REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 131 OF 2003

1. **MEIR MIZRAHI**
2. **STANLEY KINYANJUI (Treasurer and**

Secretary respectively, of the Outdoor

Advertising Association of Kenya)

Suing on behalf of

OUTDOOR KENYA ASSOCIATION OF KENYA …..... PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL …..…….…….. 1ST DEFENDANT

ADOPT A LIGHT LTD ……..……. 2ND DEFENDANT

ALLIANCE MEDIA KENYA LTD …….……. 3RD DEFENDANT

R U L I N G

1. The application for determination by the Court is by the Plaintiff dated 20th July, 2006 and brought pursuant to the provisions of **Rules 11(1) & (2)** of the *Advocates Remuneration Order*, **Section 3, 3A, 63(e) & 89** of the *Civil Procedure Act* and **Order L Rule 1 & 2** of the *Civil Procedure Rules*. The applicant seeks for orders for the stay of execution of the Certificate of Taxation dated 14th July, 2006 issued in favour of the 2nd Defendant and further for the setting aside of the Ruling dated 7th July, 2006 on the taxation of the 2nd Defendant's Bill of Costs dated 6th April, 2006.
2. The application is brought upon the grounds that the taxing master erred in principle in assessing the instruction fees on the sum of Kshs. 314,475,000/- mentioned in the Defence in awarding to the 2nd Defendant instruction fees of Kshs. 48,000,000/- on the basis of paragraph 1(b) of

Schedule VI of the Advocates Remuneration Order, instead of a reasonable amount under Schedule VI A 1(o) of the Advocates Remuneration Order. It is the Plaintiff's contention that the amount awarded is manifestly excessive and that the taxing master applied the wrong principles and disregard of practice in awarding the same.

3. The application is supported by the Affidavit of **Stanley Kinyanjui**, sworn on even date. In reiterating the contention adduced in the grounds, the deponent further avers that the subject matter of the suit was injunctive orders, declaratory orders and the nullification of the Contract dated 28th March, 2002 between the 1st and 2nd Defendants. He further depones that the taxing master erred in adopting the provisions of Schedule VI A (1) (b) and instead ought to have followed Schedule VI A I (o).
4. The application is opposed. In the Replying Affidavit of Esther Passaris, the Director of the 2nd Defendant Company, sworn on 30th April, 2010 she contends that the taxing master did not err in principle in the assessment of instruction fees in this matter, which was in accordance to Schedule VI A(1)(b). She maintained that the taxing master considered the pleadings, not only the prayers in the assessment, and that the Plaintiff contention that the assessment, should have been based on Schedule VI (1)(o) was incorrect and a misapprehension of the applicable law. It is also the 2nd Defendant's contention that the application has been overtaken by events in that the 2nd Defendant has already commenced execution proceedings and that, in any event, the application is inordinately delayed.
5. It is the Plaintiff's case that the taxing master erred in the determination of the instruction fees. It is also the Plaintiff's contention that the decision rendered by the Taxing Master be set aside and be substituted with a reasonable award on instruction fees or the Bill of Costs be resubmitted for taxation before a different taxing master. In its submissions dated 2nd June, 2010, the Plaintiff submits that the Orders prayed for in the Plaint were injunctive, declaratory and a nullification of the contract entered between the parties on 28th March, 2002. At no point was a monetary claim pleaded in the Plaint. It is such that it bases its submission that the figure awarded by the taxing master was excessive, having included issues that were not the subject matter of the suit. It is the contention of the Plaintiff that the Taxing Master in including the sum of Kshs. 314,475,000/- as the value of the subject matter had erred as the same was an estimate of the value of the agreement. The Plaintiff relied on the authorities of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board Civil Appeal No. 220 of 2004** on the issue of error in principle by the taxing master, **Attorney General v Kenya Commercial Bank Ltd H.C.C.C No. 329 of 2001** on the issue of the nature of prayers to which a Taxing Master based his decision and **Vijay Kumar Mandal v Rajinder Kumar Mandal H.C.C.C No. 337 of 2002** and **Danson Mutuku Mwema v Julius Muthoka Muema & Others Civil Appeal No. 6 of 1991 (Machakos)** on reasonable awardsof instruction fees. It also relied on **Republic v Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W'Njuguna & 6 Others Misc. Civil App.No. 621 of 2000 (2006) eKLR** on the exercise of discretion by a taxing master to increase basic fees.
6. In the 2nd Defendant's submissions filed on 19th November, 2010 it is contended that the Plaintiff took an inordinately long delay in prosecuting the reference, having filed the same on 21st July, 2006 but not having it listed for hearing until March, 2010. On the issue of delay she relied upon the case of **Downhill Ltd v Harith Ali El-Busaidy & City Finance Bank Ltd Nairobi Civil Appeal No. 254 of 1999**. It is also the 2nd Defendant's submission that there are no grounds for interfering with the discretion of the taxing master in his/her determination on a taxation matter and relied upon the authority of **Joreth Ltd v Kigano & Associates [2002] 1 EA 92**. It is the 2nd Defendant's further contention that the value of the contract that was nullified was Kshs. 314,475,000/- and such formed the subject matter of the case, which the taxing master had considered in her determination.
7. Having considered the Application, the affidavits on record by both the Plaintiff and 2nd Defendant, the submissions and authorities relied upon, there are two issues for the determination of the Court: a) whether the taxing master exercised her discretion and took into consideration all matters as appertaining to the matter at hand in her Ruling and b) whether the application by the Plaintiff has merit. The issues in contention are in relation to Item No. 2 of the Bill of Costs dated 6th April, 2006. The Taxing Master, Wamae, D.R delivered her ruling on the same on 7th July,

2006 with reasons for her ruling therein. With regard to Item No. 2, she made a determination as follows:

> **"The Plaintiff's claim in the Plaint was for injunctive and declaratory orders. Paragraph 17 of the second defendant's defence shows that what was at stake was the agreement dated 28.3.02 whose value was estimated at 89,100,000/- and a further estimated benefit of 125,475,000/- and 100,000,000/- to the 1st and 2nd defendants respectively and I find that 314,475,000/- which is the aggregate of these sums to be the value of the subject matter for purposes of item 2. Item 2 is therefore calculated under paragraph 1(b) as follows:**

For the first 1 million	***35,000.00***
313,475,000 x 1.5%	***4,702,125.00***
	4,737,125.00

> **The sum of 4,800,000/- at item 2 is reasonable considering the volume and complexity of this matter and item 2 is therefore taxed as drawn".**

8. It is the 2nd Defendants submissions that the amount of Kshs. 4,800,000/- as per the taxing master's calculation was proper and in accordance with Schedule VI A(1)(b) of the Advocates (Remuneration) Order, 1997 which reads:

> **"To sue in any proceedings described in paragraph (a) where defence or other denial of liability filed; or to have an issue determined arising out of the interpleader or other proceedings before or after the suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties".**

The 2nd Defendant further contends that the instruction fee was derived from the subject matter of the case, being that there was a contract between the parties dated 28th March, 2002. In the case of **Joreth Ltd v Kigano & Associates** (supra) which the 2nd Defendant relies upon, the learned judges on the issue of ascertaining the value of the subject matter held *inter alia*;

> **"We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of Costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account amongst other matters the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."**

The Plaintiff objects to the same, intimating that the taxing master based her determination of instruction fess on estimations, which were not part of the claim in any event. It is contended that the amount of Kshs. 4,800,000/- was manifestly excessive and the taxing master erred in principle in her determination. In the case of **Kipkorir, Titoo & Kiara Advocates** (supra) the Court's decision on the matter was;

> "**She (taxing officer) found as a fact that the claim was not a monetary claim but a claim for declaratory orders. Notwithstanding these findings, the taxing officer seems to have applied the same figure in determining instruction fees payable. This determination affected the computation of the final figure of Kshs. 6,081,312.97/-. On the face of the record therefore, the taxing officer does not seem to have exercised any discretion at all".**

9. The determination by the taxing officer was based on two aspects; a) that the subject matter of the suit was as enunciated in the statement of Defence and b) that all circumstances were considered in the final determination, including the volume and complexity of the matter. Therefore, what is the subject matter of this suit? According to the **Blacks' Law Dictionary, 9th Edition** at pg. 1562, the definition of subject matter is given as:

> **"The issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute".**

What was in dispute was the annulment of the contract between the parties, and for injunctive and declaratory Orders. It is the Plaintiff's contention that no monetary claim was pleaded or claimed by the Plaintiff in the Plaint. It would seem therefore that, since no such prayers were sought, then the taxing master ought to have followed Schedule VI A (1)(o) instead of VI A (1)(b). The taxing master in her Ruling also rightly admits that the Plaintiff's claim was for *"injunctive and declaratory orders."* It therefore indicates that the taxing master took into consideration issues that were not part of the subject matter and considered them in error in making her Ruling.

10. The upshot of the matter is that in assessing instruction fees, the taxing officer should ensure that proper provisions of the law are adopted and that the discretionary power that he/she exercises should be employed judiciously and in the interest of fair and just delivery of justice. These powers should not be callously or capriciously used. This was the position adopted by Mwera, J (as he then was) in **Danson Mutuku Muema v Julius Muthoka Muema & Others Civil Appeal No. 6 of 1991** in which the learned judge held:

> **"Then the taxing officers while applying the schedules should know and seriously apply their minds, within the discretion allowed, with due seriousness to their exercise. They should ensure that only proper, lawful and justified bills roll off their desks".'**

11. The subject matter or the claim by the Plaintiff was for declaratory and injunctive orders and for the nullification of the contract entered on 28th March, 2002. Nowhere in the Plaint was a claim made for any monetary award. The taxing master rightfully stated in her Ruling that the claim was for such Orders and she should have assessed the instruction fees at that point. The issue of value of the subject matter put at Kshs. 314,475,000/- was neither pleaded nor sought by the Plaintiff and for the taxing officer to consider the estimates in her final determination was to my mind, beyond the scope of the discretion allowed in determining and assessing costs. In so far as the Ruling in **Premchand Raichand & Another v Quarry Services E.A Ltd & Others (1972) E.A** provides that a Court would not normally interfere with the taxing officer's decision on taxation matters, the exception to the same are decisions made based on error of principle to arrive at manifestly excessive fees being awarded. This Court has unfettered power to determine what orders it deems fit and suitable to be made in the circumstances of the determination of a taxing master's ruling under **Section 51(2)** of the Advocates Act. In exercise therefore of the aforementioned provisions of the law, and despite the Plaintiff's inordinate delay in prosecuting its application dated 20th July, 2006, the same is allowed and I direct that the 2nd Defendant's Bill of Costs be placed before a different taxing officer for review.

DATED and delivered at Nairobi this 17th day of July, 2013.

J. B. HAVELOCK

JUDGE