



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 29 OF 2014**

**IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2009 AND IN THE  
MATTER OF TAXATION OF ADVCOATE/CLIENT BILL OF COSTS**

**AND**

**IN THE MATTER OF MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2013**

**AND**

**IN THE MATTER OF MOMBASA HCCC NO. 431 OF 2010**

**BETWEEN**

1. **BRIGITTA WEILGUNI KNOCHE**
2. **MICHAEL WEILGUNI ..... APPLICANTS**

**AND**

**V. N. OKATA & COMPANY ADVOCATES ..... RESPONDENT**

**RULING**

**ON CHAMBER SUMMONS DATED 17<sup>TH</sup> FEBRUARY 2014**

1. The above Chamber Summons is brought by BRIGITTA WEILGUNI KNOCHE and MICHAEL WEILGUNI (hereinafter called '**the Applicants**'). The Respondent V. N. Okata & Company Advocates were the former Advocates of the Applicants.
2. The Taxing Master of this Court on 21<sup>st</sup> November 2013 taxed the Respondent's Advocates/Client Bill of Cost which taxation is the subject of the application under consideration.
3. The Advocates (Remuneration) Order under paragraph 11 provides the procedure for objecting to a Taxation. Paragraph 11(1) and (2) provides as follows-

**"11.(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to**

which he 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.”**

4. It is clear from that paragraph that the objection procedure is in three stages. The first is the objecting party giving notice in writing to the taxing officer to the items in the taxed Bill of Costs he objects to. Secondly the taxing master is obligated to forthwith give reasons for taxing of the items objected to. The third stage is that the Objector within fourteen days of receipt of the taxing officer’s reasons must file a reference before a Judge.

5. The Applicants by a letter dated 2<sup>nd</sup> December 2013 wrote to the Taxing Officer the following letter-

**“Our Ref: KA/CAT/CIV/23/2013**

**Date: 02.12.2013**

**Your Ref: TBA**

**Deputy Registrar**

**High Court**

**MOMBASA**

**Dear Sir,**

**RE: V. N. OKATA & CO. ADVOCATES –Vs- MICHAEL WEILGUNI &**

**BRIGITTA WEILGUNI KNOCHE**

**MISC. CIVIL SUIT NO. 1 OF 2013**

**TAKE NOTICE that pursuant to Rule 11(1) of the Advocates Remuneration Order 2009 the Defendants herein do object to the decision dated 21<sup>st</sup> November 2013 and specifically to the items stated herein below-**

**Item 5; Items 7-8; Items 13-14; Item 25; Item 35; Items 39-40; Item 44; Item 48; Items 91-94; Items 97-100; Item 103; Items 105-107; Item 113; Item 118; Items 157-160; Items 172-174; Items 223-224; Item 240; Item 248; Items 259-260; Items 265-266; Items 275-278; Items 289-290; Item 294.**

**Yours faithfully,**

**Anthony Otiende**

**For: Katasi & associates, Advocates.”**

The above letter was within the fourteen days provided in paragraph 11(1).

6. The Taxing Officer, todate, does not seem to have responded to that letter. The objected items therefore remain unexplained.

7. It is in that background the Applicants sought the following prayers in their Chamber Summons under consideration-

- **There be a stay of proceedings in Mombasa High Court Miscellaneous Application Number 1 of 2013 between the Respondents and the Applicants/Objectors herein, pending the inter partes hearing of this application in the first instance, pending the hearing and determination of the application or until further orders of this Honourable Court.**
- **This Honourable Court be pleased to exercise its discretion by order to enlarge the time fixed for filing the objection to the Taxing Officer's award.**
- **This Honourable Court be pleased to set aside the Taxing Officer's Ruling dated 21<sup>st</sup> November 2013, and the Certificate of Costs issued at Mombasa on the 22<sup>nd</sup> day of December 2013 and appearing on the face of the record as having been given on 22<sup>nd</sup> January 2013 in so far as the same relates to the Bill of Costs, and the quantum awarded thereon;**
- **The Honourable Court be pleased to re-tax the Bill of Costs, or in the alternative, to remit the Bill of Costs dated 28<sup>th</sup> January, 2013 for fresh re-taxation before a different Taxing Officer with appropriate directions thereof;**
- **Such Order(s) as this Honourable Court deems fit in the circumstances.**

It is important to state that the Applicant's through the affidavit of their then Advocate, in support of the Chamber Summons, went overboard in wrongly attributing wrong doing to the Taxing Officer by alleging she was partial in the taxation. That allegation was not supported by any evidence and I find it objectionable for a Judicial officer who is simply discharging her duties to be subjected to such an unwarranted attack.

8. I also wish to state at this initial stage that I am not persuaded by the holding in the case **KENNETH KIPLAGAT T/A KIPLAGAT & ASSOCIATES –Vs- NATIONAL HOUSING CORPORATION [2005]eKLR** where the Court stated that if there was no objection to certain items of the Bill of Costs, a party is precluded from objecting, at reference hearing in the High Court, on those items. The reason that holding does not persuade me is because the Taxing Officer is obligated to follow the provisions of the Remuneration Order when taxing a Bill of Costs. If any taxation is contrary to that Remuneration Order whether or not it was objected to by the opposing party it would amenable to being set aside by the High Court. It follows that the Applicant is not precluded to object to items not previously objected to.

9. Having made that determination and having considered the parties submissions both in writing and before Court I find that parties adequately addressed themselves to the issues that can lead this Court to consider a reference of the taxed Bill of Cost. That being so my take on the issue is that in the absence of reasons of the Taxing Officer the Court is unable to determine whether the Taxing Officer followed the Remuneration as provided or how she exercised her discretion. A case in point is item number 25 of the Bill of Costs. That item related to instructions fees of the Respondent for instituting a suit on behalf of the Applicant. As correctly submitted by the Applicant's Learned Counsel the value of the subject matter was not stated in those proceedings. That being so the Taxing officer needed to explain how she used the value of Kshs. 20 million. That explanation was required as per schedule vi (viii) (i) which is in the following terms-

**“(i) The taxing officer, in the exercise of this discretion, shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial Judge, and all other relevant circumstances.”**

10. The Respondent does from the material before me seemed to have acted for the Applicants in Court action and in matters relating to conveyance. There was therefore necessity for the items relating to the case and items relating to conveyancing to be distinguished in the Taxation, since they fall under different schedule.

11. What I also find was required to be taken into account at the taxation of the Advocates/Clients Bill of Costs is the alleged payments made to the Respondent. The Taxing Officer has power under paragraph 13A of the Remuneration Order to examine witnesses under oath and order production of books to assist him in determining any dispute. Even though the allegation of payment to Respondent was not before the Taxing Officer as she taxed the Advocate's/Client's Bill of Cost, having been brought to the attention of this Court the interest of justice would require that, that matter be investigated and credit if due to the Applicant it be given. Paragraph 13A in following terms-

**“For the purpose of any proceedings before him, the Taxing Officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.”**

It is for the above reasons that I accede to prayer 4 of the Chamber Summons.

12. Before concluding this Ruling I wish to say that there is nothing in Order 19 of the Civil Procedure Rules that prohibits an Advocate swearing an affidavit in a matter that he represents a party. It is however paragraph 9 of The Advocates (Practice) Rules that puts some restriction. That paragraph is in the following terms-

**“No advocate may appear as such before any Court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:**

**Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”**

It follows, with the above observation, that the affidavits sworn by Anthony Otiende Advocate are competent to support Applicant's application.

13. In the end I make the following orders-

- a. **The Taxation in Mombasa HC Misc. Application No. 1 of 2013 of 21<sup>st</sup> November 2013 is hereby set aside.**
- b. **The Advocates/Client Bill of Costs dated 28<sup>th</sup> January 2013 in Mombasa HC Misc. Application No. 1 of 2013 shall be re-taxed before any other Taxing Officer other than Hon. Renee Kitagwa.**
- c. **There shall be no order as to costs of the Chamber Summons dated 17<sup>th</sup> February 2014.**

**DATED and DELIVERED at MOMBASA this 27<sup>TH</sup> day of NOVEMBER, 2014.**

**MARY KASANGO**

**JUDGE**