



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**MISCELLANEOUS APPLICATION NO. 675 OF 2012**

**IN THE MATTER OF ADVOCATES-CLIENT BILL OF COSTS**

**PAPIUS KIROGOTHI MUHINDI ..... 1<sup>ST</sup> APPLICANT**

**BEN GAKERE NYUTHO ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**MUCHANGI NDUATI & CO. ADVOCATES ..... RESPONDENT**

**IN THE MATTER OF VCIVIL CASE NO. 502 OF 2012**

**PAPIUS KIROGOTHI MUHINDI ..... 1<sup>ST</sup> PLAINTIFF**

**BEN GAKERE NYUTHO ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED ..... DEFENDANT**

**R U L I N G**

1. The Applicants/clients' Chamber Summons dated 11th April 2013 seeks that the taxation of the advocate/client Bill of Costs as against them dated 9th November 2012, by the Deputy Registrar on 18th February 2013, be set aside. The said Bill of Costs was taxed as against the Applicants in the amount of Shs. 611,567.52. The Application requests of the Court that the said Bill of Costs be re-taxed afresh by a different Deputy Registrar. The Application is said to be brought under the provisions of **Order 11 rule 2** of the *Advocates (Remuneration) Order*. It was brought on the following grounds:

**“a) The taxed amount of Kshs. 611,567.72 was excessive in the circumstances of the case amounting to an error in known principles of Taxation.**

**b) The Deputy Registrar erred in law and fact in failing to consider that the suit herein did not proceed to full trial nor was any interlocutory application heard as the suit was withdrawn by consent of both parties.**

- c) **The Deputy Registrar erred in law and fact in failing to find that the Plaintiff relates to Employment relation of unpaid dues and as such no complex issues arose prior to change of advocates.**
  - d) **The Deputy Registrar erred in law and fact in failing to find that the Applicants claims herein are not joint and several.**
  - e) **The Deputy Registrar erred in law and fact in failing to find that the Applicants claims are distinct and severable and the cost of the suit was supposed to be apportioned according to each Plaintiff's.**
  - f) **That the Plaintiffs/Applicants reference will further be based on the grounds that:**
    - a. **That the bill of costs as drawn was fatally defective or incurably incompetent which assertions were overlooked by the Deputy Registrar.**
    - b. **Each of the Plaintiff/Applicants had a distinct claim and not a global general claim.**
      - g) **The application has been made without delay.**
      - h) **It is in the interest of justice that this application be allowed.**
      - i) **The Deputy Registrar erred in law and fact in holding that there was interlocutory judgment before the change of Advocates yet the same occurred after the change of Advocates. This was an error on the face of the record.**
      - j) **The Deputy Registrar erred in law, fact and Principle and acted in violation of the Advocates (Remuneration) Order by awarding costs on a higher scale in a suit which was had not proceeded to Haring.**
      - k) **The Deputy Registrar erred in awarding a figure of Kshs. 84,354/= as value added tax over and above the taxed fees and the same ought not be an additional expenses in taxation".**
2. The said Chamber Summons was supported by the Affidavit of the first Applicant **Papius Kirogotho Muhindi** sworn on 11th April 2013. He detailed that the Respondent/Advocates were the Applicants' previous advocates who had only prepared the Plaintiff with regard to *Civil Case No. 502 of 2012* in which the Applicants had taken a suit as against Equity Bank Ltd. He commented that the second Applicant was now deceased yet the Respondent/Advocates were proceeding with a claim as against his estate by way of substitution. The first Applicant considered that the taxed amount of Shs. 611,567.72 was excessive in the circumstances amounting to an error in the known principles of taxation. The Deputy Registrar had erred in law and fact in failing to consider that the suit taken as against the said Equity Bank Ltd did not proceed to full trial nor was there any interlocutory application heard and determined. The suit had been withdrawn by the consent of all parties.
  3. Mr. Muhindi continued further with his Affidavit in support of the Application by detailing that the Deputy Registrar had erred in law and fact in failing to find that the suit related to the employment of the Applicants and unpaid dues arising therefrom. Such were not complex issues. She had also erred in finding that the Applicants' claims in the suit were not joint and several. They were both distinct and severable and the costs of the suit were supposed to be apportioned according to each Applicant's claim. The Deputy Registrar had overlooked the Applicants' submissions that the Bill of Costs as drawn was fatally defective or incurably incompetent and that the two Applicants had distinct claims not a general global claim. The Deputy Registrar as the taxing officer had also erred in law and fact in holding that there had been an interlocutory judgement entered in the suit before the Applicants changed advocates. This amounted, in the

deponent's view, to an error on the face of the record. The Deputy Registrar had also erred in law and fact in violation of the Advocates (Remuneration) Order by awarding costs on the higher scale when the matter did not proceed to hearing. Finally the deponent maintained that the Deputy Registrar had erred in awarding a figure of Shs. 84,354/-as Value Added Tax over and above the taxed fees. Again, in the opinion of the first Applicant such should not be an additional expense in taxation.

4. The Respondent/Advocates responded to the Chamber Summons by filing Grounds of Opposition dated 23rd April 2013. The Grounds were as follows:

- “1. The said application is a sham and is aimed at delaying/embarrassing the expeditious finalization of this matter.**

- 2. It is frivolous and lacking in merits and is a wastage of precious judicial time.**

- 3. It is otherwise an abuse of the process of the honourable court intended to keep the respondent away from realizing the fruits of the awarded costs.**

- 4. The applicants are unnecessarily holding the respondent back having withdrawn their instructions from him.**

- 5. There was absolutely no miscarriage of justice in the taxation which should be upheld”.**

5. The Respondent/Advocates filed their submissions on 2nd July 2013. Having detailed the Grounds set out in the body of the Application, the Respondent/Advocates submitted that such reflected at the lack of seriousness on the part of the Applicants leading to the conclusion that the whole Application was only intended to waste time. The Respondent/Advocates detailed that the taxed amounts could not be termed as excessive as the same, according to the Deputy Registrar's Ruling were based on the value of the subject matter of the suit. In her Ruling, the Deputy Registrar had explained in detail as to how she had arrived at the figures allowed. The argument that the fees should be reduced as the suit did not go to full trial was clearly captured at page 2 of the Deputy Registrar's Ruling dated 18th February 2013. There was an interlocutory judgement entered and the claim was liquidated. The Respondent/Advocates continued with their submissions by stating that whether the Plaint related to matters of employment or not was not relevant as the award of costs was based on the value of the subject matter as well as the work done. Further, they maintained that the claims of the Claimants were not joint and several as was revealed in the prayers of the Plaint. There was no reason for the costs of the suit to be apportioned as the Applicants' claim was global to be disbursed by the Claimants' lawyers upon payment being made.

6. The Respondent/Advocates commented that the Applicants were only raising the point that the Bill of Costs was defective and incompetent for the first time at this stage. According to the Respondent/advocates the Applicants were estopped from raising such a technical issue at this stage as it had not been raised in the taxation proceedings. As regards the Applicants point that there was an error on the face of the record, the Respondent/Advocates considered such submission as ridiculous as the Applicants' new advocates had sought leave to come on to the record because there was already an interlocutory judgement in place. As regards the position in relation to VAT, the Respondent/Advocates noted that the procedure in this regard was very clear in that advocates must charge VAT when drawing Bills of Costs. The Respondent/Advocates then referred this Court to the authorities of **HCCC No. 1723 of 1997 – Wilson Ndolo Ayah v National Bank of Kenya Ltd** as well as **HC MISC Application No. 540 of 2001 – Mereka & Co. Advocates v National Bank of Kenya Ltd**. In the first case, the Court had held that:

**“A court hearing a reference should not interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on error of principle or the fees awarded were so manifestly excessive as to warrant interference.”**

In the second case, the Court had referred to the provisions of **section 6 (4)** of the *Value Added Tax Act* which provided:

**“tax on any supply of goods or services shall be a liability of the person making the supply..... and payment shall become due at the time of supply.”**

7. The Applicants’ submissions commenced with a summary of the prayers of their Application before Court. They then commented upon the complaints that they had in relation to the Bill of Costs as drawn and presented to Court for taxation purposes by the Advocates dated 9th of November 2012. They noted that the first Applicant had claimed a sum of Shs. 17,513,000/- in the *Civil Case No. 502 of 2012*. The second Applicant, now deceased, had claimed Shs. 25,707,500/-. These were separate claims and not joint. However, the said Bill of Costs had lumped the claims together giving a total amount of Shs. 43,240,500/-. It was the Applicants’ submission that the Bill of Costs was defective as a result. The Deputy Registrar had taxed the Bill on the omnibus figure while she should have done so severally which would require the issuance of 2 Certificates of Taxation. Further, the Applicants detailed that it was perfectly obvious that no hearing of the said suit had ever taken place and the interlocutory judgement obtained by the Plaintiff therein had been set aside. To date, the suit had not been determined. As a result, the Applicants submitted that the instruction fees ought to have been based on the lower scale, despite the Deputy Registrar allowing 75% of the fees chargeable. As the default Judgement had been entered as a result of the Defence having not been filed, the Applicants submitted that costs should have been taxed under Schedule VI paragraph 1 (a) as, at the time, there was no Defence filed. The Applicants concluded that, for the above reasons, the taxation of the said Bill of Costs should be set aside and the Court should order that the advocates redraw the same for taxation before another Deputy Registrar.
8. Perusing the Court file, the said Bill of Costs dated 9th November 2012 was taxed by the Deputy Registrar by her Ruling delivered on 18th February 2013. On the next day, the advocates acting for the Applicants requested of the Deputy Registrar her reasons for the decision to enable the filing of a reference to this Court. On 8th April 2013, the Honourable Deputy Registrar wrote to the advocates acting for the Applicants detailing that the reasons for her decision were contained in her Ruling, a copy of which had been sent to them by email. They were advised that they could obtain a certified copy of the Ruling from the Registry. This Application was filed in Court on 11th April 2013 under the provisions of **Rule 11** of the *Advocates (Remuneration) Order*. As noted above, the Applicants’ Advocates have quoted the provision under which the Application has been brought before Court, in error. Further, **Rule 11 (1)** reads:

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

In their said letter dated 19th February 2013 addressed to the Deputy Registrar, the advocates for the Applicants seem to have ignored the above requirements as there is no mention whatsoever in the letter of the items of the taxation to which the Applicants object. However, in view of the more liberal attitude taken by Courts since the advent of the new Constitution in 2010 in not taking undue regard to procedural technicalities, this Court will overlook this lapse by the Applicants’ advocates.

9. Turning now to the Ruling of the said Deputy Registrar, it is quite obvious to this Court that she had carefully perused the parent file in relation to *HCCC No. 502 of 2012*. She discovered that the amount claimed in the Plaint dated 7th August 2012 was Shs. 43,240,500/-. That amount was not broken down as between the 2 Plaintiffs therein, the 2 Applicants herein. As a result, I take no cognizance of the Applicants’ submission that their claims before Court were several. They were clearly joint and correctly treated as such by the Hon. Deputy Registrar at the taxation of the said Bill of Costs. The subject matter of both the Applicants’ claims in the Plaint was the same as is evidenced by their witness statements both dated 7th August 2012. The claims as against Equity Bank Ltd were in relation to the Bank’s Employees Share Ownership Plan. The next point raised by the Applicants was that as no hearing had ever taken place, the applicable scale under Schedule VI should have been under 1. (a) as no Defence had been filed in the suit, rather than the scale

taken by the Deputy Registrar being under 1. (b). I have some difficulty with this submission for, in my reading of *Civil Case No. 502 of 2012*, the Applicants were the Plaintiffs therein. The matter was certainly defended by Equity Bank Ltd, the Defendant. Accordingly, I am of the opinion that the Deputy Registrar taxed the said Bill of Costs under the correct scale of Schedule VI of the Advocates (Remuneration) Order. The fact that the suit did not go to trial was taken into account by the Deputy Registrar when she quoted Schedule VI Rule 1 (ii) which reads:

**“To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial of the fee shall be 75% of the fees chargeable under item 1 (b) where the value of the subject matter is in excess of Ksh 3,000,000.”**

The Deputy Registrar found that the above rule was applicable to the matter and consequently she taxed off 25% of the instruction fee. She also taxed off Item No. 2 covering attendances upon the Applicants for an hour as there had been no proof tendered by the Advocates to support such item.

10. In this Court's view, the said Deputy Registrar's Ruling dated 18th February 2013 was quite proper and she taxed the Advocates' Bill of Costs dated 9th November 2012 completely in accordance with the Advocates (Remuneration) Order. As a result, this Court refuses to set-aside the same and/or the ensuing Certificate of Taxation dated 22nd February 2013. In accordance with **section 6 (4)** of the *Value Added Tax Act*, it was perfectly proper for the said Advocates and indeed the Deputy Registrar to add VAT to the said Bill of Costs. Accordingly, the Applicants' Chamber Summons dated 11th April 2013 stands dismissed with costs to the Respondent/Advocates.

**DATED and delivered at Nairobi this 10<sup>th</sup> day of December, 2013.**

**J. B. HAVELOCK**

**JUDGE**