REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 1091 OF 2009

IN THE MATTER OF THE ADVOCATES ACT, CAP 16

AND

IN THE MATTER OF TAXAITON OF COSTS

BETWEEN

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

VERSUS

THE ATTORNEY GENERAL OF KENYA

(REPRESENTING THE MINISTRY OF

INFORMAITON & COMMUNICATIONS) ……..…... RESPONDENT

R U L I N G

1. Before this Court is the Applicant/Advocates' Chamber Summons dated 6th March 2013 brought under the provisions of **Rule 11 (2)** of the *Advocates (Remuneration) Order, 2009*. The Applicant/Advocates seek Orders from this Court that it may be pleased to set-aside the decision of the Taxing Officer in relation to Item Nos. 1 to 398 of its Bill of Costs dated 21st December 2009. The Court was requested to review the decision of the Taxing Officer in respect of all the items and to award the Applicant/Advocates such costs as are in accordance with the *Advocates (Remuneration) Order*.
2. The Application is brought on the following grounds:

> **"1. The taxing master erred in law by failing to tax the Bill of Costs according to paragraph 69 of the Advocates Remuneration Order, 2009. In failing to indicate the amount taxed off in the Bill of Costs for each and every item, the taxing master did not tax the Bill of Costs in accordance with the law or at all.**
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> **2. The taxing master erred both in fact and law when she appreciated that the Applicant incurred expenses in travelling to United Kingdom and other expenses incidental thereto for the hearing of the matter but failed to award the expenses incurred as particularized under item 7 in the Bill of Costs.**

3. The taxing master erred both in fact and law by failing to award perusal, drafting and preparation of various relevant correspondence fees as particularized under item 8 to 398 of the bill of Costs all inclusive despite the fact that she acknowledged that the matter required perusal of voluminous documents, correspondence with the Client and communication with Messrs. Edwin Coe Solicitors who were defending the Government of Kenya jointly with the Applicant; after the said firm of solicitors were engaged by the Applicant with the approval and written authority of the Attorney General.

4. The taxing master erred in law and fact by holding that the role of the Applicant was merely advisory when she had established under paragraph 2 of her Ruling that it was undisputed fact that the Applicant was to provide legal services to Government of Kenya and defend the Government of Kenya in the local court and the legal proceedings in the High Court of Justice Queen Bench Division in the Commercial Court – London UK'. Despite overwhelming evidence before the court, she failed to take into account that the Applicant was engaged by the Government of Kenya through the Attorney General who also authorized the applicant to conduct the defence jointly with Messrs. Edwin Coe solicitors together with Gordon Bennet Esq. Barrister in defending the Government by way of conducting extensive research of the applicable Kenyan law, preparing witness statements, defence and counter-claim that clearly captured the Kenyan Law in paragraph 11 and dated 26th August 2008 and setting aside exparte judgment, that had been entered against the Government of Kenya while relying on the applicant's witness statement.

5. The taxing master erred in fact when she held under paragraph 63 of the Ruling that the Applicant was claiming instruction fees of Kshs.1,113,017,940.00 when in fact the Applicant was claiming instruction fees of Kshs. 72,454,054.90 under item 1 of the Bill of Costs, which indeed led her to misinterpret and fail to apprehend the rules of law and facts in the matter duly filed in the High Court of Justice Queens Bench Claim Number Claim Number 2006 Folio 881.

6. The taxing master erred both in law and fact in failing to take into account the value of the subject matter in arriving at the decision. The Applicant was engaged by the Respondent to defend a claim of Kshs.1,554,922,350.00 inclusive of interest and further to raise a counter-claim of Kshs.1,692,000,000.00 inclusive of interest as clearly particularized on the Claim and Defence and Counter-claim and indeed the applicant and the respondents negotiated an out of court settlement and arrived at a sum of Kshs.160.0 million being a global amount for fees and expenses expended in the matter by the applicant.

7. The Taxing Master failed to exercise her discretion judiciously when she held that the Applicant role was merely advisory, while indeed the Respondents had engaged the Applicant and gave the Applicant a legitimate expectation that he would charge legitimate fees under the Advocates Remuneration Order as by law provided. She failed to appreciate that the Applicant was very instrumental and invaluable in drawing the pleadings and his contribution was indispensable particularly in Kenyan Law aspects both Statutory and case law which he was competent to plead on as clearly depicted in the Defence and Counterclaim and List of Authorities and the legal opinions provided to Government of Kenya and Messrs. Edwin Coe Solicitors.

8. The taxing master erred both in fact and law in holding that schedule V

was the applicable schedule. She failed to appreciate that the matter was a civil suit before the High Court of Justice Queens Division in the Commercial Court Claim Number 2006 Folio 881 which is an equivalent of the High Court of Kenya. Therefore schedule VI of the Advocates Remuneration Order was the applicable schedule.

9. The taxing master erred both in fact and law by failing to take into account that the matter was complex in arriving at her decision though she had established under paragraph 67 of the Ruling that the matter was complex.

10. The taxing officer erred both in law and fact in arriving at and concluding that the amount Kshs. 4 million was reasonable without setting out whether it is for instruction fees, air ticket expenses, getting up fees, preparation of legal opinion, witness statement, pleading and or perusal fees or for any other item in the Bill of Costs.

11. The taxing officer did not exercise her discretion judiciously and abdicated her duties by holding that a deposit of Kshs.4,000,000 was reasonable legal fees which was contrary to the intention of the parties. There was ample evidence vide letters dated 8th December 2006 and 15th August 2007 that the said Kshs.4,000,000 was a mere deposit which the Respondent duly acknowledged. Therefore it was intention of parties that the remaining amount would be settled later and thereby breaching and abrogated and abused the applicant's rights and implied rights and legitimate expectations.

12. The taxing master failed to take into account the submissions of the Applicant in relation to quantum of costs and also failed to appreciate that the Respondent in his submissions did not object to quantum of costs as particularized on the Bill of Costs and had indeed engaged to an out of court settlement which had reduced the Bill to a sum of Kshs.160.0 million as global amount.

13. The taxing master erred in fact in holding that the firm of Messrs, Mills & Reeve LLP were representing the Respondent in Commercial Court, London UK when in fact it was both the Applicant and the firm of Messrs. Edwin Coe Solicitors who were defending the Government of Kenya before Commercial Court, London, UK which indeed had led the taxing master into totally and completely misinterpreting the applicant's role and duties in the matter.

14. The taxing master erred in law and in fact by ignoring the fact that the applicant and Messrs. Edwin Coe Solicitors attended court and obtained orders setting aside the exparte judgment and further obtained orders for Pre-trial mediation as required by English Rules of Practice and indeed the court approved the appointment of both legal and Technical Mediators namely Mr. William Wood and Mr. Geoff Daniels respectively and indeed the court provided a Time-table for the said mediation process".

3. The Supporting Affidavit of **John Wacira Wambugu** was sworn on 6th March 2013. The deponent stated that he was the managing partner in the firm of the Applicant/Advocates and that on 22nd December 2009, his firm filed a Bill of Costs to recover legal fees from the Respondent herein being the Attorney General (representing the Ministry of Information and Communications). He noted that his firm was appointed by the Respondent on 18th September 2006 to defend it in suits filed both in Kenya and in the Queen's Bench Division (Commercial Court) of the High Court of Justice in London, England. It was agreed that the Ministry (as above)

would be responsible for the reasonable fees of the deponent's firm and in the event of a lack of consensus, the same would be taxed before the Deputy Registrar of this Court. The deponent went on to say that he engaged a firm of solicitors in London (with the approval of the Attorney General) and he worked with that firm jointly in defending the Government of Kenya in contract claims brought against it involving 3 parties abroad. The deponent attached to his said Affidavit a copy of the numerous documents filed in the English Court. He liaised both with a Mr. Whitton of Messrs. Edwin Coe, solicitors as well as Mr. Gordon Bennett, the English barrister retained for the case. Mr.Wambugu detailed that the claimants had obtained an *ex-parte* Judgement out of the English Court which was set-aside and leave to defend granted. Thereafter, he was involved in the preparation of the Government's Defence and Counterclaim and with the preparation of witness statements. He maintained that he was the lead counsel in so far as Kenyan Law was concerned. He emphasised that his role was not just advisory as found by the Taxing Officer, but also involved preparation of pleadings and putting together witness statements.

4. Mr. Wambugu continued with his Affidavit and went into great detail of just how he had participated in relation to the English proceedings including attending numerous meetings and, eventually, pre-trail mediation as between the parties. He noted that on 8th December 2006, the Attorney General had approved an initial deposit of Shs. 3 million and a further deposit of Shs. 1 million was paid 15th August 2007. He further commented that by a letter dated 24th November 2008, the Minister for Information and Communication and recommended the payment of Shs. 6,379,165/-to Messrs. Edwin Coe, as Solicitors as well as Shs. 9,961,765/-to the Applicant/Advocates. This latter sum had also been agreed by H.E. The President. The deponent went on to say that after the Bill of Costs was filed in this matter, the parties explored an out-of-court settlement and Messrs. Kirundi & Co, Advocates were appointed to mediate. The parties had agreed to settle the matter at Shs. 160 million. Mr. Wambugu went on to say that the Taxing Officer had failed to take into account that the Applicant/Advocates (as well as the firm of Edwin Coe, Solicitors) were defending a claim of Shs. 1,554,922,350/- as well as a counterclaim of Shs. 1,692,000,000/-. In arriving at her Ruling, the Taxing Officer had failed to take into account the Applicant/ Advocates' submissions on quantum. She had failed to tax each and every item as required by the Advocates (Remuneration) Order. In the deponent's opinion, it was in the interests of justice that the Taxing Officer's said Ruling should be set aside and a reasonable amount to be taxed and awarded to the Applicant/Advocates. The amount that she had awarded of Shs. 4 million had no legal basis and was grossly irregular, inadequate and unjustifiable to cover not only instruction fees, but also travelling and accommodation expenses, perusal and drafting fees and other incidental expenses.
5. The Grounds of Opposition were dated 26th April 2013 and filed herein by the Respondent on the same day. The Respondent maintained that the Taxing Officer did not commit any error of principle in the taxation of the Applicant/Advocates' Bill of Costs so as to warrant the setting aside of her decision. As far as the Respondent was concerned, the Taxing Officer had abided by the provisions of the Advocates Act and the Advocates (Remuneration) Order. The Respondent emphasised that the role of the Applicant/ Advocates was merely advisory and, as such, the amount awarded by the Taxing Officer was fair and reasonable taking into consideration the amount of the legal work undertaken by the Applicant/Advocates. Finally, the Respondent maintained that the Application before this Court was misconceived, and bad in law.
6. The Applicant/Advocates' Submissions were filed herein on 30th April 2013. They recounted much of what Mr. Wambugu had detailed in his Supporting Affidavit to the Application by way of facts as regards thereto. As the Applicant/Advocates saw it, the issues for determination by this court were as follows:

> **"a. Whether the Taxing Master took into consideration the principles of taxation;**
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> **b. Whether the Taxing Master exercised her discretion in accordance with paragraph 69 of the Advocates Remuneration Order;**
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> **c. Whether the Taxing Master took into consideration the value of subject matter, complexity and importance of the subject matter;**

d. Whether the Taxing Master exercised her discretion judiciously in failing to award travelling and accommodation expenses of Kshs.5,179,012;

e. Whether the Taxing Master exercised her discretion judiciously in failing to consider item 8 to 398 of the Bill of Costs;

f. Whether the role of the Applicant was merely advisory;

g. Whether Schedule V of Advocates Remuneration Order was the only applicable schedule;

h. What is the reasonable instruction fees?

Thereafter, the Applicant/Advocates referred the Court to the principles of taxation as set out in the Court of Appeal's decision in **Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & Ors. EALR (1972) EA 162** as follows:

"(i) (a) that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;

(b) that a successful litigant ought to be fairly reimbursed for the costs that he has had to incur;

(c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and

(d) that so far as practicable there should be consistency in the awards made;

(ii) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party;

(iii) in considering bills taxed in comparable cases allowance may be made for the fall in value of money;

(iv) apart from a small allowance to the appellant for the responsibility of advising the undertaking of the appeal there is no difference between the fee to be allowed to an appellant as distinguished from a respondent;

(v) the fact that counsel from overseas was briefed was irrelevant: the fee of a counsel capable of taking the appeal and not insisting on the fee of the most expensive counsel must be estimated (*Simpson Motor Sales v. Hendon Corporation* (2) followed);……."

In the opinion of the Applicant/Advocates, the decision of the Taxing Officer did not embrace the above principles and the amount awarded of Shs. 4 million was so low that it did not even cater for the travelling and accommodation costs incurred of Shs. 5,179,012/-. The Applicant/Advocates detailed that the Taxing Officer had only considered the deposit of Shs. 4 million already paid by the Respondent. If that amount was allowed to stand, the Applicant/ Advocates would suffer gross injustice. It had not been disputed that the suit was before the Commercial Court of the Queen's Bench Division of the High Court in London and as a result, the Applicant/Advocates had to travel to London in order to prepare the Defence together with the UK solicitors. The Applicant/advocates and then referred the Court to the authority of **Mutuli & Apopo Advocates v Jirongo (2010) eKLR** quoting from the Judgement of **Koome J.** (as she then was) in setting aside the Order of the Taxing Officer. The learned Judge had observed:

"However there are factors that the taxing master did not take into account in arriving in his decision. For instance the holding that the advocate did not demonstrate the complexity

of the matter, in my opinion this is an error of principle. It is discernible from the Bill of costs and the submissions by the advocate that this was a complex matter which elucidated enormous public interest. Secondly, there were volumes of records to peruse. The proceedings went on for two and a half months and the advocate attended to represent the client".

7. The Applicant/Advocates noted that the Taxing Officer herein had failed to take into account both the public interest in the case and the value of the subject matter. It then referred to the Court to the case of **Green Hills Investments Ltd. v China National Complete Plant Export Corporation HCCC No. 572 of 2000 (unreported)**.

The Applicant/Advocates pointed to the provisions of paragraph 69 of the *Advocates (Remuneration) Order* which detailed the format for the preparation of Bills of Costs. It noted that the Taxing Officer had failed to indicate her deductions for all items in the Applicant/Advocates' Bill of Costs in the 5th column so provided. She had given no reasons for failing to allow items Nos. 8 to 398 of the Bill of Costs. In the opinion of the Applicant/ Advocates, this clearly manifested injustice. Moving on to whether the Taxing Officer took into consideration the value of the subject matter, as well as the complexity and importance of the same, the Applicant/Advocates detailed that it was not contested that the value of the claim was over Shs. 1 billion. It referred to the authority of **Joreth Ltd v Kigano & Assoc. Civil Appeal No. 66 of 1999 (unreported)**. The Court of Appeal had observed therein as follows:

"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, judgement 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 instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

It was the Applicant/Advocates' contention that the value of the subject matter in relation to the suit could be ascertained from the pleadings. The Taxing Officer had failed to take such into consideration.

8. The Applicant/Advocates' submissions continued by posing the question as to whether the Taxing Officer had exercised her discretion judiciously in failing to award travel and accommodation expenses incurred of Shs. 5,179,012/-. Similarly, had the Taxing Officer failed to exercise her discretion by not considering item Nos. 8 to 398 of the Bill of Costs? The Applicant/Advocates also felt that the finding of the Taxing Officer that the role of the Applicant/Advocates was merely advisory was in error. It referred to the nature of instructions as captured by 2 letters written by the Hon. Attorney General dated 18th September 2006 and 16th July 2007. These indicated that the Applicant/Advocates should personally take charge of the case in view of its seriousness gravity and complexity and further, that an application was required to be made to amend the Counterclaim and generally defend in the suit filed against the Government by Universal Satspace (North America). In the opinion of the Applicant/Advocates such communication from the Chief Legal Advisor of the Government was clear indication that the Applicant/Advocates' role was not merely advisory. Such was made worse by the finding of the Taxing Officer in paragraph 2 of her Ruling in which she stated:

"The Applicant's cause of action arises on the undisputed facts that on the 18th September 2006, the Respondent engaged the Applicant to provide legal services to the Government of Kenya in the local court and the legal proceedings in the High Court of Justice, Queen Bench Division in the Commercial Court – London, UK".

In the view of the Applicant/Advocates this finding by the Taxing Officer herself was clear evidence that its role was far more than mere supervision.

9. The next and possibly the most important submission put before this Court by the

Applicant/Advocates was whether Schedule V of the Advocates (Remuneration) Order was the applicable schedule for the assessment of the fees detailed in the Bill of Costs or whether Schedule VI should be considered? It was the Applicant/Advocates contention that though the term "High Court" was used in relation to the High Court of Kenya, it should also include a matter filed in the High Court in London and the Taxing Officer should have applied the same principles. In this regard, the Applicant/Advocates noted that on 25th August 2008, the line Ministry (as it put it) recommended to the Attorney General to pay a further deposit (over and above the Shs. 4 million initially paid) of Shs. 9,961,765/-. Further, the mediation under the auspices of the Law Society on the amount of the fees that should be payable to the Applicant/Advocates had come up with a figure of Shs. 160 million and such was agreed. The Taxing Officer would seem to have disregarded these facts. The Applicant/ Advocates detailed that it had calculated minimum fees in accordance with Schedule VI and arrived at a figure of Shs. 88,560,767.76. It attached a computation of its submissions, in that regard.

10. The Respondent's submissions were filed herein on 17th May 2013. They laid out the Grounds of Opposition which the Respondent had filed and as referred to above. Simply put, the Respondent detailed that the Applicant/Advocates' Bill of Costs had been filed on the allegation that the Applicant/Advocates were instructed by the Respondent to defend the Government of Kenya in Angloleasing related contracts in the Commercial Court in England and that, with the authority of the Respondent, they had engaged the services of the firm of Edwin Coe, Solicitors, for the purposes of defending the suit brought against the Government there. The Respondent relied upon the submissions filed before the learned Taxing Officer. However, it was its further submission that though the Applicant/advocates were instructed by the Respondent, its services were only limited to rendering advisory opinion and co-ordination between the firm of Edwin Coe and the Ministry of Information and Communication. The Applicant/Advocates were never on record in the case and consequently the disputed Bill of Costs was unreasonable and unjustifiable and the Applicant/Advocates were not entitled to getting-up fees as claimed. The pleadings in the matter were filed in England by the said firm of Edwin Coe who were instructed by the Respondent to defend the Government of Kenya and not the Applicant/Advocates as claimed. Further, the Applicant/advocates were neither solicitors nor barristers and were not entitled to practice law in the United Kingdom. The Respondent concluded its submissions by urging this Court to uphold the decision of the Taxing Officer and to find that the work of the Applicant/advocates was minimal.

11. I have perused the composite Ruling of the Taxing Officer, Mrs. Njora DR delivered on her behalf on 13th February 2013. It is a comprehensive document running to 25 pages. At page 3, the Taxing Officer details the contract between the Government of Kenya and a company incorporated in Delaware, USA called Space net Inc. for the supply of VSAT, communication computers and other telecommunication equipment at a price of US$11,787,000 (equivalent Shs.1,060,830,000/-). She noted that before her, it was the Respondent's contention that the application for the taxation of the Applicant/Advocates' Bill of Costs was wrongly before the Court as it lacked jurisdiction to determine on the costs payable for services rendered in the Court in London. It had been further contended that the laws of Kenya did not apply extra-territorial to matters adjudicated in courts within the jurisdiction of other states and that there was no provision under the Advocates Act that created a forum for the Applicant/Advocates to file a Bill of Costs in respect of matters conducted outside Kenya. The Taxing Officer noted that it was the Respondent's contention that the Applicant/advocates ought to have filed their Bill of Costs in the Queen's Bench Division of the High Court of England. The Applicant/Advocates had contended that as both parties were domiciled and ordinarily resident in Kenya, this Court would have automatic jurisdiction, such being disputed by the Respondent. Further, the Taxing Officer noted that **section 48 (3)** of the *Advocates Act* which gave her jurisdiction to tax the Applicant/ Advocates' Bill of Costs did not apply, according to the Respondent, to the present dispute. The subject matter was not a suit in this Court and, again according to the Respondent, the Advocates (Remuneration) Order did not apply in this matter as it related to contentious matters in the High Court of Kenya, not England. Finally as regards the Respondent's submissions before, the learned Taxing Officer, she noted that the Respondent maintained that the Hon. Attorney General's said letter dated 20th September 2006 indicating that, in the event of a dispute as regards fees, the same would be referred to the Deputy Registrar, was a mistake. On the question of quantum as claimed

in the Bill of Costs, the Respondent averred that the Applicant/Advocates were not entitled to the amount claimed because they were not on record and that the pleadings filed in the case in London were by the firm of Messrs. Mills & Reeve LLP – barristers.

12. The learned Taxing Officer had then considered the submissions of the Applicant/Advocates herein and noted that they maintained that the Court had jurisdiction to entertain the taxation of the Bill of Costs arguing that the contract for the provision of legal services had been executed in Kenya and that partial legal fees by way of deposit had been paid in Kenya. She had been referred to the case of **Spiliada Maritime Corporation v Cansulex Ltd (1986) 3 All ER 843** in which the English Court had put forth the criteria that a Court should apply in deciding on the more appropriate forum of determining a dispute. The Taxing Officer quoted in her Ruling from that case as follows:

> **"In considering whether there was another forum which is more appropriate the court would look for that forum with which the action had been the most real and substantial connection e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court it would normally refuse a stay…".**

The Applicant had also referred the Taxing Officer to the question of jurisdiction to the case of **Karachi Gas Co. Ltd v Isaac (1965) EA 42** where it had been held:

> **"In the case of contract, courts of Kenya will assume jurisdiction, *inter-alia* if the contract is made in Kenya or if the proper law of the contract is Kenya law or with breaches committed within Kenya..."**

The learned Taxing Officer also recorded that the Applicant/ Advocates had invoked the doctrine of estoppel claiming that the Respondent was estopped from reneging on its representation by the Applicant/Advocates. The Respondent had maintained that they had agreed to the Attorney General's representation that in case a dispute arose as to the payment of their fees on the contract to provide legal services, the same would be referred to the Deputy Registrar of the High Court of Kenya for taxation. The Respondent was barred from alleging otherwise. Finally, the Taxing Officer noted that on the issue of quantum, the Applicant/Advocates had claimed amounts totalling to US$17,276,915.00 inclusive of interest accrued. Such was based on the Applicant/advocates' contention that they were entitled to a getting up or preparation for trial under Schedule VI.

13. The learned Taxing Officer then laid out at paragraph 24 of her said Ruling what she regarded as the issues for determination as follows:

> **"i. The twin issue of Jurisdiction: The proper forum and Applicable law for determination of the Bill of Costs.**
>
> **ii. The extent of the taxing master's powers in taxation matters. Whether taxing master could determine the extent of Advocate's instructions.**
>
> **iii. Whether issuance of summons to appear and produce documents offends section 38 of the Evidence Act.**
>
> **iv. The Issue of Quantum. Whether Applicant entitled to the amount claimed in this matter".**

On the question of jurisdiction, the Taxing Officer referred to the decision of **Justice Nyarangi** in the well-known case of the **Owners of Motor Vessel "Lillian" v Caltex Oil (K) Ltd** as well as the finding of **Justice Shah** in the case of **Doge v Kenya Canners Ltd (1988) KLR** the latter with regard to the Applicant/Advocates' estoppel submission and in which the learned Judge had detailed:

> **"If a party is made to believe in a certain state of facts and that party acts on those facts, to his detriment, and the other party stands by and does not stop him from so doing, that other party is estopped from changing his stand…".**

As a result, the learned Taxing Officer dismissed the Respondent's contention that this Court had no jurisdiction quoting from **Halsbury's Laws of England, Volume 16, 4th Edition at paragraph 1471**:

> **"It seems that, in general, where a party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal obligations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration."**

14. Furthermore, the learned Taxing Officer maintained that she could see no injustice that would be occasioned to the Respondent or indeed the Applicant/Advocates by having the latter's Bill of Costs taxed in Kenya where both parties were domiciled and where the contract and its alleged subsequent breach occurred. She explored the finding of **Lord Goff** in **Connelly (A.P.) v R.T.Z. Corporation Plc & Ors. (1997) UKHL 30** as well as adopting the finding of **Shah JA** in the **Karachi Gas Co.** case (supra). She also referred to **section 15** of the *Civil Procedure Act* more particularly Illustration 3 thereof and pointed to *Article 159* of the *Constitution* as to the principle that justice should not be delayed. She disagreed with the Respondent's contention that **section 48 (3)** of the *Advocates Act* did not apply to the present case. She maintained that the section and the Rules conferred jurisdiction on the Taxing Officer with regard to all matters of taxation including the present matter. Finally, the Taxing Officer referred to the case of **Attorney General v Kenneth Kiplagat (2010) eKLR** in which she noted that the counsel therein had represented the Government in arbitration proceedings between World Duty Free and the Republic of Kenya. Similar to the instant case, an objection had been raised therein that the Taxing Officer lacked the jurisdiction to taxed costs premised in arbitral proceedings conducted outside the jurisdiction of the Kenyan courts. The Taxing Officer in that case had struck out the preliminary objection detailing as follows:

> **"The instructions were given in Kenya and this court has jurisdiction to tax the bill. I therefore find and hold that where the subject matter of a dispute or the place where that dispute is eventually determined is of no consequence to the claimant to claim and lodge a bill of costs for legal services so long as such a person making a claim for legal fees intending to Lodge a Bill of costs is a person competent to provide such legal services under the Advocates Act".**

The learned Taxing Officer herein agreed with and adopted that finding holding that the Bill of Costs of the Applicant/Advocates was properly before Court and that the Deputy Registrar had jurisdiction to tax the same. I wholeheartedly agree with this position.

15. As regards the extent of the Taxing Officer's instructions, the Respondent had submitted that the Taxing Officer had lacked the jurisdiction to determine the extent of Counsel's instructions and that such power lay with the High Court. Quoting **Rule 13A** of the *Advocates (Remuneration) Order*, the Taxing Officer noted that her powers to tax the Applicant/Advocates' Bill of Costs were not restricted and were wide enough to enable the just disposition of the matter. The Taxing Officer overruled the Respondent in this regard and I have no problem in accepting her decision. In reference to the complaint by the Respondent that the Taxing Officer had no power to issue the Summons Notice dated 20th September 2011 addressed to the Deputy Solicitor General to attend Court for the purposes of cross examination by the Applicant/Advocates herein, again this Court fully endorses the decision of the Taxing Officer that she had the power so to do. **Sections 125** and **128** of the *Evidence Act* are self-explanatory in this connection.

16. Turning now to what the Taxing Officer termed the "Quantum of Damages", she noted that the Applicant/Advocates had asked the court to consider that the suit giving rise to the taxation was no ordinary suit but was both complex, unique, time-consuming and involved the perusal of voluminous documentation. The Applicant/ Advocates had carried out extensive research involving both Kenya and English law and the managing partner had travelled severally to London to meet with the appointed solicitors and barrister in order to agree on the best line of defence for the Respondent in relation to the case before the London Court. In her finding, the Taxing Officer stated that it was not in contention that the Applicant/Advocates were engaged on 18th September 2006 to provide legal services to the Government of Kenya, such appointment being accepted on 20th September 2006. She found that the matter was indeed complex and noted the letter sent by the Hon. Attorney General to the Applicant/Advocates dated 18th of September 2006 in which he had requested the managing partner of the said firm of Advocates to personally take charge of the case in view of its seriousness, gravity and complexity. In other words, the Attorney General appreciated just how involved and complex the matter was. This was clearly in the mind of the Taxing Officer when she detailed at paragraph 71 of her Ruling:

> **"I have no doubt in mind that this matter was complex and one that involved enormous labour and responsibility and highly important/'sensitive' material. The bundle of documents clearly illustrate what the task was involving. Even considering the value of the subject matter, that is Kshs 1,554,922,350.00 is evidence of the importance of the subject matter."**

17. From her Ruling, it is obvious that the learned Taxing Officer did not consider that Schedule VI of the Advocates (Remuneration) Order applied in this case. I concur with her opinion in that regard. The heading to the Schedule reads:

> **"Costs of Proceedings in the High Court"**.

Such quite clearly means the High Court of Kenya. It does not mean any other High Court that may have jurisdiction over a suit including the High Court of England. Accordingly, the Taxing Officer applied Part II of Schedule V of the Advocates (Remuneration) Order to the taxation proceedings before her and, indeed, set out the principles that should be adhered to in the assessment of instruction fees. In arriving at her decision, she also referred to the cases of **Premchand Raichand** and **Green Hills Investments** (supra). Where I have some difficulty with the findings of the Taxing Officer is that she found that the role played by the Applicant/Advocates was an advisory one. She found that the firm gave advisory opinion and collected evidence for and on behalf of the client, the Respondent. There was no evidence as to the firm filing pleadings, which of course they would/could not have done having no audience before the English Court. However, she found that the Applicant/Advocates had produced no evidence that they attended any court. It was for this reason that that the Taxing Officer arrived at her decision that the sum of Shs. 4,000,000/-, as had already been paid out by the Respondent, was sufficient to cover the work done.

18. Under Schedule V of the *Advocates (Remuneration) Order*, the Taxing Officer was to arrive at an Instruction fee which was to be fair and reasonable but that due allowance should be given in relation thereto for other charges raised under that Schedule. I have perused the Applicant/Advocates', Advocate/Client Bill of Costs dated 21st December 2009 and filed herein on the next day. It is quite obviously drawn up under *Schedule VI* of the *Advocates (Remuneration) Order*. The Applicant/Advocates single out at paragraph 5 of its submission at letter e. that the Taxing Officer failed to consider items nos.8 to 398 of the Bill of Costs. This was over and above the criticism that the Taxing Officer had been unfair in taxing item nos.1 to 7. It seems to me therefore that I should concentrate particularly upon those 7 items so far as the Ruling is concerned. Setting aside the preamble thereto which covers pages 2, 3 and 4, one finds the instruction fee as item no. 1 of Shs. 48,302,703.30. Item no.2 details those instruction fees raised by 1/2 to take into account that this is an Advocate/Client Bill. That may be the correct position under Schedule VI but not under Schedule V. Further, item no. 3 details getting-up fees. Again the Applicant/Advocates would not be entitled to these under Schedule V. Item no. 4 covers the

Applicant/Advocates' attendances at meetings with various parties arriving at the extraordinary figure of Shs. 54,286,000.00. Under Schedule V attendances may be charged in ordinary cases per 15 minutes or part thereof at Shs. 375/-with telephone calls being charged at Shs. 75/-. Again the Applicant/ Advocates has failed to set out its attendances one by one and detailed the time taken in or at each such attendance. Item no. 5 does not appear in the left-hand column of the Bill of Costs but I would presume that such amounts to the instruction fees on the counterclaim in which a figure has been detailed at Shs. 27,143,000.00. Here again under the Schedule V, the Applicant/Advocates are not entitled to such instruction fee under this particular Schedule. Nor are they entitled as per item no.6 to increase such instruction fee by 1/2 in relation to the fact that it is an Advocate/Client Bill of Costs. Item no. 8 in the said Bill of Costs details travelling costs to which no total has been entered but quite possibly may be justified as disbursements if supported by relevant air tickets/invoices/vouchers etc.

19. It is quite clear to this Court that items nos. 1 to 7 of the said Bill of Costs, in reality, amount to a composite instruction fee. Such has been assessed by the Taxing Officer at Shs. 4,000,000/-. Leaving aside the disbursements incurred by the Applicant/Advocates for travelling expenses etc. this Court would endorse to the words of **Ibrahim J.** in the **Green Hills Investments** case (supra):

> **"…. while I ought not to interfere with quantum generally, the amount awarded herein was outside reasonable limits so as to be manifestly inadequate to such an extent it could be deemed to be a mockery of legal representation….".**

I would adopt these words in connection with this matter before Court. I find that the award of the Taxing Officer of Shs. 4,000,000/-to be inordinately low and must necessarily be adjusted. To this end, I bear in mind the history and correspondence which passed between the Applicant/Advocates and the Attorney General as well as the Ministry of Information & Communications. For instance, the letter from the Permanent Secretary of the Ministry dated 14th November 2006 to the Permanent Secretary in the Ministry of Finance is illuminating in that it asks that provision be made for Shs. 17,000,000/- to meet the legal fees expected to accrue from the case. Of course, that letter does not go into detail as to how that amount would be split as between the solicitors in London and the Applicant/Advocates in Nairobi but the letter to the Attorney General from the Ministry dated 7th November 2006 makes it quite clear that the estimate on legal fees was GBP 37,000 for the Solicitors and Shs. 17,000,000/-for the Applicant/Advocates. Moving further along, the letter from the Minister for Information & Communications addressed to the Hon. Attorney General dated 24th. November 2008 is also indicative as it was asking for approval for payment of the sum of GBP 50,830 for the London Solicitors and Shs. 9,961,765/-for the Applicant/Advocates. Interestingly, that letter also refers to the Applicant/Advocates' fee note for the local case of *HCCC No. 1769 of 2005* in the amount of Shs. 3,630,000/-. The sequence of letters in the Exhibit, attached to the Supporting Affidavit in relation to the Application before this Court, was somewhat confusing but the Applicant/Advocates did write on 25th February 2010 to the Chairman of the Law Society of Kenya detailing that they had filed the said Bill of Costs and were asking the Chairman to step in and get enjoined in the taxation proceedings with a view to protecting the Applicant/Advocates, as members of the Law Society in order to have the fees paid either by way of negotiated settlement or taxation.

20. That process seems to have gone further with the appointment by the Law Society of Kenya of Messrs. Kirundi & Co., Advocates to appear on the Law Society's (and presumably the Applicant/ Advocates') behalf and to explore possible settlement out of court. The letter from Kirundi & Co. to the Attorney General dated 2nd June 2010 is self-explanatory to this end. Further, it appears from Messrs.Kirundi & Co's letter to the Attorney General dated 6th September 2010 that a meeting was held at the Attorney General's Chambers on the 5th September 2010 at which an offer by way of final proposal to settle the issue of fees out of court was put forward. The amount detailed was Shs. 160 million plus VAT but inclusive of all expenses and disbursements. Nothing further seems to have transpired apart from three mention dates before Court at which it was hoped to record a consent between the parties. That attempted settlement seems to have ground to a halt as per Messrs. Kirundi & Co.'s letter to the Secretary of the Law Society of Kenya dated 19th November 2010 which conveyed the information:

> **"We have all along been hopeful that the Attorney General would live up to his word especially after our meeting on 5th September 2010. We are of the view that the Attorney General is not interested in settling the matter or does not see the urgency in it. This being the case, we have decided to fix the matter for hearing. In the event that the parties come into a settlement before the hearing, we can fix the matter for mention to confirm the same."**

From this, it seems that out-of-court settlement negotiations failed and the matter progressed to taxation before the Taxing Officer accordingly.

21. As I have detailed above, the Applicant/Advocates have drawn the Bill of Costs under the wrong Schedule of the Advocates (Remuneration) Order. As a result, the items that have been detailed one by one from Item - no.8 to Item no. 398 bear a different charge rate for each in that Schedule VI rates have been applied not Schedule V. Accordingly, I direct that if the Applicant/Advocates wish to pursue the taxation of these items then they should file a fresh Bill of Costs under the correct Schedule for taxation before any other Taxing Officer of this Court save Mrs. Njora. In this regard, it should be noted that the Applicant/Advocates were in breach of **Rule 69** of the *Advocates (Remuneration) Order* in that they had included in the said Bill of Costs disbursements for travelling expenses etc. as an item for taxation (Item no. 7) when such should have been shown separately at the foot of the Bill. This point should be noted by the Applicant/Advocates if and when submitting a fresh Bill of Costs for taxation purposes.
22. That leaves this Court to determine as to what is a fair and reasonable instruction fee for the Applicant/Advocates to have charged for the services rendered to the Respondent. It must be borne in mind that in November 2006 the Applicant/Advocates had estimated its fees to be Shs. 17 million. At that stage, the Applicant/Advocates must have had some realistic idea what was going to be involved so far as the legal services that they were going to provide to the Respondent. Reading through the correspondence and noting the documentation which the Applicant/Advocates had to deal with, it does appear to me that the estimate may have been far adrift from reality. It must also be borne in mind that the suit in London was resolved through mediation and did not go to full trial. As a result, this Court is unable to understand how, in the Bill of Costs, the Applicant/Advocates can put in for a getting-up fee even if such was allowed under Schedule V. In my view, the Applicant/Advocates' claimed fees as per its filed Bill of Costs, are exorbitant for the work carried out, obviously a viewpoint shared by the Taxing Officer who had only awarded to the Applicant/Advocates the sum of Shs. 4 million. Doing the best I can, I would direct that I consider the reasonable instruction fee for the legal services rendered by the Applicant/Advocates would be Shs. 25,000,000/-. It is so ordered. In the circumstances, I make no Order as to costs of the Reference.

DATED and delivered at Nairobi this 31st day of October, 2013.

J. B. HAVELOCK

JUDGE