



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS CAUSE NO. 662 OF 2012**

**IN THE MATTER OF: THE ADVOCATES ACT, CAP 16**

**AND**

**IN THE MATTER OF: TAXATION OF COSTS BETWEEN ADVOCATES AND CLIENT**

**WAMBUGU, MOTENDE & CO. ADVOCATES ..... APPLICANT**

**VERSUS**

**KAJULU HOLDINGS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KISUMU CONCRETE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**LALJI KARSAN RABADIA ..... 3<sup>RD</sup> RESPONDENT**

**ARVIN JADUA RABADIA ..... 4<sup>TH</sup> RESPONDENT**

**CHANDARAKANT LALJI RABADIA ..... 5<sup>TH</sup> RESPONDENT**

**SUDHIR BRAHMBHATT ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. This is a Reference dated 30th August 2013 brought by the Respondents as against the decision of the Taxing Officer dated 22nd July 2013 and grounded under the provisions of paragraph 11 of the Advocates (Remuneration) Order. The Application seeks the following Orders:

**“1. THAT the decision of the Taxing Officer given on 22<sup>nd</sup> July, 2013, particularly on items 1, 2, 19, 22, 23 and 24 of the bill of Costs dated 25<sup>th</sup> October, 2012 filed in court by the Respondent on 31<sup>st</sup> October, 2012 be set aside and/or varied.**

**2. THAT the finding/decision of the Taxing Officer that no agreement existed between the 2<sup>nd</sup> Respondent and the Applicant/Advocates on fees chargeable for the services rendered for the 2<sup>nd</sup> Respondent by the Applicant/Advocates be set aside and in place thereof be substituted a finding/decision that the fees for instructions to transfer Title No. Kajiado/Kitengela/2354 from Kajulu Holdings Limited to Kisumu**

**Concrete Products Limited and to register a charge over the same property in favour of Development Bank of Kenya Ltd were agreed between Kisumu Concrete Products Limited and the Applicant/Advocates at Kshs. 250,000/=.**

**3. THAT the decision of the Taxing Officer allowing Item 1 of the Bill of Costs at Kshs. 150,000/= be set aside and in place thereof be substituted an order taxing off the entire Item 1.**

**4. THAT the decision of the Taxing Officer allowing Kshs. 250,000/= under Item 2 be set aside and in place thereof be substituted an order allowing only Kshs. 70,000/= under that Item or such other sum this court will deem reasonable.**

**5. THAT the decision of the Taxing Officer allowing Items 19, 23 and 24 be set aside and Item 19, being Value Added Tax, be allowed only on the sum found to be properly due to the Applicant/Advocates as professional fees.**

**6. THAT the decision of the Taxing Officer refusing to expunge and/or strike out the names of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents from the Bill of Costs be varied and an order be given striking out the claim against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents or expunging their names from the Bill of Costs.**

**7. THAT costs of this application/reference be borne by the Applicant/Advocates”.**

2. The said Reference was brought upon the following grounds:

**“i) The learned Taxing Officer erred in law and principle when he allowed and/or awarded fees for services which the Applicant/Advocates did not render and thereby reached erroneous decisions on the Items objected to, especially Items 1 and 2 of the Bill of Costs.**

**ii) Instructions to the Applicant were given by Kisumu Concrete Products Limited, the 2<sup>nd</sup> Respondent, and Development Bank of Kenya Limited only but not by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and/or 7<sup>th</sup> Respondents or any of them.**

**iii) The instructions to the Applicant/Advocates were limited to the following services:-**

- a. Registration of transfer of Title No. Kajiado/Kitengela/2354 from Kajulu Holdings Limited to Kisumu Concrete Products Limited.**
- b. Registration of Charge over Title No. Kajiado/Kitengela 2354 by Kisumu Concrete Products Limited in favour of Development Bank of Kenya Limited.**

**iv) Professional fees and disbursements for the above service/work was agreed between Kisumu Concrete Products Limited and the Applicant/advocates at a consolidated sum of Kshs. 715,080/= as evidenced by the applicant's/Advocates' communication to the 2<sup>nd</sup> Respondent vide their complimentary slip which was attached to the Replying Affidavit of Vimal L. Rabadia sworn on 11<sup>th</sup> March, 2013. The finding to the contrary by the Taxing Officer was therefore erroneous.**

**v) Professional fees and disbursements were agreed and broken down as follows:-**

- a. Stamp duty on transfer - Kshs. 400,000.00**
- b. Stamp duty on charge - Kshs. 15,040.00**
- c. Special Land Board Consent/**

Disbursements - Kshs. 50,000.00

d. Legal fees - Kshs. 250,000.00

**Total - Kshs. 715,080.00**

vi) The Applicant/Advocates only completed one transaction, namely, transfer of Title No. Kajiado/Kitengela/2354 from Kajulu Holdings Limited to Kisumu Concrete Products Limited but after an inordinately long delay, yet the Taxing Officer erroneously found and decided that the Applicant/Advocates also rendered services in respect of sale and charge of the same property.

vii) The Applicant did not render any other service and, more specifically, did not prepare or register a charge of the property in favour of Development Bank of Kenya Limited as was initially instructed. The Taxing Officer's finding/decision to the contrary was a grave error.

viii) The award of Kshs. 150,000/= under Item 1 relating to instructions to charge was therefore wholly unjustified and the Taxing Officer was wrong in allowing this sum.

ix) The award of Kshs. 250,000/= under Item 2 was also wrong because the Applicant/Advocates only completed one part of the dual instructions to transfer and charge for which full fees had been agreed at Kshs. 250,000/=. Not more than Kshs. 70,000/= should have been allowed under this item because no sale/purchase was involved and all the Advocates did was to draw, have executed and register a transfer.

x) Value Add Tax should be allowed only on the property sum found to be due to the Applicant/Advocates.

xi) Item 23 should not have been allowed at more than Kshs. 5,000/=.

xii) Item 24 should be taxed off in whole.

xiii) The claim against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents should have been disallowed and their names should have been struck off or expunged from the Bill of Costs as no instructions were received from them and no services were rendered to them”.

3. The Reference was supported by the Affidavit of a director of the second Respondent company being one **Vimal L. Rabadia** sworn on 30th August 2013. The deponent noted that he had been informed by the advocate on record for the Respondents, Mr. Paul Amuga, that the reasons for the Taxing Officer's decision were supplied to him on 30th August 2013. The deponent then went on to detail where he considered the Taxing Officer had gone wrong in the taxation exercise, such as has been detailed above in the Grounds in support of the Reference. The Applicant filed a Preliminary Objection by Notice dated 18th October 2013. The same was brought on the following grounds:

“1. The Application is incompetent before this Honourable Court as it offends the mandatory provisions of paragraphs 11 (1) and (2) of the Advocates Remuneration Order, having been filed after the expiry of the prescribed period of fourteen days after taxation and delivery of the Ruling.

2. The Taxing Officer taxed the Applicant's Bill of Costs dated 25<sup>th</sup> October 2012 vide Ruling of 22<sup>nd</sup> July 2013, which Ruling explained the reasons for the amounts taxed and the same was delivered on the said date and availed to both the Applicant and Respondents.

3. Despite the delivery of the said Ruling, the Respondents did not make any application for reference within the prescribed fourteen days under paragraph 11 of the Advocates Remuneration Order.

4. Instead, the Respondents filed the application for reference on 30<sup>th</sup> August 2013, which was way out of the prescribed time of fourteen days under paragraph 11 (1) the Advocates Remuneration Order.

5. Further, paragraph 11 (4) of the said Order requires that where a party aggrieved by the Taxing Officer's decision seeks to enlarge the time for making such an application for reference, the party may do so by firstly seeking an order of this Honourable Court upon giving every other interested party's not less than three days' notice in writing or as the Court may direct. The Respondents, despite having not brought their application within the prescribed time, have failed to make an application seeking leave from the court to file the application after expiry of the prescribed time.

6. Hence, the Respondents' Application is improper before your Honour and ought to be struck out with costs to the Respondents".

4. The Respondents filed their submissions in relation to their Application on 25th November 2013. It was interesting for the Court to note that in their submissions, the Respondents detailed that they had filed a supplementary affidavit through the said advocate, Mr. Amuga in which they stated that the deponent had not only exhibited the Notice of Objection filed on 25th July 2013 but that he also confirmed that the reasons for the decision of the Taxing Officer's Ruling had been supplied to him on 30th August 2013. Unfortunately for the Respondents, there was no trace of that supplementary affidavit on the Court file. Interestingly, the Affidavit in support of the Application exhibited as "VLR 1" annexed a copy of the Taxing Officer's Ruling which is dated 22nd July 2013. The Respondents maintained that their Application before Court was filed on the same day that the reasons for the Taxing Officer's decision on the challenge items was supplied being 30th August 2013. The Respondent submitted that the allegations by the Applicant that no notice of objection to taxation was filed or that the Application before Court was filed out of time, were baseless. Thereafter, the Respondents' submissions went into details as regards the merits of their Application before Court. In my view, it would be premature of this Court to consider those submissions until the Preliminary Objection of the Applicant is disposed of.
5. In that regard, the Applicant's submissions were filed herein on 20th January 2014. They opened by tracing the history of the work done on behalf of the Respondents and how non-payment of fees resulted in the filing of the Bill of Costs dated 30th October 2012 for taxation purposes. The Applicant submitted that the Respondents had failed to file their Application before Court within the prescribed time under paragraph 11 (1) and (2) of the Advocates (Remuneration) Order. The Applicant set out the provisions of paragraph 11 (1) and (2) and maintained that the failure to adhere to the same within the prescribed time rendered the Application incompetent. To this end they referred to 2 decisions by my learned brother **Odunga J.** being **Republic v Otieno Kajwang' Minister for Immigration and Registration of Persons & Anor ex parte Mohamed Muhumed Sirat** (HCMisc. Appl. No. 316 of 2008) and **Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Ltd** (HC Misc. Appl. No. 343 of 2011). The Applicant noted that the Respondents had filed the Application before Court on 30th August 2013 yet the decision of the Taxing Officer had been made and delivered on 22nd July 2013 when the Ruling was availed to the parties. As a result, the Application had been filed way beyond the 14 day period as allowed by paragraph 11 aforesaid and consequently the same should be considered as incompetent and be entirely disregarded. The fact that the Respondents had filed a Notice of Objection to Taxation did

- not preclude them from filing the Application before Court out of time.
6. The question here is whether the Respondents have adopted the correct procedure by coming by way of the provisions of **Rule 11 (1) and (2)** of the *Advocates (Remuneration) Order*. Those sub-rules read as follows:

**“(1)Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.**

**(2)The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”**

7. I am cognizant of the position taken by my learned brother **Ochieng J.** in the case of **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2) (2006) 1 EA 5** in which he held as follows:

**“Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even where reasons for the disputed taxation are already contained in the formal and considered ruling.”**

8. In my opinion, there are reasons on the face of the Taxing Officer’s Ruling dated 22nd July 2013 which would make it futile to expect him to furnish further reasons. However, the complaint in the affidavit evidence before the Court would seem to be whether the Taxing Officer provided copies of his Ruling to the parties on the day that he delivered the same or that he did not so deliver copies until 30th August 2013. However, I do not consider that such should make any difference as to the time period in which the Respondents should have filed their Application. My learned brother **Odunga J.** put it this way in his finding in the case of **Evans Thiga Gaturu, Advocate** (supra):

**“The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons as happened in the case of Kerandi Manduku & Company vs Gathecha Holdings Ltd Nairobi (Milimani) HMCA No. 202 of 2005, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent.”**

9. I have perused the record of the Court for the 22nd July 2013. The Taxing Officer Mr. R. Nyakundi recorded Mr. Ngige as appearing for the Applicant and Mr. Orunga holding brief for Mr. Amuga for the Respondents. He then recorded:

**“The ruling read and delivered on 22.7. 2013 in the presence of the above”.**

It seems to this Court that if the Ruling was so read on 22nd July 2013, Mr. Orunga would have knowledge of its contents sufficient to decide whether an application should be made to challenge some of the items taxed by the Taxing Officer. Indeed, the Notice of Objection to this end was filed by the Respondents 25th July 2013. It was interesting for this Court to note that, despite the Respondents alleging that they did not receive a copy of the said Ruling until 30th August 2013, a

certified copy of the same (along with the Certificate of Taxation of Costs) was annexed to the Supporting Affidavit of John Wacira Wambugu sworn on 22nd August 2013 with regard to the Notice of Motion filed by the Applicant on that day.

10. As a result, there is serious doubt cast on the evidence of the Respondents as to the date upon which they received a copy of the Taxing Officer's Ruling dated 22nd July 2013. However, be that as it may, paragraph 11 (1) of the Advocates (Remuneration) Order as above is quite clear – the reference must be filed within 14 days of the Ruling being contested having been delivered. In my view, the Respondents were way out of time and, as a result, I uphold the Preliminary Objection of the Applicant dated 14th October 2013. The Respondents' Chamber Summons dated 30th August 2013 is hereby struck out with costs to the Applicant.

**DATED and delivered at Nairobi this 19<sup>th</sup> day of June, 2014.**

**J. B. HAVELOCK**

**JUDGE**