REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CAUSE NO. 501 OF 2012

PAUL IMISON

LUCY IMISON …….……..……...… APPLICANTS

VERSUS

JODAD INVESTMENTS LTD...RESPONDENT/INTERESTED PARTY

R U L I N G

The applicants' application dated 6th September 2012 is brought under the provision of paragraph 11(1) and (2) of the Advocate Remuneration Order section 3A and 63 (e) of the Civil Procedure Act.

It seeks from this court orders that:-

1. The order made by the taxing officer on 25th April 2012 allowing Ksh. 570,121.33 as the costs of the interested party be set aside.
2. That the respondent's bill of costs dated 9th January 2012 be referred back to the taxing officer with directions for fresh taxation.
3. That the amount paid by the applicants to the Respondent on 9th August 2012 under execution be refunded by the interested party forthwith failing which, execution to issue.
4. Costs of the applications be provided for.

The application is premised on the grounds that

1. The taxing officer erred in law as follows:-

a. By granting the respondent instructions fee of Ksh.400,000/- which is more than 47 times greater than the amount of Ksh. 8,400 allowable under Schedule VI (L) of the Advocates Remuneration Order 2006.
b. The amounts allowed are manifestly excessive in the circumstances of the case and there is no justification for the same.
c. The decision was based on an error of principle and amounted to wrongful exercise of discretion.
d. That the matter was not complex as to require extensive research on the part of the interested parties as novel issues of law were not raised and determined in the petition to justify such high cost and the taxing master has not given any reasons for the same.

e. There was no basis of awarding getting up fee in the constitutional petition.
f. The court is entitled to interfere with wrongful exercise of the taxing officer's powers.
g. That the applicants have paid the respondent the taxed sum of Ksh. 570,121.33 on 9th August 2012 under proclamation and imminent threat attachment.

The said application is further supported by the affidavit of Justry Patrick Lumumba Nyaberi advocate sworn on 6th September 2102 and a further affidavit sworn by him on 17th July 2014.

The interested party's advocates A.H Malik & Co filed grounds of opposition dated 20th November 2012 challenging the applicant's application on the grounds that:-

1. The application was filed out of time contrary to the provision of paragraph 11(1) and (2) of the Advocates Remuneration Order.
2. Pursuant to paragraph 11(4) of the Advocates Remuneration Order, [2009] the application is incurably defective as it has been filed out of time without leave from this court.
3. That the applicants are estopped from challenging the taxation having duly paid the taxed costs and marking the matter as settled.
4. That the application is tainted with delay and is otherwise an abuse of the court's process

In the applicants' advocate's affidavit supporting the chamber summons, it is deposed that, among others, the taxing officer's award was excessive and way above what is provided for in schedule VI (L) of the Advocates Remuneration Order and that the matter was not highly complex. Further, that the delay in filing the application was occasioned by a delay in obtaining certified Ruling of the taxing officer which was only certified on 7th August 2012.

In the further affidavit, Mr. Nyaberi advocate deposes that the application was filed in time because they asked for the reasons for the decision on 3rd May 2012 which request was received in court on 8th May 2012, within 13 days after the Ruling and the Ruling was only received on the 4th September 2012 and the application was filed on the 13th September 2012, within 14 days of receipt of the Ruling as per paragraph 11 (2) of the Advocates Remuneration Order. In addition, that there is no stay order available in the proceedings for review of costs, his clients had to pay to avoid execution being levied and that in fact the auctioneer who proclaimed the property was fired for incorrectly proclaiming the applicants' property. He also attached the correct submissions in Petition 57 of 2009.

Parties agreed to have this matter disposed of by way of written submissions. The applicants filed theirs on 10th October 2014 whereas the Respondent filed theirs on 23rd October 2014.

The applicants' advocates submitted that the subject bill of costs was party and party costs affecting a Judicial Review matter that was filed in court in 2009 hence the bill must be based on the old Advocates Remuneration Order which came into force on 1st January 2007 and that as the matter was a High Court one, Schedule VI is applicable. He goes further to analyze the bill item by item which I take into account in my analysis.

The respondent on the other hand supports the bill of costs as taxed, urging this court to uphold the taxing officer's order of taxation.

The law applicable to taxation of bills of costs whether between advocates and clients or party and party costs brought by way of reference from the taxing officer's order is Paragraph 11 of the Advocates Remuneration Order which provides:

11 Objection to a decision on taxation and appeal to court of appeal

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 14 days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all parties concerned, settling out the grounds of his objection.

3. Any person aggrieved by the decision of the judge upon any objection referred to such Judge under sub section (2) may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal.
4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chambers summons upon giving to every other interested parties not less than 3 clear days' notice in writing, or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

The Respondent's objection to the application/reference raises the issue of jurisdiction in that it is alleged that the said application was filed out of the stipulated period without first seeking enlargement or extension of time to file such application.

The first issue for my determination, therefore, is whether the application was brought within the prescribed period and if not, what would be the consequences.

The applicants by a further affidavit sworn by their counsel have maintained that the application was filed in time, outlining the steps they took from the date of the taxation order.

I have perused the record herein. The taxation order was made on 25th April 2012 by L.W Gichera (Mrs.) Senior Principal Deputy Registrar in the presence of the counsel for the interested party and in the presence of the applicant on 8th May 2012, the applicant objector wrote to the Principal Deputy Registrar, **objecting " to the amount of instruction fees of Ksh. 400,000 given to the interested party under item No 2 of the bill of costs dated 9th January 2102"** and asking the Deputy Registrar to supply them with reasons as to how she arrived at that amount for the purpose of filing a reference in the High Court. Indeed, the notice of objection requesting for reasons was filed within 14 days of the date of taxation.

The record further shows that the ruling was certified on 7th August 2012 and the advocate for the applicant deposes that the same was received by his office on 4th September 2012 and on 13th September 2012 he filed the reference herein which was well within the 14 days upon receipt of the reasons for the order of 24th April 2012 as per paragraph 11(2) of the Advocates Remuneration Order. Although the respondent raised the objection relating to the application having been filed out of time, they did not advance the objection to their submissions hence I will not delve into it as there is no contrary evidence or assertion to controvert the deposition and record that indeed the reference and all the attendant processes were filed within the time frames stipulated under the paragraph 11 (1) and (2) of the Advocates Remuneration Order hence, there was no basis for the applicants to seek for enlargement of time under subparagraph 4 of paragraph 11.

I shall however delve into the question of whether, the applicants are entitled to object to all the items of the taxed bill of costs, having only requested for reasons on item No. 2, the instruction fees by their notification dated 3rd May 2012. The said notification specifies that:

> ***"The respondents object the amount of instructions fees of Ksh. 400,000/- given to the interested party under item No. 2 of the bill of costs dated 9th January 2012. Please supply us with the reasons as to how you arrived at 'this amount' for the purpose of filing a reference in the High Court."***

Clearly, under Paragraph 11 (1) of the Advocates Remuneration Order,

> ***"Any party who objects to the decision of the taxing officer may within 14 days after the decision give notice in writing to the taxing officer <u>of the item of taxation to which he objects</u>.***

(2) The taxing officer shall forthwith record and forward to the objector the "reasons for his decision on those items" and that the objector may write in 14 days from the receipt of the reasons … apply…"

It therefore follows that the applicant could only pursue the reference with regard to only those items which they had given notification in writing that they were objecting to, and no more.

To do otherwise would amount to sneaking into the reference items which were outside the objection. It further follows that the reference herein could not be expected to refer to no more than the item No. 2 objected to in the notification dated 3rd May 2012. In the case of **Machira & Co Advocates – Vs - Arthur K. Magugu & Margaret Wairimu Magugu CA 199/2002 [2012] eKLR**, the Court of Appeal held that:-

Subrule (1) of Rule 2 Paragraph 11 of the Advocates Remuneration Order requires the party objecting to give notice in writing within 14 days "of the items of taxation to which he objects". As the trial judge correctly found, the respondent's notice of 1st August 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.

As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given, taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the respondent's notice of 1st August 2001 was fatally defective. It follows that the respondent's reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.

Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master's decision was received is immatenal and does not avail the Respondent…"

What I gather from the above decision is that the party aggrieved by the taxation must give a notification in writing specifying the items of taxation to which they object to and it is expected that only those items objected to as specified in the notification that would find their way into the reference by way of chamber summons.

In this case, it is clear that the appellant sought to object to only the instruction fees. However, when he filed the reference, he sought the entire taxation to be set aside attacking each and every item as taxed. In my view, the applicants were trying to steal a match on the respondent. I say so with conviction while appreciating that the fee of getting up and preparation for trial where allowable, in the discretion of the taxing officer, would subject to the conditions set out in the Schedule VI paragraph 2 sub paragraph (iii) of the Advocates Remuneration Order, be determined depending on how much instruction fees was allowed.

Consequently, I find that the attack on all the other items as taxed has no legal basis and I decline to consider any objections attached to the rest of the items as taxed other than the instruction fee.

Before delving into the merits and or demerits of the prayer seeking interference with the award of Ksh. 400,000/- instruction fees, I shall determine the issue of jurisdiction to interfere with the special jurisdiction of the taxing officer. In **Donholm Rahisi Stores – Vs - East African Portland Cement Ltd [2005] eKLR**, the court held that:

"The taxation of costs, whether they be between party and party or between advocates and client, is a special jurisdiction reserved for the taxing officer by the Advocates Remuneration order … the present application seeks an order that would have the effect of interfering with

the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of costs ...”

In **Nyangito & Co Advocate Vs Doinyo Lessos Creameries Ltd [2014] Eklr, Odunga J** emphasized that the circumstances under which a judge of the High Court interferes with the taxing officer’s exercise of discretion are now well known. These principles are:-

1) That the court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle or the fee awarded was manifested excessive as to justify an inference that it was based on an error of principle;

2) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial judge;

3) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount was high.

4) It is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

5) The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;

6) The full instructions fees to defend a suit are earned the moment a defense has been filed and the subsequent progress or the matters is irrelevant to the item of fees;

7) The mere fact that the defendant does research before filing a defense and then puts a defense informed of that research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate’s unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

These principles were stated in the case of **First American Bank of Kenya – Vs - Shah & Others [2002] IEA 64.**

In **Kipkorir, Titoo & Kiara Advocates – Vs - Deposit protection Fund Board (2005) 1 KLR 528**, the Court stated:-

“... On a reference to a judge from the taxation by the taxing officer, the Judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs …. An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxation officer acted on erroneous principles.”

In **Nyangito & Co Advocates (Supra)**, Hon. Justice G.V.Odunga stated:-

“It is my view and I hold that in Judicial Review Constitutional applications and in public electoral matters, the amount in dispute is not necessarily the determinant factor in deciding the quantum of costs payable though the same may be taken into account in considering the interest and importance of the matter to the parties. As was rightly submitted by the respondent, the matter never went to trial and the amount of instructions fee awarded was much more than 100%. Therefore it was not possible to determine the exact time that was

expected in the matter."

In **Joreth Ltd – Vs - Kigano & Associates EALR (2002) IEA 92**, the Court of Appeal set aside the order of the High Court which reassessed the instruction fee allowed by the taxing officer and stated:-

> ***"What the learned Judge did not appreciate, was that sitting on a reference against the assessment of instructions fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle."***

The Court of Appeal in the above case further held that the value of the subject matter ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instructions fee as he considers just, taking into account amongst others, *"the nature and the importance of the cause or matter … it is not in the province of the judge to re-tax the bill and that in principle, the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached."*

In assessing the instruction fees, the taxing officer had this to say, after considering the opposing submissions by both parties:-

> ***"When deciding an instruction fees the court is usually guided by the complexity of the matter, its nature and importance to the public, whether a novel point of law is raised, the responsibility and skill of counsel. The court should also bear in mind as stated in Minister of Agriculture Exparte W. Njuguna & Others that public law matters like judicial reviews, constitutional applications, public electoral matters are in a class of their own. The instruction fees allowable must not in principle be extrapolated from the practices containing in the private Law domain which may waive business claims and profit calculations.***
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> ***He (sic) also states that the taxation of advocates instruction fee is to seek no more and no less than reasonable compensation for professional work done. It should avoid any prospect of unjust enrichment for any particular party. I have considered the proceedings in my opinion they can has (sic) to be considered to have been evenly complex, no novel point of law arose.***
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> ***However, the research and preparation done by counsel cannot be ignored. I award them the instruction fees of Ksh. 400,000/- and tax off Ksh. 2.1Million".***

No doubt, part of the above ruling was extracted from **Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd [2014] eKLR.**

In the same case of **Nyangito & Co. (Supra)** the court held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it. The same principle was upheld in the **First American Bank of Kenya - Vs Shah & Others [2002] IEA 64 (Supra)** where, although the taxing officer did set out the basic fee, she did not indicate the reason why the said basic fee had to be increased from Ksh. 28,000/- to Ksh. 300,000/- which was more than 10 times the basic fees and the court set it aside.

In **Opa Pharmacy Ltd – Vs - Howse & McGeorge Ltd Kampala [1972] EA 233** it was held:-

> ***"Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave no reason whatsoever for doubling the instructions fee. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is, he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The***

failure to give any reason for the choice, surely, must therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."

Further in **Republic – Vs - Ministry of Agriculture & 2 Others Exparte Muchiri W'Njuguna & 6 Others**, citing **Danson Mutuku Muema – Vs - Julius Muthoka Muema & Others Machakos HCA 6/91, Mwera J** (as he then was), held that whereas the court was entirely right in giving costs within its discretion, the amount allowed being ten times the sum provided for, the court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The court further found that since the taxation officer was bound to give reasons for excising his discretion, it was just and fair to set aside the sum be allowed.

In this case, the taxing officer did not allude to or recognize the basic instruction fees set under Schedule VI (i) of the Advocates Remuneration Order, which sum for prerogative orders is Ksh. 28,000/= and not 8400/. In other words, she did not lay the basis for an increase. On the other hand, having found that "although the proceedings could be considered to have been evenly complex, no novel point of law arose," she nevertheless found that "as research and preparation done by counsel cannot be ignored, an instruction fee of Ksh. 400,000 was sufficient." In principle, the taxing officer erred in mixing up issues. She mixed up the instructions fee and fee for preparation of documents. As I have stated earlier, instruction fee is a stale figure which stands alone, whereas fees for getting up and preparing for trial may or may not be awarded in addition to instruction fees, depending on the taxing officer's judicial discretion and taking into account the conditions set out in Schedule VI Paragraph 2 (iii) of the Advocates Remuneration Order.

Furthermore, the taxing officer even went further and defined getting up and preparation for trial fees as *"the amount charged in the preparation of documents, applications in preparation for the guide."* She should therefore have been conscious that in awarding instructions fee it is entirely exclusive of any other fee like getting up fees and preparation for trial.

In my humble view, the mix up occasioned a miscarriage of justice and in the end raised the instruction fees to an inordinately excessive figure of Ksh. 400,000/-.

Paragraph (2) of Schedule VI provides that

"Fees for getting up or preparing for trial of a case shall be allowed in addition to the instruction fee and shall not be less than 1/3 of the instructions fee allowed in taxation:

Provided that:-

1) This fee may be increased as the taxation officer considers reasonable, but it does not include any work comprised in the instruction fee"

As to whether research should have guided the taxing officer in awarding the said Ksh. 400,000/- instruction fees, the case of **First American Bank of Kenya – Vs - Shah & Others (supra)** is relevant. The court in that case held that:-

"The mere fact that the defendant does research before filling a defense and then puts a defense informed of that research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocates' unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary"

I am in agreement with the above holding. Accordingly, therefore, I find that the taxing officer allowed an instruction fee based on wrong principles and arrived at an excessive figure in the circumstances of this case and that justifies interference by this court.

Finally, on the issue of instructions fee as allowed, this court is guided by the Court of Appeal decision in **Butt & Another – Vs - Sifuna T/a Sifuna & Co. Advocates CA 45/2005 [2009] KLR 427** where, while

appreciating that the basic instructions fee was Ksh. 9000/- . In a winding up Petition, the court nevertheless awarded Ksh. 150,000/- in respect of instruction fees which was 17 times the basic instruction fees.

And in **Joreth Ltd – Vs - Kigano & Associates [2002] IEA 1992**, the Court of Appeal set aside the Judge's orders increasing advocate/client instructions fee from Ksh. 934,000/- to 9,084,880/- as having been unsupported in principle.

In this case, having found that the principles applied in arriving at instructions fees of Ksh. 400,000/- were wrong and therefore unsound, I proceed and order that the instruction fees must therefore be reassessed by the taxing officer taking into account the principles set out in this ruling.

Consequently, I remit the taxed bill back to the taxing officer or any other Deputy Registrar of the High Court in the Civil Division, for an appropriate assessment.

Before I conclude, I shall address the issue of whether the payment by the applicant to the respondent of the taxed costs stopped the applicant from filling this reference and objecting to the taxation.

My answer is no, for reasons that ordinarily, the taxed costs in themselves are not a judgment or decree of the court capable of being executed until a certificate of taxation has been issued and forwarded to a judge for entry of judgment in accordance with that Certificate of Taxation and a Decree issued to that effect. Section 51 (2) of the Advocates Act requires that a Certificate of Taxation must be issued by the taxation officer. The law does not contemplate a situation where execution can be levied immediately after taxation and that is why there is provision under Paragraph II of the Advocates Remuneration Order, for objection and a reference, and the whole process of issuing of Certificate of Taxation, obtaining judgment and decree being issued by a judge. In this case, there was no final judgment upon which the respondent could execute decree. The decision by the Auctioneers Licensing Board against the auctioneers who threatened execution that compelled the applicant to pay the amount though under protest followed an irregular and illegal process. The respondent cannot, therefore rely on an illegal process to derive a benefit and plead estoppel. Even if that was not to be the case, a successful party to a reference, who may have paid or overpaid the taxed sums would still be entitled to a refund of the amount in excess of what would be due. Accordingly, I dismiss that argument and plea of estoppel.

The upshot of all this is that the applicants' reference succeeds to the extent that I have stated in this ruling, remitting the bill back to the Deputy Registrar of reassessment of the instruction fees. Any other such sums as shall be found to have been paid to the respondent in excess of the amount allowable shall be refundable only after the reassessment by the taxing officer.

Dated, signed and delivered at Nairobi this 18th Day of December, 2014.

R.E. ABURILI

JUDGE