REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 241 OF 2013

In the Matter of the Advocates Act Cap 16 Laws of Kenya

In the Matter of Taxation of Costs between Client and Advocate

BETWEEN

ODERA OBAR & CO. ADVOCATES………………………APPLICANT

VERSUS

ALY ENTERPRISES LIMITED……………………….1ST RESPONDENT

HALAL MEAT PRODUCTS LIMITED……………...2ND RESPONDENT

MOHAMMED ALI MOTHA……………………..…..3RD RESPONDENT

MAFUTA PRODUCTS LIMITED……………………4TH RESPONDENT

RULING

Setting aside Certificate of Taxation

[1] The application before the court is dated 22nd April 2015 and essentially seeks for the setting aside of the Certificate of taxation, the decree thereto and all consequential orders. The Applicant also seeks for an opportunity to be heard on the advocate-client bill of costs that had been taxed. The application is expressed to be brought under Article 159 of the Constitution, sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 50 rule 1 of the Civil Procedure Rules, sections 45, 48 and 51 of the Advocates Act, rules 13 and 70 of the Advocates (Remuneration) Order and all enabling provisions of the law. It is premised upon the affidavit of JUMA MOHAMMED MOTHA and other grounds contained in the submissions filed herein. For purposes of this ruling, the Applicant and Respondents in the main cause shall be referred to as the Advocate and the Applicants, respectively.

Applicants' gravamen

[2] The Applicants allege that they have neither been served with the bill of costs dated 6th March 2013 nor Taxation Notice thereof as required under section 48 of the Advocates Act. Thus, they were denied an opportunity to be heard in the taxation of the bill of costs. They termed the act to be one of stealing a match from them and a violation of the right to be heard. Accordingly the taxation was ex parte

proceedings, irregular and unlawful; as such the Certificate of Taxation in the sum of Kshs. 17,716,484 and the decree arising therefrom should be set aside. They averred that they only learnt of the taxation on 16th April 2015 when the Advocate served them with winding up proceedings against the 1st Respondent for allegedly failing to settle the decree herein. Therefore, any execution proceedings should also be set aside and or stayed.

> [3] The above grounds were amplified in the Applicants' written submissions filed on 22nd May 2013 and 22nd May 2015. They argued that the purported service on Apopo & Associates Advocates was ineffective as the advocates herein were aware that Apopo & Associates Advocates were not acting for them. They also argued that the said advocates neither had nor confirmed to have any instructions to accept service of the taxation proceedings on behalf of the respondent client which could possibly have prompted the advocate herein to file a notice of motion application dated 8th July, 2013 for leave to effect service of the notice of taxation upon the respondents by substituted service by way of an advertisement in the "daily nation" newspaper. Similarly, there was no basis for applying for the court to dispense with service of the notice of taxation for the subsequent dates for taxation of the advocate client bill of costs dated 6th March, 2013. In addition, the taxation notice that was served through advertisement as ordered by court was for the particular initial date and not for subsequent dates. Even if Notice was served upon the firm of Apopo & Associates, it never forwarded the taxation pleadings & notices or consulted the respondent client on the taxation proceedings. Therefore, the bill of costs was never served on the Applicants. According to the Applicants, the affidavit of service by JOEL MWANZIA sworn on 14th June 2013 is false as no service was ever caused upon the Applicants. The Applicants aver that it is surprising to note that whereas the Respondent served the warrants of arrest and other execution processes upon the 3rd Applicant, he failed to serve the Bill of Costs and Taxation Notice upon the four Applicants. Therefore, it would be against public policy and fair administration of justice for an advocate to tax a bill of costs against the client without serving the client. The taxation and the resultant orders thereto are oppressive and prejudicial to the clients herein as they wholly violate the rules of natural justice. They referred the court to section 48 of the Advocates Act and Rule 72 of the Advocates (Remuneration) Order in support of their application. The Respondent did not utilize any of the avenues under rule 72 above to dispense with service before they could conduct the taxation of costs *ex parte.* The documents filed by the Respondent does not show he made any efforts to serve the Respondents or that they could not be found and so he applied for service to be dispensed with or for substituted service. The Applicants submitted that none has ever evaded service or refused to accept service of court process in these proceedings. The only effort of service alluded to in paragraph 10 of the Replying Affidavit is an alleged one-time visit to the Applicants' residential homes which were known to the advocate. The process server did not give any detail or effort he made to serve them. See paragraphs 3, 4, 5, and 6 of the Affidavit of Service. Therefore, in the absence of legitimate efforts to serve process, the court's discretion should not be exercised in favour of the Respondent. The 3rd Applicant is an elderly person and execution upon him is being applied unlawfully, oppressively and ruthlessly. Again, this is not a case for judgment in default but one where proceedings were had contrary to section 48 of the Advocates Act.

[4] Other than service, the Applicants raised substantive issues on the taxation carried through herein which will affect the decision of the taxing master of fees. One example is that there was an agreement of fees of Kshs. 500,000- the said sum was paid in full, yet these facts were not disclosed to the taxing master. They also distinguished the judicial authorities relied upon by the advocate especially the case of **Gacau Kariuki & Co. Advocates vs. Allan Mbugua Ng'ang'a Misc Appl No. 678 of 2011** by Hon. Justice Odunga which dealt with settin aside of orders that were made by the Deputy Registrar and not a judgement and decree of the court as is the case here. The court should even invoke its inherent jurisdiction under Section 3A of the Civil Procedure Code to meet the ends of justice or to prevent abuse of the process of the court. The judgement was obtained through material non-disclosure and deliberate misrepresentation of facts, which is a clear abuse of the due process. Para 11(4) of the Advocates Remuneration Order provides for reference in respect to the taxing officers decisions. It does not provide a party recourse from a judgement of the Honourable court especially where one party has benefited from

their own mischief contrary to principles of natural justice and as determined in the cases of **Machira & co Advocates vs. Magugu [2002]2 EA 428 & Wafula Simiyu & Co. Advocates vs. Eastland Hotel Limited HCCC 713 of 2012**. For the reasons above, the Applicants concluded that their right to be heard under Article 50 of the Constitution has been violated and the judgment herein should be set aside to provide them with an opportunity to be heard.

The Advocate opposed the application

[5] The advocate opposed the application dated 22nd day of April 2015. They filed submissions, a Replying Affidavit sworn by **ODERA OBAR KENNEDY** together with a List of Authorities of even date. The Advocate also filed a Supplementary List of Authorities on the 25th day of May 2015 in opposition thereto. The advocate started by attacking the Supplementary Affidavit sworn by Juma Mohammed Motha and submissions filed on 22nd day of May 2015 for having been filed way out of time and in breach of the court's directions issued on the 4th day of May 2015. He, however, zeroed into substantive arguments. The advocate argued that they were instructed to file HCCC 692 OF 2012 against Barclays Bank of Kenya Limited to challenge the Bank's attempt to recover from them the outstanding sum of Kshs. 803,811,194.00. Afterwards, on the 14th day of February 2013 the Applicants instructed the firm of Apopo & Co. Advocates to take over the conduct of the said proceedings from the Advocate. Consequently, the Advocate filed the Advocate Client Bill of Costs dated 6th day of March 2013. (Hereinafter referred to as "**the Bill**"), which was taxed on 30th day of July 2014 in the sum of Kshs. 17,716,484.00 and a Certificate of Taxation issued. Subsequently, the Advocate moved the Court pursuant to the provisions of Section 51 of the Advocates Act for judgment to be entered for the taxed sum of Kshs. 17,716,484.00. On the 1st day of October 2014 the Hon. Mr. Justice Ochieng entered judgement against the Respondents for the sum of Kshs. 17,716,484.00.

[6] The best argument by the advocate is that the court should be guided by known legal principles in the exercise of discretion to set aside an ex parte judgement. The guidelines were summed up in the celebrated case of **Shah Vs. Mbogo & Another [1974] E.A 116.** See Harris J that:-

> **"I have carefully considered in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgement obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice."**

[7] Applying the said test, the advocate urged that the Applicants and their advocates have been hell bent at deliberately obstructing and delaying the course of justice, hence are undeserving of the exercise of court's discretion. The court should determine:-

a. **Whether jurisdiction of this Honourable Court has been properly invoked in the challenge to the taxation proceedings.**

b. **Whether the Taxation proceedings and consequential Decree issued on the 12th day of November 2014 are regular.**

c. **Whether the Applicants have an arguable case, which has a real prospect of success?**

[8] The advocate was of the view that the jurisdiction of this Honourable Court has not been properly invoked in the challenge to the taxation proceedings. The plethora of cases in recent years suggests that the appropriate recourse of a party aggrieved by the decision of a Taxing Officer, whether interlocutory or final is by way of Reference under the provisions of Paragraph 11 of the Advocates Remuneration Order. They referred the court to the observations by the Hon. Mr. Justice Ringera (as he then was) in the case of **Machira & Co. Advocates vs. Magugu [2002] 2 EA** 428. Based on the principle laid therein, the advocate relied on another decision of court in the case of **Gacau Kariuki & Co. Advocates Vs. Allan**

Mbugua Ng'ang'a Misc. Application No. 678 of 2011, where the Hon. Mr. Odunga declined to set aside the decision of the Taxing Officer on account of failure by the Applicant to file a Reference. Similarly, they cited the case of **Wafula Simiyu & Co. Advocates vs. Eastland Hotel Limited HCCC 713 of 2012** where the Hon. Mr. Justice Mabeya reaffirmed the significance of invocation of Paragraph 11 of the Advocates Remuneration Order in challenging the decision of the Taxing Officer.

[9] According to the advocate, in the absence of appropriate Reference to challenge the decision of the Taxing Officer made on the 30th day of July 2014 in compliance with the mandatory provisions of Paragraph 11 of the Advocates Remuneration Order, the current application should be refused. The Notice of Motion Application dated 22nd day of April 2015 invoked Article 159 of the Constitution, Sections 1A, 1B, 3A and Section 63 (e) of the Civil Procedure Act, Order L (sic) Rule 1 of the Civil Procedure Rules, Sections 45, 48 and 51 of the Advocates Act, Rule 13 and 70 of the Advocates Remuneration Order and all enabling provisions of the law. Yet, it seeks for setting aside of the taxation proceedings, the certificate of taxation dated 12th day of August 2014 together with the decree thereto dated 6th day of November 2014 and all consequential orders. It also seeks for an opportunity to be heard on the Advocates Client Bill of Costs dated 6th day of March 2013. These orders can only be sought in a Reference under Paragraph 11 of the Advocates Act to challenge the decision of the Taxing Officer. Conversely, they would have to seek leave of the Court to enlarge time within which to file the reference. They have not sought enlargement of time to file a Reference under paragraph 11 (4) of the Advocates Remuneration Order. Therefore, the Application is incompetent and should be dismissed on that score.

[10] The advocate did not stop there. He submitted that the Taxation proceedings and consequential Decree issued on the 12th day of November 2014 are regular. Invocation of Section 48 of the Advocates Act is wrong because there is a visible contrast between Recovery of Costs by an Advocate under Section 48 of the Advocates Act against Section 51 (2) of the Advocates Act. Consider the following arguments: (1) The difference in the two modes of the recovery of costs provided in Section 48 and 51(1) of the Advocates Act was exhaustively explained by the Hon. Lady Justice Kamau in the case of **Lubullelah & Associates Advocates Vs. N. K. Brother Limited Misc Civil Case No. 52 of 2012** in the following terms:

> "**The Applicant herein opted not to file a suit for recovery of its costs as provided for under Section 48 of the Advocates Act. It applied for taxation of its Bill of Costs in accordance with Section 51(2) of the said Act. The Applicant was therefore under no obligation to comply with the provisions of Section 48 of the Act by filing a suit for the recovery of its costs against the Respondent herein."**

The Advocate filed a Bill of Costs, which was taxed, and a Certificate for Taxation was issued that culminated in the judgement being entered for the sum of Kshs. 17,716,484.00 under the provisions of Section 51 (2) of the Advocates Act. Reject arguments based on Section 48 of the Advocates Act. (2) In any event, on the 18th day of March 2014, the Advocate cautiously wrote to the firm of Respondents' Advocates and inquired whether the said Advocates had instructions to accept service of the Notice of Taxation and the Bill of Costs on behalf of the Respondents. *See Page 20 of the Replying Affidavit.* In response by their letters dated 11th day of April 2013 and 15th day of April 2013, both of which were copied to the Applicants, and their Advocates requested the Advocate to furnish them with the Notice of Taxation together with the Bill of Costs. *See Page 21-22 of the Replying Affidavit.* Since the Applicants were copied on the said letters, and so , logical deduction to be drawn is that they were aware of the proceedings and deliberately chose to suppress material facts from court. On the 2nd day of May 2013 the Advocate forwarded to the Applicants' advocates the Notice of Taxation and the Bill of Costs. It is important that we underscore the fact that the Advocate impressed upon the Respondents' Advocates that the taxation was scheduled for the 17th day of June 2013. *See Page 23-25 of the Replying Affidavit.* Pursuant to the proviso to **Paragraph 72 of the Advocates Remuneration Order**, the Taxing Officer has been given discretion to dispense with service of the Notice of Taxation and the Bill where a person so entitled to receive such notice and the bill cannot be found at his last known address for service. *(See page 2 b of the Advocate's List of Authorities).* Accordingly, following an Application filed by the Advocate pursuant to the provisions of Paragraph72 of the Advocates Remuneration Order, and upon

being satisfied that the Respondents could not be found at their last known address, on the 9th day of July 2013, the Deputy Registrar Hon. Mr. Nyakundi (as he then was) exercised his discretion in favour of the Advocate and made an Order in writing dispensing with personal service of the Notice of Taxation upon the Applicants. *See Page 34 to 35 of the Replying Affidavit.* Also, on the 9th day of July 2013, the Advocate informed the Applicants' Advocates that the Deputy Registrar had made an Order dispensing with personal service of the Notice of Taxation and the Bill upon their clients. *See page 36 of the Replying Affidavit. T*he orders by the Deputy Registrar made on the 9th day of July 2013 dispensing with service of the Notice of Taxation and the Bill upon the Respondents have not been discharged, varied and/or set aside. Thus, the Taxing Officer having judiciously exercised his discretion to dispense with service of the Notice of Taxation and the Bill upon the Applicants, it is not right in law for the Applicants to suggest that the taxation proceedings together with the consequential decree are irregular for want of service. They ought to have filed a Reference to put these arguments forth. Out of abundant caution the Advocate served the Applicants' advocates with the Hearing Notices for the taxation dates, the Submissions in support of the Bill and the Ruling Notice.

[11] The advocate continued to submit that upon the issuance of the Certificate of Taxation, the Advocate filed the Application under Section 51 of the Advocates Act for judgement against the Applicants for the taxed costs in the sum of Kshs. 17,716,484.00. It is evident from the Affidavit of Service of Joel Mwanzia annexed as OOK 18 on page 92 of the Replying Affidavit that the Applicants' advocates were duly served with and accepted service of the said Application by stamping and signing it. They failed to attend and so on the 1st day of October 2014, the Hon. Mr. Justice Ochieng entered judgement against the Applicants for the sum of Kshs. 17,716,484.00. Therefore, it is not correct for them to allege that they only became aware of the taxation proceedings and decree when the Advocate advertised the Winding UP proceedings. The averments in paragraph 22 of the Replying Affidavit are false and misleading.

[12] Based on the above matters, the advocate is convinced that the Applicants do not have an arguable case, which has a real prospect of success. See the dicta of the Court of Appeal in the case of **Express (K) Ltd Vs. Patel [2001] 1 E.A 54** that once the judgement is regular, before it is set aside, the Applicant ought to show merits of the defence. The Hon. Mr Justice Shah, JA is recorded as follows:

> **"In my view, the rule as regards showing merits in defence is a golden rule. The court ought to be satisfied that the Applicant is not applying to set aside a regular judgement with a view to delaying the inevitable."**

[13] They also cited the case of **Stallion Insurance Company Limited vs. Ignazzio Messina & C.S.P.aA Civil Appeal No. 18 of 2001,** where the Court of Appeal considered the prospects of the success of the Defendant's defence if the Application to set aside was granted and made the following observation:

> "**We have examined the draft defence with care and also the various issues touted as triable but we think they are but fanciful. The thrust of the draft defence is that the guarantee, which was admittedly issued by the appellant, was not for USD. 750,000.00 but for USD 500,000.00 and that in any event the amount was not payable without proof because it was disputed. The denial about the amount of the guarantee flies in the face of the documentary proof produced by the Respondent in their affidavit and no challenge was made to that document. There can be no issue there."**

To the advocate, paragraph 6 of the Supporting Affidavit of Juma Mohammed Motha, merely suggests, without any documentary proof, that the parties had entered into an Agreement on fees and that the parties agreed that the fee payable to the advocate was the sum of Kshs. 500,000.00 and that the Advocate had been paid in full. On the other hand, the Advocate has denied existence of any agreement on fees in writing or verbally, as alleged or at all. The advocate also argued that there are no payment cheques of the said sum of Kshs. 500,000.00 as alleged; this makes the allegation hollower. It is a hackneyed principle of law espoused under the provisions of **Section 45 (1) of the Advocates Act Chapter 16 of the Laws of Kenya** that for it to be valid and binding, an agreement between as Advocate

and Client with respect to remuneration **should be in writing and signed by the client or his agent duly authorised in that behalf**. In the case of **Kahari & Kiai Advocates Vs. Kenya Safari Lodges & Hotels Ltd Misc. Cause No. 385 of 2006** the Hon. Mr. Justice Waweru recognised the existence of such circumstances. The judge held as follows:

> **"It is common ground that in the present case there was not one single document signed by the client or its agent duly authorized in that behalf constituting an agreement on fees… The clear words of the statute (Section 45 (1) of the Act say that an agreement on fees to be valid and binding on the parties it must be in writing and signed by the client or his agent duly authorized in that behalf. In the present case, without any document duly signed by the client or its agent duly authorized in that behalf confirming the agreement on fees, which appears to have been reached orally, there is no valid and binding agreement between the parties on fees. I so find.** *(Emphasis added).*

[14] Other questions abound from the allegation that there was an agreement for fees of Kshs. 500,000.00 and it would be asked whether such agreement is enforceable in the face of the law that an Advocate should not charge less than the prescribed fees. These arguments are based on the value of the suit property. The provisions of **Section 36 (2) of the Advocates Act** provides as follows;

> "**No advocate shall charge or accept, otherwise than in part payment, any fee or other consideration in respect of professional business which was less than the remuneration prescribed, by order, under this Act."**

See also **Legal Notice No. 159 of 2006**that an advocate is prohibited from agreeing or accepting remuneration at less than that provided by the Advocates Remuneration Order. In the case of **Kahari & Kiai Advocates** (Supra)the Hon. Mr. Justice Waweru explicated the enforceability of the alleged agreement on fees against the backdrop of the provisions of Section 36 (2) of the Advocates Act in the following terms:

> **"There is yet another problem. By agreeing to accept legal fees that were less than those prescribed by the Advocates Remuneration Order, the Advocates were in contravention of Section 36 of the Act…The long and short of all this is that, even if the client in the present case had confirmed in writing the apparently oral agreement with the Advocate that they would accept fees that were less than those prescribed by the Advocates Remuneration Order, the agreement would not have been valid and enforceable for the reasons given above."***(Emphasis Ours)*

[15] The advocate termed the argument by the Applicants that the Advocate was not entitled to his full fees since the matter did not proceed for hearing as the same was at the interlocutory stage to be another feeble defence. The same issue as to whether the Advocate earned his full fees when he filed the Statement of Claim on the 1st day of November 2012 was an issue that was directly and substantially in issue in the taxation. In any case, the fee was fully earned. See the case of **First American Bank of Kenya vs. Shah & Others [2002] 1 E.A 64** where the Hon. Mr. Justice Ringera (as he then was) held as follows:

> **"In my opinion the full instruction fees to defend a suit is earned the moment a defence is filed and the subsequent progress of the matter is irrelevant to that item of fees. In the premises I DON'T consider that the taxing officer erred in not taking into account that the suit was withdrawn only 3 days after it was filed and that no hearing had taken place.** *(Emphasis added)*

[16] Accordingly, the advocate submitted that the line of defence adopted by the Applicants clearly show that they have not established *a prima facie* defence which would warrant a regular judgment to be set aside. By their conduct and that of their advocates, viewed objectively the Applicants have deliberately sought by evasion, wilful misrepresentation of facts to obstruct and delay the course of justice. They merely intend to **delay the inevitable**. As such, the advocate urged the court to dismiss the

application with costs to the Advocate.

DETERMINATION

[17] From both divides come very eminent arguments. But, in my view, I see an obfuscation of two distinct proceedings by this application; the one under section 51 of the Advocates Act with the one under paragraph 11 of the Advocates (Remuneration) Order. I also note that the major reason for the fusion is the alleged lack of service of the Bill of Costs and the Notice of Taxation on the clients- the Applicants herein. The said approach brings the court to want to first determine the issue :-

> a) W**hether the application herein is in the nature of a reference or not; and whether it is incompetent as brought.**

This issue bear fundamental preliminary connotation as the decision of court on the said issue will also influence the decision on the other pertinent issue on:-

a. **Whether the taxation as well as the certificate of Taxation and the decree herein should be set aside.**

[18] I need not belabor the point that the law is that Article 159 of the Constitution should not be used as a panacea for all ills and omissions in approaching the court. Procedural law also serves a useful purpose in the attainment of fair trial or hearing in judicial proceedings. The application before me seeks for two significant orders, to wit; (1) that the Taxation proceedings, Certificate of Taxation and the decree therefrom be set aside for being irregular and unlawful; and (2) that the Applicants be given an opportunity to be heard on the taxation of the Bill of Costs dated 6th March 2014. These prayers portend a challenge to the decision of the Taxing Master. Even issues of non-service or that the taxation proceeded ex parte in circumstances it should not have, are matters falling under the process of a Reference and such matters would be treated as ''error in principle'' on which the Bill of Costs may be remitted for re-taxation. Again, arguments such as; (1) that the fee was not fully earned or (2) that there was an agreement on fee payable and (3) the fee was fully paid etc.; all of these matters ought to be urged in a Reference under paragraph 11 of the Advocates (Remuneration) Order. These issues will be gauged against the decision of the Taxing Master and the applicable law. There are ample judicial decisions on this subject which I do not need to multiply except to cite some few which have been quoted by parties also. For instance see the decision by Ringera J (as he then was) in the case of **Machira & Co. Advocates vs. Magugu [2002] 2 EA** 428that:-

> **"As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order."**

[19] See also the decision of court in the case of **Gacau Kariuki & Co. Advocates Vs. Allan Mbugua Ng'ang'a Misc. Application No. 678 of 2011**, where the Hon. Mr. Odunga declined to set aside the decision of the Taxing Officer on account of failure by the Applicant to file a Reference. The Learned Judge expressed himself more succinctly as follows:

> **"I must make it very clear that what is before me is not a reference from taxation but an application seeking to set aside the orders made on 29th day of September 2011 and 27th day of October 2011. The orders, which were made on 29th day of September 2011, were made by the Deputy Registrar when in her capacity as the Taxing Master taxed the Bill as presented. What is the procedure for challenging such a decision? In my view the only available recourse to a person aggrieved by a decision of a taxing officer is to lodge a reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein paragraph 11 (4) of the Advocates Remuneration Order empowers the court to extend time. It has been said time and again that where there is a specific procedure provided for addressing a grievance**

<u>that procedure should be strictly complied with.</u> *(Underlining added)*

[20] Odunga J in the above case finally declared that:

> **"I am also of the same school of thought as the Learned Judges' as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing officer has directed himself on a matter of principle. If the same is found to have been the case, the usual course is to remit the matter back to the taxing officer with the necessary directions. <u>The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the judge may remit the matter back with directions that the bill be re-taxed in the presence of the parties. It is therefore my view and I so hold that the only recourse available to the client herein was to come by way of Reference. Accordingly, I decline to set aside the taxing master's decision made on the 29th day of September 2009."</u>** *(Underlining added)*

[21] See also the case of **Wafula Simiyu & Co. Advocates vs. Eastland Hotel Limited HCCC 713 of 2012** where the Hon. Mr. Justice Mabeya extensively dealt with the importance in law of invoking of Paragraph 11 of the Advocates Remuneration Order in a challenge to the decision of the Taxing Officer. The Learned Judge stated that:-

> **"I note that although attachment was effected on the 24th May 2013, as at the date of this motion was argued, no steps had been undertaken by the Client to regularise its position under the provisions of Rule 11 of the Advocates Remuneration Order to challenge that subject taxation. No application was made or prayer included in the present motion to extend time for complying with Rule 11 aforesaid. The client did not state when it intended to file the reference. In my view if the client was serious with its protestations regarding the ex parte nature of the proceedings so far, it should have made a prayer in these very proceedings for extension of time. This it did not. If it did not want to go to the taxing officer to set aside the ex parte proceedings, it should have prayed for extension of time under Rule 11 (4) and issue a notice of objection. How and when does it intend to pursue the reference? This has not been disclosed. To my mind, this information lacking I do not see what purpose a stay will serve. It will lead to further delays contrary to the provisions of Article 159 (2) (c) of the Constitution."**

[22] I agree with the argument by the Applicants that the application, also seeks to set aside the judgment entered into herein under section 51 of the Advocates Act. But all the grounds set out or argued in the application relate to and befits a Reference. That is the reason why I stated in the opening part of this decision that there is a fusion of proceedings under section 51 and paragraph 11 of the Advocates Act and Advocates (Remuneration) Order, respectively. Perhaps as this decision progresses, the following statement by Ringera J (as he then was) in the case of **PYARALAL MHAND BHERU RAJPUT vs BARCLAYS BANK AND OTHERS Civil Case No. 38 of 2004** on Omni-bus applications may be vindicated in the circumstances of this case, when he stated that;

> **"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."**

[23] The approach- or style, if so befits- adopted in this application is inappropriate as the test applicable in deciding a Reference under paragraph 11 of the Advocates (Remuneration) Order is

different from the one applicable in an application for the setting aside of a judgment entered into under section 51 of the Advocates Act. I do not really see any formidable argument on dispute on retainer because the alleged agreement on fee does not qualify, for none was exhibited- at least none was shown to me. The application was served and the service has not been impeached in any way. The application is based on non-service of the Bill of Costs and Taxation Notice which essentially takes the court back to the procedure of a Reference. I should note also that there are no other circumstances which would make the court consider setting aside the said judgment. Note also that, there are certain requirements on time for filing the Reference under paragraph 11 of the Advocates (Remunerations) Order which must be adhered to, or in the event of default, may be extended by the court on application by a party in that behalf. Of course there are the defined considerations that the court will have to take into account in enlarging the time for filing a reference. Those factors have not been argued in any able manner. Also, there is no request for enlargement of time which the court can competently consider. Before I close, I must admit that the requirements under paragraph 11 of the Advocates (Remuneration) Order are not superfluous as they support rights of parties in a taxation proceeding. All these arguments and others which may be put forth only support the approach that has been taken by majority of judges who have had occasion to consider the question on whether an application not made pursuant to paragraph 11 of the Advocates (Remuneration) Order is competent. Accordingly the application dated 22nd April 2015 is not meritorious and is dismissed with costs to the advocate. I do not, however, wish to make specific pronouncements on most of the issues raised for I believe they befit a Reference; for this decision may not necessarily foreclose any right to apply for extension of time as far as the law may permit. It is so ordered.

Dated, signed and delivered in court at Nairobi this 25th day of August 2015.

F. GIKONYO

JUDGE