REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 127 of 2007

MURIU MUNGAI & CO. ADVOCATES..APPLICANT/ RESPONDENT

VERSUS

NEW KENYA CO-OPERATIVE CREAMERIES..RESPONDENT/ APPLICANT

RULING

This is a reference arising from the decision of the Taxing Office (the learned Senior Deputy Registrar Mr. M M Muya) made on 25th September 2007 in which the Taxing Officer taxed the Bill of Costs lodged by the applicant therein who is the respondent in the present application (hereinafter referred to as the advocate) against the respondent therein who is the applicant in the present application (hereinafter referred to as the client) dated 19th February 2007 in the total sum of Kshs. 69,390.

The reference, as is the prescribed procedure is brought by way of Chamber Summons dated 8th March 2012 and filed in this court on14th March 2012. In the said summons the client seeks the following orders:

1. That the Honourable court be pleased to set aside the learned taxing officer's decision of 25th September 2007 following the Advocates/Client bill of costs dated 19th February 2007 at Kshs. 69,390/=.

2. That the Honourable Court be pleased to remit the bill of costs dated 19th February 2007 for re-taxation before a different taxing officer with appropriate directions.

3. That the costs of this application be borne by the Applicants/Respondents.

The application, though not supported by any affidavit, is based on the following grounds:

a) That following the order issued in court on 15th February 2012 by Hon. Gicheha PDR that the reasons of the taxing master are deemed to be contained in her ruling dated 25th September, 2007.

b) That the learned taxing officer erred in principle in proceeding to tax the Advocate/Client bill of costs without giving the Clients/Applicant a chance to file their written submissions.

c) That the learned taxing officer erred in principle in allowing Kshs. 69,390/= in the Bill of Costs.

d) That the learned taxing officer erred in not considering the relevant factors, hence allowing the amount of Kshs. 69,390/= that was excessive in the circumstances.

In opposition to the reference the advocate filed grounds of opposition dated 7th May 2012 on 10th May 2012 which state as follows:

a) That Applicant has not demonstrated any error of principle by the taxing master to warrant setting side of the ruling on taxation.

b) The Applicant was granted the opportunity way back on the 4th July 2007 to lodge submissions on the bill of costs and did not do so.

c) The Applicant has not demonstrated that the taxed amount is manifestly excessive as to warrant setting aside of the same as there is no dispute that instructions were given by the client and the work undertaken.

d) The applicant is guilty of latches as there is no reasonable explanation for delay in filing the instant application considering the fact that the orders extending time to lodge the reference were issued way back on the 7th March 2008, about 4 years ago.

In his submissions, **Mr. Omari,** learned counsel for the client submitted that the learned Taxing Officer erred in principle in taxing the said bill. First, it is submitted that the learned Taxing Officer failed to give the client an opportunity to file written submissions thereby taxing the said bill erroneously. According to counsel, when the matter came before the learned Taxing Officer, directions were given that parties do file written submissions with the advocate filing and serving their submissions first. The advocate, however, failed to comply with the said directions with the result that the clients were unable to comply with the said order. It was only when the clients went to fix the matter for directions on 2nd October 2007 that it dawned on them that the ruling on taxation had been delivered on 25th September 2007 in the absence of both parties. According to learned counsel, the failure to accord the client an opportunity to submit has occasioned a miscarriage of justice.

Secondly, it was submitted that the provision under which the learned Taxing Officer taxed the advocate's costs was not the relevant provision. According to counsel, the costs arose from an objection proceedings yet the learned Taxing Officer based the instructions fees on Schedule VI paragraph (o)(viii) which relates to instructions fees in respect of applications not provided for. According to counsel the applicable schedule should have been Schedule VI paragraph 3(c) under which instructions fees are, under the 1997 Advocates (Remuneration) Order, provided as Kshs. 2,250/-. Relying on the case of **Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92**, counsel submitted that the failure to apply the correct schedule amounts to an error in principle. Counsel accordingly prayed that the decision of the learned Taxing Master be set aside and the bill be remitted back for taxation by a different taxing master with appropriate directions.

On his part **Mr. Chenge**, learned counsel for the advocate, submitted that the client was granted opportunity to file submissions on 4th July 2007 but the same were not filed and therefore it is on that basis that the taxing master proceeded with the taxation. It is further submitted there was no error of principle. The subject matter, according to counsel, was a decree in the sum of Kshs. 506,399.55 and therefore the taxing master was guided by the value of the subject matter. The matter was of utmost importance to the client since what was involved was plant and machinery whose attachment grounded the client's operations. Those facts according to learned counsel were taken into account and hence there was no error in principle. Counsel further submitted that the client has not contended that the amount

taxed was so high as to amount to injustice and hence there was no miscarriage of justice, which is the only ground upon which the order setting aside can be warranted.

In conclusion it was submitted that the client is guilty of inordinate delay in filing the reference. Whereas an order extending time was given on 7th March 2008 the reference was not filed till 8th March 2012, 4 years down the line without any attempt being made to explain the delay. Accordingly, it was submitted that the reference is simply meant to delay the advocate from realising the fruits of his labour. However, in the alternative, **Mr. Chenge** submitted that if the Court found that there was an error in principle, this court should proceed to tax the costs since the matter has been pending for a long time.

In a rejoinder to the said submissions, **Mr. Omari** invited the Court to look at the record and confirmed that the client is not objecting on the quantum per se but to the legal provision invoked. Counsel submits that had the relevant provision been invoked, one cannot tell whether the Taxing Master could have come to the same decision. Under rule 11(1) of the Advocates (Remuneration) Order, it is submitted, a competent reference can only be mounted after receipt of the reasons for the decision. In this case, it was impossible to get the reasons until 15/02/12 when **Mrs. Gicheha** the Deputy Registrar directed that reasons be deemed to be contained in the decision.

I have considered the application, the submissions made as well as the authority cited and this is the view I form of the matter.

Rule 11(1) and (2) of the Advocates (Remuneration) Order provides as follows:

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

There is no provision for an affidavit in support of the application, save for grounds of objection. The reason for this, in my view, is that a decision of the taxing master is, in reality, a delegated decision of the court and therefore a reference, strictly speaking, is not an appeal. However, being in the nature of an appeal, fresh evidence may not be readily admissible. It is, however, a different matter where there are issues of fact which are neither on record nor admitted by the parties in which case some form of evidence may be necessary in form of affidavits. That is the difficulty that the client found itself in this matter when it tried to explain the reasons why there was a delay in filing the reference.

This reference brings into focus the perennial problems bedevilling the procedure for the taxation of costs between an advocate and client in this country. Paragraph 13 of the Advocates (Remuneration Order) provides as follows:

(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bills of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.

(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.

(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but

no advocate shall be entitled to an instruction fee in respect thereof.

From the foregoing it is clear that the reasons for the decision are to be sought for by way of a notice within 14 days of the decision and the reference is to be lodged within 14 days of the receipt of the reasons.

That brings us to the question of what happens, as the client alleges in this case, where no reasons are given. First, and foremost, the above provisions presuppose that in delivering their decisions on taxation, the taxing officers only pronounce the results of the taxation without the reasons behind them. In most cases, the court is aware that, taxing officers, in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons, thereafter. In such circumstances it would, with due respect, be foolhardy to expect the taxing officer to redraft another "ruling" containing the reasons. In my view, this is an area that needs to be looked by the authorities concerned. I do not see the reason why the taxing officer cannot be required at the time of making the decision to do so together with the reasons therefor. The result of these vague provisions is that certain courts have held that preferring a reference before the reasons are furnished renders the reference incompetent. In **Muriu Mungai & Co. Advocates vs. New Kenya Co-Operative Creameries Ltd Nairobi (Milimani) HCMC No. 692 of 2007, Mwilu, J** was of the view that:

"It is mandatory for an applicant who objects to a taxation to annex the ruling, giving reasons by the taxing master supporting the taxation...Nowhere is it provided that if there be a delay in the taxing master giving reasons for taxation then a party may file a reference. Instead, rule 11(4) gives the court power to enlarge time if the same lapses before a step needed to be done is done or taken...Under the rules the taxing officer is required forthwith, upon receipt of the notice of objection to give reasons for the decision and where they fail to do so, the thing to do is not to file a reference to the High Court...In the court's view, the applicant moved the court too soon. More reminders should have been sent to the taxing officer for reasons or any other legal action that would have resulted in the taxing officer giving reasons to be taken to have the reasons given. Nobody else can give those reasons but the taxing officer and it has not been shown that the taxing officer is not available. And more importantly the court cannot determine the matter in the absence of the taxing officer's reasons for her decision in taxing the bill of costs as she did".

Mwilu, J's view is supported by **Mohammed Ibrahim, J**, (as he then was) in **Paul Gicheru T/A Gicheru & Co. Advocates vs. Kargua (K) Construction Co. Ltd Eldoret HCMCA No. 124 of 2007**, where the learned judge was of the view that:

"Under rule 11(2) of the Advocates Remuneration Order, the taxing officer was required to record and forward to the objector the reasons for his/her decision on items 1 and 2. This is a mandatory requirement as the word used is "shall". It is only after receipt of these reasons that an objector may within another fourteen (14) days of receipt of the reasons that he can file the application raising his objections before a judge...While the taxing master did not give specific reasons even by reiteration and referred to the entire body of his ruling, he complied with the requirement at least by way of procedure, if nothing else. In such a case, if the ruling is detailed and answers the inquiry, it is arguable that it would be superfluous for the taxing master to give any other reasons or repeat himself...But it is not correct to say that if the ruling of the taxing master is actually a ruling then there is no need to request for such reasons. If this was correct interpretation, then there would be no need for the Rules Committee to set out an elaborate and long procedure as set out in the Rules. All an aggrieved person would have required to do is to give notice of objection within 14 days of the decision being made and thereafter file the application/reference within another 14 days. The words in Rule 11(2) are certain and clear that the taxing master must give the reasons for the decision within 14 days of the Notice of Objection being filed. He could thereafter do either of the following:

a. if he is satisfied that the Ruling is so elaborate, detailed and sufficient to express clearly all the reasons for the decision on each item, then he could state that the reasons are in the ruling; or

b. he could summarise specific reasons for decision on each item; or

c. if the ruling/decision given earlier is not detailed enough to enable the objector lodge an effective and proper reference, then the taxing master would be obliged to give reasons for the decisions on each of the items complained.

It would appear that the requirement for the reasons to be given was to ensure that an objector fully knows the basis for the decision. Such a requirement appears reasonable since it is quite common and usual that the rulings or assessment of taxation are brief, precise and to the point. It is only where there is serious contentions and arguments that the taxing master would go into in-depth reasoning. In any event, the Court must apply the law as it is, as there is no room for any other interpretation or need to use any other method of interpretation than the "Golden Rule" to meet the ends of justice...In the instant case, after the notice, the taxing master was required to record and forward the reasons for the decision on items 1 and 2. No time is given for this and it is presumed that it must be done within a reasonable time. However, no sooner, the notice was filed than the applicant the next day filed the reference. This did not give any time to the taxing master to discharge her duty under Rule 11(2). The applicant acted prematurely and pre-empted the giving of the reasons by the Deputy Registrar as taxing officer/master...There are no reasons on record after the Notice of Objection. The application/reference herein is null and void *ab initio*. It is a nullity. This omission is incurable as the requirement for recording and forwarding of reasons is a mandatory one and the effect of this is that this Court truly in the circumstances has no jurisdiction to entertain the application and jurisdiction being everything, without it a Court has no power to make one more step".

The Court of Appeal however, took a different view in **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board Civil Appeal No. 220 of 2004 [2005] 1 KLR 528**where the Court held:

"On reference to a Judge from a 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 taxing officer acted on erroneous principles or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit...If the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI (1), that would be an error in principle...If a Judge on a reference finds that the taxing officer has omitted an error of principle the general practice is to remit the question of quantum for the decision of taxing officer... The judge has however a discretion to deal with the matter himself if the justice of the case so requires...*If a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference"*.

In **Nyamogo & Nyamogo vs. Kenya Bus Services Nairobi Milimani HCMA No. 587 of 2004, Ochieng', J** stated that:

"pursuant to the provisions of rule 11(1) of the advocates (remuneration) order, if any party should object to the decision of the taxing officer he should within 14 days after the decision give notice of the items of the taxation to which he objects and upon receipt of the notice, rule 11(2) obligates the taxing officer to forthwith record and forward to the objector the reasons for his decision...by promising to give his reasons for taxation in due course the taxing officer must be deemed to have been aware that the reasons were not in the ruling and by subsequently declining to provide the reasons the taxing officer must be deemed to have failed to discharge the obligation bestowed upon him by rule 11(2) of the Advocates (Remuneration) Order...Where the sum awarded is four times the minimum sum prescribed, the taxing officer would have been expected in his reasons for taxation to justify his finding that such an award was appropriate...Such reasons are essential when the Judge is giving consideration to a reference, as it enables the Court determine whether or not the taxing officer may have taken into account irrelevant consideration; or if he had failed to take

into account relevant factors, or if the taxing officer had erred in principle".

In **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5**, **Ochieng, J**, similarly, held as follows:

"Although rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling...Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance, the same dismissed".

It is therefore clear that the interpretation by the Courts especially the High Court on this issue is far and varied. In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.

However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of **Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005,**where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent. Similarly in this case, it has been stated from the bar the Taxing Officer had been transferred and was not in a position to furnish the reasons. Hence another Taxing Officer directed that the reasons be deemed contained in the ruling. That direction is, in my view, proper where the reasons are actually contained therein. However, it must always be borne in mind that taxation is an exercise of discretion and where the reasons are not patent on the face of the record, it is only the taxing master who can, properly speaking, explain in his reasons, the basis for the exercise of the discretion. The basis cannot be given by a different taxing master.

In the present case, it is clear from the submissions that the parties were not prejudiced in their prosecution of the reference by lack of the reasons. What comes out is that the client did not really require the reasons in order to mount a competent reference. If the client considered the said decision to contain the reasons, it could file the reference within 14 days from the date thereof. If, on the other hand, it was of the view that there were no reasons contained in the decision, it could request for the same in writing, in which case, he would be bound to wait for the same. If, however, at a later stage it decided to prefer the reference notwithstanding the failure by the Taxing Master to furnish the reasons, after the lapse of the 14 day period, it is my view that it would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order. One of the grounds in that case if not the only ground would be the failure by the Taxing Master to furnish it with the reasons which, according to the decision in **Kipkorir, Titoo & Kiara Advocates** (supra), is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference, the said reasons have not been furnished.

I, accordingly, would have had no difficulty, in the circumstances of this case, where the said reasons were, in fact not crucial to the institution of the reference, in finding that this reference was filed out of time. However, from the record, on 7th March 2008, **Waweru, J** granted an order by consent of parties extending time for filing a notice of objection. Whereas that order did not expressly extend time for filing the reference itself, I am prepared to excuse the client's view, misguided though in my view, that it was entitled to wait for the reasons. In the premises under the provisions of Article 159(2)(d) of the

Constitution I will proceed to determine the reference on merits.

It is submitted that the client was not accorded an opportunity to be heard. Obviously the right to a hearing is fundamental right that must at all times be adhered to since compliance with the rules of natural justice is one of the basic and important tenets of the rule of law. However, the law is not that a party must be heard; rather it is that a party must be accorded a reasonable opportunity of being heard. According to the record on 27th July 2007, the learned Taxing Officer directed that the applicants do file and serve submissions by 10th August 2007 while the respondents would file and serve theirs by 24th August 2007 and the matter be mentioned on 26th August 2007 to confirm compliance. This was after the order issued on 4th July 2007, referred to by **Mr. Chenge** in his submissions had been ignored. Accordingly the said order was superseded by the order of 27th July 2007.This order was, likewise not complied with and a further mention date was scheduled for 7th September 2007 when counsel for the advocate informed the court that the advocate had filed submissions. There was no indication that the same had been served. However, counsel for the client seems not to have raised any issue although the client was represented. A ruling date was hence given. Going by the record, I am not prepared to accept the submissions that the client was denied an opportunity of submitting. Counsel kept silent when the court fixed the matter for ruling. Nothing would have been easier than for counsel to seek time to file submissions assuming he had had not been served. Keeping silent in the face of the remarks made on behalf of the advocate could only mean that the client's counsel was not interested in submitting. Accordingly that ground of reference fails.

With respect to the provision under which the bill was taxed, it is clear that the Taxing Master based his decision on Schedule VI(i)(viii) which according to him applies to "To present or oppose any other application not otherwise provided for whether by summons in Chambers or by Notice of Motion where the application is opposed". The correct provision is actually Schedule VI Paragraph 1(o)(viii). Counsel for the client submitted, rightly in my view, that that was not the relevant provision. Objection proceedings are covered under Schedule VI paragraph 13 of the said schedule under which three items are provided for under the 1997 Remuneration Order as follows:

(a) Instruction to prepare objection **900**

(b) Instruction to proceed with attachment **450**

(c) Instruction to take proceedings to establish

or oppose such proceedings **2,250**

It therefore follows that the applicable provisions were paragraph 13(a) and (c). It is clear that the learned Taxing Master misdirected himself when he applied the provisions of Schedule VI Paragraph 1(o)(viii) aforesaid.

What are the consequences of this? According to the advocate since there is no allegation that the amount arrived at was so inordinately high as to warrant interference, there is no error of principle disclosed. As was stated by the Court of Appeal in **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board (Supra)** if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI (1), that would be an error in principle. Here the formula for assessing costs for objection proceeding is provided in paragraph 13 aforesaid. Yet the Taxing Officer invoked a totally different provision. There is a good reason why separate provisions were provided and therefore one cannot be interchanged for another. It may be that the Taxing Officer addressing his mind to the correct provision may have arrived at the same decision, but we cannot be certain about that.

Consequently, on that ground I find merit in the Chamber Summons dated 8th March 2012. The same is allowed with the result that the decision of the taxing master made on 25th September 2007 is hereby set aside.

Counsel for the advocate has requested that this Court should proceed to tax the costs. Having looked at the Bill of Costs, it is my view that it would be preposterous for me to proceed and purport to tax the costs since the record herein does not contain sufficient material to enable me do so. Accordingly, I wish to follow the wise words of the Court of Appeal in **Joreth Limited vs. Kigano & Associates** (Supra) that it is not really in the province of a Judge to re-tax the bill and that if the Judge comes to the conclusion that the taxing master has erred in principle he should refer the bill back for taxation by the same or another taxing master with appropriate directions on how it should be done.

In the result, the Bill of Costs herein is remitted for taxation before any other Deputy Registrar other than **Mr. M M Muya** to tax the same in accordance with the provisions of Schedule VI paragraph 13 of the Advocates Remuneration Order 1997 and taking into account the guidelines set out in the said Order.

In the circumstances of this case and as the error was not caused by any of the parties herein I make no order as to costs.

Ruling read, signed and delivered in Court this 12th day of June 2012
G.V. ODUNGA
JUDGE

In the absence of the parties.