REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISCELLANEOUS CAUSE NUMBER 181 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

NAIROBI MAMBA VILLAGE 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 the same date the Respondent's Written Submissions also dated 24th April 2015 were both filed.

3. A brief background of this case was that the Applicant herein represented the Respondent herein 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, 4, 5 and 6 of the Applicant's Bill of Costs dated 22nd May 2013 that was taxed in the sum of Kshs 7,296,974/= on the grounds that the Taxing Master's Award was manifestly excessive, that the Taxing Master erred in principle 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 delivered 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 2013** 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's Award was not manifestly excessive, that there were no arithmetic errors and that the Taxing Master did not err in principle in awarding the figures under the items the Respondent had objected to but 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's Award under item 1 was so manifestly excessive to justify an inference that it was based on an error of principle or was arrived at unjudicially.**
b. **THAT the Learned Taxing Master erred in principle in not giving reasons to justify the award under item 1.**
c. **THAT the Learned Taxing Master erred in principle in her assessment of item 4 of the Bill.**
d. **THAT the Learned Taxing Master erred in principle in awarding the advocate costs for item 6 of the Bill of Costs without giving reasons to justify it.**
e. **THAT the Learned Taxing Master erred in principle in rounding off figures in respect of**

item 4 and 6 in her Award after establishing the amounts due according to her assessment.

f. **THAT the Learned Taxing Master erred in principle in the manner in which she taxed the Bill of Costs on a suit consolidated with another.**
g. **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 NOS 1& 2 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 624 of 2005**, a fact that the Taxing Master accepted when she rendered herself as follows:-

> **"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/=…"**

15. 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/=."**

16. It argued that despite applying the said schedule, the Taxing Master gave no reason to show why she arrived at the manifestly excessive sum of Kshs 1,000,000/=, which was an increment of 16,666%. It was its argument that the maximum the Taxing Master ought to have awarded was Kshs 6,000 x 4 = Kshs 24,000/= and that in any event, the Applicant was awarded Kshs 2,437,643/= in respect of Counter-Claim that was based on the same facts. It therefore argued that as the Taxing Master had misdirected herself, this court should interfere with the said Award of Kshs 1,000,000/=.

17. 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.

18. On its part, the Applicant submitted the Plaint filed on 25th October 2005 sought ten (10) substantive orders amongst which the Respondent had sought a declaration that the Defendant therein was not entitled to any monies in that the same were 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.

19. 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.

20. 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**.

21. It is trite law that in the absence of any particular or specific circumstances or proof that the taxing master 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 would 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.

22. The value the Respondent had instructed the Applicant to protect was Kshs 163,509,478.70. 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 624 of 2005 (Nairobi Mamba Village Ltd vs National Bank of Kenya Ltd) wherein the Plaintiff prays for an Order for proper account and a declaration that the Defendant is not entitled to recover from the Plaintiff the sum of Kshs. 163,143,500.70 together with interest thereon as demanded, taking instructions, drafting and filing the Plaint on 25/10/05."**

23. 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.

24. 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 1,000,000/= 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.

25. In the circumstances, bearing in mind that the Respondent had wanted this court to review quantum alone being downwards from Kshs 1,000,000/= to Kshs 24,000/= and the principle applied by the Taxing Master was correct, the court came to the firm conclusion that it could not interfere with the award that was made by the said Taxing Master as that was a position that well settled in the several cases that were relied upon by the Applicant herein. In the same vein, the court was not persuaded that it ought to interfere with Item No 2 of the Applicant's Bill of Costs.

II. **ITEM NOS 4 & 5 OF THE APPLICANT'S BILL OF COSTS**

26. Under this item, the Applicant had charged an amount of Kshs 2,500,000/= for:-

> **"Instructions to file a defence to the Counter-claim for Kshs 163,509,487.70 filed on 2nd December 2005 against the Respondent in HCCC No 634 of 2005, taking instructions, perusing the necessary documents, drafting and filing the defence to Counter-claim."**

27. On one hand, the Respondent argued that the Taxing Master awarded Instruction Fees in the sum of Kshs 2,500,000/= as had been sought by the Applicant without taking into account that the same arose out of a consolidation of the two (2) suits as mentioned hereinabove. It was its contention that the same should only have been awarded in the Parent file, namely **HCCC No 199 of 2005**.

28. The Respondent referred the court to the case of **Grace Wangui Ngenye vs Wilfred Kiboro & Nation Media Group Limited consolidated with HCCC No 1008 of 2005 [2013] eKLR** 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."

29. On the other hand, the Applicant argued that the Taxing Master was right in awarding Instruction Fees on the Counter-claim as it was independent to the plaint and further that the award was minimal. It referred the court to the case of **Amon vs Bobbet [1889] 22 Q.B.D. 543** in which it was held as follows:-

"That for purposes of taxation the claim and Counter-claim must be treated as independent action; that the costs of the Counter- claim followed the ordinary rule as to costs and that the Plaintiff was entitled to have the costs of his defence to Counter-claim taxed on the High Court scale."

30. Evidently, the monetary value of the claim in the Defence and Counter-claim was ascertainable at Kshs 163,509,487.70. The Taxing Master exercised her discretion and awarded a sum of Kshs 2,500,000/=, which again, she exercised her discretion to round up from Kshs 2,492,643/=.

31. As the Respondent rightly pointed out, the value of Kshs 163,143,500.70/= was correctly used by the Taxing Master when assessing the Instruction Fees in respect of the Counter-claim. The Taxing Master proceeded on the correct principle that the Plaint and Counter-claim were separate claims and could stand independent of each other. The court could not therefore interfere with her award of Kshs 2,500,000/= under this head which she computed as follows:-

For the 1st Kshs 1,000,000/=	Kshs 55,000/=
1.5% x Kshs 162,509,487.70	Kshs 2,437,643/=
	Kshs 2,492,643/=

32. The rounding off of the figure to Kshs 2,500,000/= was a question of discretion of the Taxing Master. As the same was a question of quantum, the court could not interfere with the same. Appreciably, the Counter-claim had only been filed in **HCCC No 624 of 2005.** The court rejected the Applicant's assertions that the Instruction Fees ought to have been charged in **HCCC No 199 of 2005** for the reason that the Respondent did not file any Counter-claim in **HCCC No 199 of 2005.**

33. For the foregoing reasons, the court was not persuaded to interfere with Item No 5 of the Applicant's Bill of Costs as the same was dependent on Item No 1 herein which this court found had been properly assessed by the Taxing Master.

III. **ITEM NO 6 OF THE APPLICANT'S BILL OF COSTS**

34. The Respondent submitted that the Taxing Master erred in principle in awarding a sum of Kshs 1,170,000/= that was rounded up from Kshs 1,666,667/= for Getting Up fees for the reason that the same could only be charged once, Instruction Fees having been awarded in **HCCC No 199 of 2005**.

35. Evidently, the general principle is that a party is only to entitled to Getting-Up Fees if a matter has been fixed for hearing. If more than one (1) suit proceeds separately, Getting Up Fees would be payable in all suits that have proceeded as such. However, if the suits are consolidated, Getting Up fees are only chargeable once and if the matter is fixed for hearing. It is irrespective that such a matter does not proceed for hearing on the day that such matter had been set down for hearing. It is sufficient that an advocate has prepared to proceed with the trial on a particular day.

36. Notably, the Applicant attended court for **"hearing"**as was evidenced in several items in its Bill of Costs. It was not sufficient for the Applicant to have submitted that **HCCC No 624 of 2005** proceeded on its own until 6th November 2006 when it was consolidated with **HCCC No 199 of 2005** as costs for proceeding by way of application and attending the Registry to file documentation were adequately

catered for and awarded under the respective items in the Applicant's Bill of Costs.

37. Under Item No 109, the Applicant prepared a Statement of Agreed Issues which it filed in court and under Item No 111, it filed a Notice to Produce. However, from the way the Applicant's Bill of Costs was drafted, it was not clear to the court whether parties had attended court for the hearing of the main suit or for applications. In the absence of any evidence to the contrary, the court could only fall back to the contents on page 9 of the Respondent's Written Submissions (pg 195 of the Respondent's application) that were presented before the Taxing Master in which it was stated as follows:-

> **"… we submit that the records of the trial Court will speak for themselves. The matter did not proceed to trial. No documents to substantiate the claims outside of the initial pleadings were ever filed, no list of issues were filed, further there is no request on record to even fix the matter for hearing. In view of the above, we submit that item 6 should be disallowed…"**

38. On its part, on pg 6 of its Written Submission dated 19th November 2013 (pg 185 of the 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…"**

39. The Taxing Master awarded Getting Up Fees in the sum of Kshs 1,170,000/= in respect of **HCCC No 624 of 2005**. However, it is expected that she ought to have ascertained that the Applicant herein had indeed prepared for trial and given reasons for awarding the said sum. She gave no reasons but only stated as follows:-

> **"Under item 6 the total instruction fee allowable under item 1 and item 4 is Kshs 3,500,000/=. 1/3 of Kshs 3,500,000/= is Kshs 1,166,667/=. I will round this figure off to Kshs 1,170,000/=. Kshs 580,000/= is taxed off."**

40. As there was no evidence that the Applicant prepared for trial in **HCCC No 624 of 2005**, Getting Up Fees could only be allowed in **HCCC No 199 of 2005**. Allowing Getting Up Fees in **HCCC No 624 of 2005** when the same was consolidated on 6th November 2006, with the matter proceeding for hearing in **HCCC No 199 of 2005** on 13th March 2006 would amount to unjustly enriching the Applicant.

41. Consequently, the court was persuaded by the Respondent's submissions that Item No 6 in which the Taxing Master awarded a sum of Kshs 1,170,000/= was not allowable. In this regard, the court was in agreement with the holding of Ougo J in the case of **Grace Wangui Ngenye vs Wilfred Kiboro & Another** (Supra) and found that this was a suitable case for it to interfere with the Taxing Master's Award under Item No 6 of the Applicant's Bill of Costs. In view of the court's finding herein above, the question of whether or not the Taxing Master erred in principle in rounding off the Getting Up Fees was rendered moot.

DISPOSITION

42. For the aforesaid reasons, the court found that the Respondent's Notice of Chamber Summons application dated and filed on 16thFebruary 2015 was merited as it had demonstrated that it was necessary for the Taxing Master ought to re-consider Item No 6 of the Applicant's Bill of Costs with a view to issuing a Certificate of Costs bearing the correct figure of the taxed costs.

43. The Taxing Master's Award of Kshs 7,296,974/= 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 No. (6) of the said Bill of Costs.

44. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 21st day of July, 2015

J. KAMAU

JUDGE