IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.265 OF 1989

TITUS NGANGA KAMUYU……..PLAINTIFF

VERSUS

MUTHEKI MUCHONJORU…….DEFENDANT

RULING

The respondent's bill of costs dated 8th January, 2011 was slated for arguments on 6th September, 2011 before the taxing officer, L.C. Komingoi, Deputy Registrar. The taxation proceeded *ex parte* with counsel for the respondent urging the court to tax the bill as drawn and also to award Kshs.1,500/= attendance costs per day for four occasions. The taxing officer ordered that:

"COURT: The date was taken by consent. There is no appearance of the respondent. The plaintiff's bill of costs is taxed as drawn. In addition, they are given Kshs.6000 attendance (sic)"

The applicant has now made reference to this court pursuant to the provisions of **Rule 11(2)** of the **Advocates (Remuneration) Order** for orders that the taxation be set aside and the respondent's bill of costs of 8th January, 2011 be taxed afresh. The applicant's advocate has averred that he filed submissions in objection to the bill of costs on 12th April, 2011; that after several adjournments, the bill was fixed for arguments by consent on 6th September, 2011. On that day, the matter was not in the day's cause list and the file too was not in court. Counsel then proceeded to attend to another matter being C.M.CR.C.No.2720 of 2011, **Republic** V. **James Mwangi Gakuo**. At 9.50a.m., he got information that the file had been taken to the taxing officer.

When he got to court at 9.55a.m., the matter has been dealt with as explained at the beginning of this ruling. The applicant is aggrieved by the fact that taxation proceeded *ex parte* when the matter was not listed and while the file was not before the court when it ought to have been there; that taxation of the bill as drawn ignored the fact that there was objection and submissions filed.

This reference is opposed. Learned counsel for the respondent has deposed that the applicant's counsel had not sufficiently explained why he did not attend before the taxing officer yet the date was taken by consent; that by abandoning the matter and proceeding to other courts, counsel was not vigilant; that the bill was taxed on merit as no substantive objection had been raised in the applicant's submissions. It is further argued that the bill was drawn to scale and the taxing officer acted fairly and judiciously in allowing the bill as drawn; that if the application is allowed, the respondent will be prejudiced in view of the fact that the costs were awarded on 31st May, 2010. Issue has also been taken with citing of **Rule 11(2)** aforesaid to the effect that it does not give rise to the prayers sought.

I have considered these arguments and the authorities relied on by learned counsel for the applicant, namely **Dominic Kimatta t/a Kimatta & Company Advocates** V. **Joseph Yator**, H.C.C.Misc. Appl. No.437 of 2008, **Steel Construction & Petroleum Engineering (EA) Limited** V. **Uganda Sugar Factory Limited** (1970) EA 141 and **Trust Bank Limited** V. **Amalo Company Limited** (2002) 2 KLR 627

I start with the first ground. Under Rule 11(1), an aggrieved party may object in writing to the decision of the taxing officer pointing out the items to which he objects. After receiving the reasons from the taxing officer, the objector may apply to the judge. The provision does not specify what the judge is to do with the objector's reference. The powers of the High Court enumerated under sub-rule (4) only apply to power to enlarge time for the taking of any step under the rule. But through judicial pronouncements, the jurisdiction of this court in such matter has now been settled. For instance, it has been stated in the case of **Joreth Limited** V. **Kigano & Associates**, Civil Appeal No.66 of 1999 that:

"A High Court judge when hearing such an objection is not sitting in his capacity as a judge exercising his appellate jurisdiction as, say, would be the case when he hears an appeal against the decision of a magistrate. The taxing officer whilst taxing a bill of costs is carrying out his function as such only. He is an officer of the superior court appointed to tax bills of costs."

The courts have also addressed the extent to which the High Court can interfere with quantum of a taxed bill of costs. **In the Estate of Ogilvie Ogilvie** V. **Massey** (1910) P.243 Buckley L, J said:

"In questions of quantum, the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed, the court will not interfere unless the taxing master is shown to have gone wholly wrong."

There must be an error in principle and it must be shown that the taxing officer went outside the settled practice.

It is common ground that the 6th September, 2011 was taken by consent. Learned counsel for the applicant has stated without being contradicted that he was before the court but the matter was not listed. Neither was the relevant file available before the court.

The taxing officer is allowed by **Rules 14** and **76** to proceed *ex parte* if a party or counsel without excuse fails to attend. Counsel for the applicant has given a plausible explanation. Having filed submissions and signified the intention to object to the bill, it was imperative for the taxing officer even in the absence of counsel for the applicant to consider the submissions which were already on record. The consideration must be clear on record. There are no reasons why the bill was allowed as drawn.

For these reasons, the said taxation is set aside and the bill of costs remitted to the taxing officer to tax the same afresh.

I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 23rd day of February, 2012.

W. OUKO

JUDGE