in the prayers in the Plaint he would have paid Court fees commensurate with that amount. The Court fee paid was Kshs. 12,125/=…"

17. The Respondent submitted that in the absence of a monetary value, the Taxing Master was mandated to apply the residual Schedule VI 1(l) that provides as follows:-

"To sue or defend any case not provided for above, such sums as may be reasonable but not less than Kshs. 6,000/=."

18. It referred the court to the cases of **Rosafric Limited & 3 Others vs The Central Bank of Kenya & Another** (unreported) and **Kenya Wildlife Services vs Construction Company Limited** (unreported) where the common thread was that the values of the subject matter were not actual monetary awards to which values could be ascertained, in which case, the instructions fees ought to have been calculated under the residual provision of Schedule VI 1 (l) of the Advocates Remuneration Order.
19. It argued that despite applying the Schedule VI 1(1), the Taxing Master gave no reason to show why she arrived at the manifestly excessive sum of Kshs 2,487,152.50, which was an increment of 41,452%. It was its contention that the maximum the Taxing Master ought to have awarded was Kshs 6,000 x 4 = Kshs 24,000/=.
20. In this regard, it referred the court to the case of **Thomas James Arthus vs Electricity Undertaking (1961) EA 492** where the Court of Appeal observed that quadrupling the scale fee of Kshs 2,000/= **"was higher than appropriate"** but upheld the award of Kshs 8,000/= due to the peculiar circumstances of the case therein.
21. On its part, the Applicant submitted that the Plaint filed on 25th October 2005 had sought ten (10) substantive orders amongst which the Respondent had sought a declaration that the Defendant in **HCCC No 199 of 2005** was not entitled to any monies as the same was oppressive and constituted a breach and variation of the contract of lending executed by the Respondent and the Defendant therein. The Applicant therefore argued that it was clear from the pleadings that the issue for determination by the court was the recoverability or ir-recoverability of the sum of Kshs 163,143,500.70.
22. It was its further averment that a judge sitting on a reference is not entitled to interfere with an award of a taxing master on grounds of quantum only and that the principles of interfering with a taxing master's award are well settled in the following general terms:-

a. **THAT a taxing master has the sole discretion of accessing instruction fees taking into account, the nature and cause of the matter, the interest of the parties, the general conduct of the pleadings and all relevant factors he may deem relevant to consider in assessing the said instruction fees.**
b. **THAT the judge will not interfere with the discretion of a taxing master merely if the judge is of the opinion that he would have awarded a lower figure than had been awarded by a taxing master.**
c. **THAT a judge will only interfere with a taxing master award if he is satisfied that the taxing master had awarded an amount that was so manifestly excessive or that the award was based on an error of principle.**

23. It placed reliance on several cases in this regard- **See Civil Appeal No Joreth Limited vs Kigano& Associates** (unreported), **First American Bank of Kenya vs Shah & Others [2002] 1 E.A. 64** and **treatise of Kuloba J (as he then was) in Judicial Hints on Civil Procedure 2nd Edition at pg 122**.
24. It is trite law that in the absence of any particular or specific circumstances or proof that the Taxing master has proceeded on an error of principle, the decision of a Taxing master on the issue of quantum is final and conclusive as the taxing master will have had the benefit of having seen the parent file and all relevant correspondence that should correspond to the items sought in a bill of costs.
25. The Applicant had charged a sum of Kshs 2,500,000/= under Item No 1 for:-

"Receiving instructions from the Respondent to act on its behalf in HCCC No 199 of 2005 (Muturi Investments Ltd vs National Bank of Kenya Ltd) wherein the Plaintiff prays inter alia for an Order of permanent injunction to restrain the Defendant from selling by private treaty or public auction all that property known as L.R. No 13525/3 Lang'ata, Nairobi, to recover the outstanding debt of Kshs. 163,143,500.70 together with interest thereon as demanded, taking instructions, drafting and filing the Plaint on 15/4/05."

26. In assessing the Instruction Fees in the Applicant's Bill of Costs, the Taxing Master applied the proper principle by awarding a sum that was not less than Kshs 6,000/= allowed in Schedule VI (1) (l) as the monetary value of the subject matter could not be ascertained from the pleadings, a fact that the Applicant, the Respondent and Taxing Master were agreed upon.
27. It was therefore within the discretion of the said Taxing Master to award what she deemed to have been reasonable in the circumstances of the case therein. Notwithstanding that the award of Kshs 2,500,000/= was subjective and another Taxing Master could very well have awarded a different figure or that the Respondent was of the opinion that the said award was higher than appropriate, that was not a good reason that would have warranted this court to interfere with the Taxing Master's Award.
28. However, in view of the fact that for a similar claim in **HC Misc No 181 of 2013**, the Taxing Master had found that a sum of Kshs 1,000,000/= was adequate as Instruction Fees, there was no justification in her finding that the Instruction Fees for the claim herein where the value subject matter could not be ascertained was Kshs 2,500,000/= and not Kshs 1,000,000/=.
29. She erred in principle in arriving at a different figure that involved a related matter where the facts and circumstances were the same. Bearing in mind, the Taxing Master's assessment of the Instruction Fees in **HC Misc No 181 of 2013** at Kshs 1,000,000/=, the sum of Kshs 2,500,000/= under Item No 1 herein appeared manifestly excessive. This court can therefore interfere with the Taxing Master's Award on Item No I It therefore follows that Item No 2 would require to be re-looked at so to arrive at the proper assessment.

II. **ITEM NO 2 OF THE APPLICANTS BILL OF COSTS**

30. Item No 2 of the Applicant's Bill of Costs would therefore require some adjustment as the same is calculated as **"Instruction Fees in Item 1 above increased by ½."**

III. **ITEM NO 4 OF THE APPLICANT'S BILL OF COSTS**

31. The Respondent submitted that the Taxing Master erred in principle in awarding a sum of Kshs 916,666/= being a third of Kshs 2,500,000/= under Item No 1 for Getting Up fees and that the same ought to have been apportioned between **HCCC No 199 of 2005** and **HCCC No 624 of 2005**.
32. Evidently, the general principle is that a party is only entitled Getting-Up fees if a matter has been fixed for hearing. If more than one (1) suit proceeds for hearing separately, Getting Up Fees would be payable in all suits that have proceeded as such. However, if the suits are consolidated, Getting Up fees would only chargeable once and only if the matter has been fixed for hearing. It is irrespective that such a matter does not proceed for hearing on the day that it has been set down for hearing. It is sufficient that an advocate has prepared to proceed with the trial on a particular day.
33. On pg 6 of its Written Submission dated 19th November 2013 (pg 185 of the Respondent's application), the Applicant stated as follows:-

"I have submitted above and also in my submissions filed on 25th September 2013 that HCCC No. 624 of 2005 was consolidated under HCCC No. 199 of 2005 on 6th November 2006. The two suits were prepared and subsequently fixed for trial on 12th March 2009 under HCCC No 199 of 2005 as borne in the record in the consolidated suit…"

34. The Taxing Master awarded Getting Up Fees in the sum of Kshs 916,666/= in respect of **HCCC No 199 of 2005**. She appeared to have correctly ascertained that the Applicant herein had prepared for trial for hearing on 13th March 2006, a fact that the Respondent did not rebut. The court was thus persuaded by the Applicant's submissions that Item No 4 in which the Taxing Master awarded a sum of Kshs 916,666/= was allowable only in respect of **HCCC No 199 of 2005.** This figure is, however, determinant on what would be assessed under Item No 1 of the Applicant's Bill of Costs.
35. As regards the issue of apportionment of Instruction Fees, the court had due regard to the case of **Grace Wangui Ngenye vs Wilfred Kiboro& Nation Media Group Limited consolidated with HCCC No 1008 of 2005 [2013] eKLR** that was relied upon by the Respondent in which Ougo J stated as follows:-

"where suits… are consolidated there should be an apportionment of costs including the instructions fees. The advocates for the parties cannot expect to be paid twice over the same work… On getting up fees, since counsel prepared for hearing for one suit after the consolidation, this Item should be taxed once."

36. However, apportionment of the basic Instruction Fees on the plaint would not be applicable herein for the reason that the Respondent opted to file two (2) suits which had similar facts. The Respondent had the option of filing one suit. It would be punitive to demand that the Applicant foregoes its costs merely because it was agreed that the said suits could be consolidated at a later stage. The Applicant took instructions and filed the two (2) suits and is thus entitled to its Instruction Fees in this respect.

DISPOSITION

37. For the aforesaid reasons, the court found that the Respondent's Chamber Summons application dated and filed on 16th February 2015 was merited as it had demonstrated that it was necessary for the Taxing Master to re-consider Item Nos 1, 2 and 4 of the Applicant's Bill of Costs with a view to issuing a Certificate of Costs bearing the correct figure of taxed costs.
38. The Taxing Master's Award of Kshs 4,343,905/= is hereby set aside. It is hereby directed that the Applicant's Bill of Costs dated 22nd May, 2013 be and is hereby remitted to the Taxing Master for reconsideration of Item Nos 1, 2 and 4 of the said Bill of Costs.
39. Costs shall be in the cause.
40. It is so ordered.

DATED and DELIVERED at NAIROBI this 21ST day of JULY 2015

J. KAMAU

JUDGE