



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC MISC. APPLICATION NO. 98 OF 2017**

**WETANG'ULA, ADAN & COMPANY ADVOCATES.....APPLICANT**

**=VERSUS=**

**JULIANA MUTHONI KITOLOLO &**

**AUSTIN SALMON KITOLOLO.....RESPONDENT**

**RULING**

**Background**

1. On 7/3/2018, the taxing officer of this court [Hon I N Barasa] taxed the advocate-client bill of costs lodged by **M/s Wetengula, Adan and Company Advocates** (hereinafter referred to as “**the advocate**”) against **Juliana Muthoni Kitololo** and **Austin Salmon Kitololo** [hereinafter referred to as the “**the Clients**”] at Kshs 11,177,289.4. The said decision triggered the following two applications which fall for determination in this ruling: (i) the Advocate’s notice of motion dated 21/6/2018 urging this court to enter judgment in favour of the advocate in terms of the taxing officer’s award; and (ii) the client’s chamber summons (hereinafter referred to as “**the reference**”) dated 6/7/2018 urging this court to set aside the award on the ground of commission of various errors of principle on part of the taxing officer.

2. It logically follows that the client’s reference should be disposed first

because if it succeeds, the advocate’s application will stand spent. Similarly, if the client’s reference were to fail, there would be no legitimate basis for denying the advocate the adaption order they seek.

**The Reference**

3. The client’s reference was premised on the following verbatim grounds:

- i. That the Deputy Registrar erred in principle in awarding manifestly excessive costs touching on all the items in the bill of costs and in particular item 1.*
- ii. That the Deputy Registrar erred in failing to consider the written submissions by the respondents in the bill of costs touching on both the preliminary objection and the bill of costs itself.*
- iii. That the Deputy Registrar erred in allowing costs under one bill of costs touching on different transactions.*
- iv. That the Deputy Registrar erred in principle in awarding costs on item when there was no evidence that the advocates executed the alleged task. (sic)*
- v. That the Deputy Registrar erred in allowing costs under item 3 of the bill of costs against the respondents yet the documents on record filed by the advocates/respondents clearly stipulated who was to meet such costs.*
- vi. That the Deputy Registrar erred in principle in allowing costs against the respondents contrary to the contents of the joint venture agreement which clearly stipulated who was to meet the costs under the joint venture agreement.*
- vii. That the Deputy Registrar exercised her discretion capriciously by unilaterally making a finding that the alleged meetings captured in item 6 of the bill of costs took an hour each without any evidence in that regard and without the respondent is firm of advocates indicating as much.*

viii. *That the Deputy Registrar erred in principle in taking into account irrelevant factors when taxing the bill of costs.*

ix. *That the Deputy Registrar erred in principle in failing to take into account the deposition contained in the replying affidavit of Juliana Muthoni Kitololo filed in court on 6th December 2017.*

x. *That the Deputy Registrar erred in principle in failing to appreciate that the fees under item 4 of the bill of costs was being demanded by the firm of Wetangula, Adan & Co Advocates yet the conveyance was indicated to have been drawn by Wetangula, Adan, Makokha & Co Advocates which are two separate and distinct law firms.*

xi. *That the Deputy Registrar erred in principle in allowing costs against the 2nd respondent who was never a party to the joint venture agreement.*

xii. *That the Deputy Registrar erred in principle in taxing items 4 and 5 in the bill of costs as separate items.*

xiii. *That it is only fair, just and in the interest of justice that*

*the orders sought herein be granted.*

#### **Advocate's Case**

4. The advocate opposed the client's reference on two principal grounds: (i) that the client failed to file and serve a notice of objection within the time stipulated under paragraph 11(1) of the **Advocates (Remuneration) Order** (hereinafter referred to as "**the Remuneration Order**"); and (ii) that the client failed to file and serve the application within the period prescribed under paragraph 11(2) of the Remuneration Order. The client contended that their letter dated 9/3/2018 was both a request for reasons and a notice of objection under Paragraph 11(1) of the Remuneration Order.

#### **Analysis and Determination**

5. I have considered the reference together with the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. Two key issues fall for determination in this reference. The first issue is whether the client's reference is incompetent by dint of non-compliance with the requirements relating to lodging of notices of objection and filing of references under paragraph 11 of the Advocates (Remuneration) Order. The second issue is whether the taxing officer committed any error of principle warranting the setting aside of her award. I will make sequential pronouncements on the two issues in the above order.

6. The first limb of the advocate's objection to this reference was that the clients did not give written notice of objection to the taxing officer's award as prescribed under paragraph 11(1) of the Remuneration Order. The second limb of the objection was that the clients did not file the present reference within the period of 14 days prescribed under Paragraph 11(2) of the Remuneration Order. In their rejoinder, the clients contended that their letter dated 9/3/2018, which was duly served on the taxing officer and on the advocate, was both a request for reasons and a notice of objection under paragraph 11 (1) of the Remuneration Order.

7. I have carefully perused the letter dated 9/3/2018. It is addressed to the Deputy Registrar and reads as follows:

***"RE: NAIROBI ELC MISC APP NO 98 OF 2017 WETANGULA, ADAN & CO ADVOCATES –VS- JULIANA M KITOLOLO & AUSTIN SALMON KITOLOLO***

***Please refer to the above matter and the ruling on taxation delivered on 7th March 2018.***

***We would be glad if you could favour us with the reasons of the decision on all the items in the bill of costs as the respondents object thereto"***

8. Paragraph 11 of the **Advocates Remuneration Order** which parties to the two applications are relying on contain the following legal framework:

***"11. Objection to decision on taxation and appeal to Court***

***of Appeal***

***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***

***3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

4) *The High Court shall have power in its discretion by order to enlarge the time filed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.*"

9. My reading of the above framework, and indeed the entire legal framework in the Advocates Act and in the relevant subsidiary legislations thereunder is that the law does not prescribe a statutory format which the notice of objection under paragraph 11(1) should take. The letter which the clients rely on requested for reasons for the decision on each item and at the same time indicated that the clients were objecting to the taxing officer's decision on all the items. The English language employed may not have been concise but it is clear from the letter that the clients requested for reasons and expressed their objection to the taxing officer's award on all the items. In my view, in the absence of a prescribed statutory format, this court would be acting contrary to the letter and spirit of Article 159 of the Constitution if it were to lock the clients out of the seat of justice by striking out the reference herein on the ground that the letter dated 9/3/2018 did not meet a certain unprescribed threshold or format. Suffice it to say that, notwithstanding the apparent inadequacy in language precision in the letter dated 9/3/2018, notice of the clients' objection was conveyed and the object of paragraph 11(1) of the Remuneration Order was duly achieved.

10. On the second key ground of objection to the reference, it is noted from Annexure "JMK 7" that the taxing officer responded to the request for reasons on 4/7/2018. The reference herein was thereafter filed on 10/7/2018 which was within the prescribed period of 14 days from the date of the taxing officer's response. I accordingly do not find merit in this ground of objection.

11. Consequently, my finding on the first issue is that the letter dated 9/3/2018 constituted an adequate notice of objection and the reference herein was filed within the prescribed time.

12. I now turn to the second issue which focuses on the merits of the reference brought by the clients. I have considered the reference together with the entire record of proceedings and documents before the taxing officer. I have also considered the parties' submissions in this reference.

13. Taxation of costs is a discretionary jurisdiction vested in the taxing officer. In exercising that jurisdiction, the taxing officer is guided by the legal framework in the Advocates Remuneration Order as amended from time to time and by various principles laid down by Kenya's superior courts. The jurisdiction of a judge of a superior court to interfere with the taxing officer's decision is exercised on well settled principles. [see the pronouncement in **Republic vs Minister of Agriculture and 2 Others; Exparte Muchire W' Njuguna & Others (2006) eKLR**]. Firstly, a judge of a superior court will not interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle or the fee awarded was manifestly excessive or manifestly low as to justify an inference that it was based on an error of principle. Secondly, it would be an error of principle on part of the taxing officer if she were to take into account irrelevant factors or if she failed to consider relevant factors. Thirdly, some of the relevant factors to be taken into account are set out in the Remuneration Order and include the nature and importance of the case or matter; the amount or value of the subject matter involved; the interest of the parties; the general conduct of the proceedings; and any direction by the trial Judge.

14. One of the gravamens in this reference was that the taxing officer allowed fees in favour of the advocate, **M/s Wetang'ula, Adan & Company Advocates**, in respect of conveyance work that was undertaken by **M/s Wetang'ula, Adan, Makokah & Company Advocates**. The clients contended that the two law firms were distinct and the taxing officer committed a grave error by making the award in favour of **M/s Wetang'ula, Adan & Company Advocates** in relation to conveyance work undertaken by **M/s Wetang'ula, Adan, Makokha & Company Advocates**. The advocate did not file a replying affidavit or make submissions to address this issue. In the absence of controverting evidence, I find this to be a valid ground and an indication that indeed the taxing officer committed an error in making the award. In the absence of any other evidence, the proper law firm to lodge a bill of costs relating to the conveyance work is M/s Wetang'ula, Adan, Makokha & Company's Advocates.

15. Further, the clients have faulted the taxing officer on the ground that she allowed the taxing of the bill in respect of work relating to the preparation of the joint venture agreement against **Mr Austin Salmon Kitololo** yet he was not a party to the joint venture agreement. The taxing officer in her decision addressed this issue in the following words:

*"I have carefully perused the documents annexed to the affidavit of Naima Sheikh filed on the 29th August 2017. The copy of telephone SMS conversation between Juliana and Austin Kitololo on the one hand and Mr Adan of the applicant firm show clearly that there was a retainer agreement between the parties. The last paragraph of a copy of letter dated 19th May 2016 from Mr Austin Kitololo to the applicant firm states "The matter of legal charges was left for Adan and Kitololo to sort out as they shall deem satisfactory" I am satisfied that indeed there was a retainer between the applicant and the respondents. I am also satisfied that the applicant supported their bill of costs.*

16. Firstly, there was no evidence of any formal retainer agreement in the relevant transactions. Secondly, the parties identified as clients in the bill of costs and in the impugned ruling bear the name "**Kitololo**". Only one of them [Juliana Muthoni Kitololo] was a party to the joint venture agreement and to the conveyance. The paragraph which the taxing officer relied on to conclude that Mr Austin Salmon Kitololo was liable for legal costs contained in the composite bill of costs did not specify which "**Kitololo**" was to liaise with Mr Adan to sort out the issue of legal charges. I therefore agree with the clients that the taxing officer did not address this issue adequately and therefore committed an error of principle in committing Mr Austin Salmon Kitolo to meet the advocate's costs without conclusive evidence that he was the instructing client in the three transactions. In the absence of evidence to the contrary, parties to the relevant instruments are deemed to be the instructing clients.

17. Similarly, the decision of the taxing officer is silent on the position of Osman Bahir Dedeoglu in relation to the joint venture. If it was the position of the taxing officer that there was sufficient evidence exonerating Mr Dedeoglu from shouldering any portion of the costs, the taxing officer should have made a pronouncement to that effect.

18. Without saying much, it is clear from the above errors of principle that the legal costs relating to the material services require fresh

taxation based on properly drawn and properly directed bills of costs.

19. In the circumstances, my finding on the second issue is that the taxing officer committed various errors which make it untenable to uphold the award. The reference herein accordingly succeeds on that ground.

**Disposal Orders**

20. The errors committed by the taxing officer were largely caused by the decision of the advocate to draw a single bill to cover different transactions involving different parties and law firms. I will in the circumstances not remit the same bill of costs to the taxing officer for fresh taxation. I will instead direct that, in the absence of an amicable resolution of the issue of costs, the law firms which rendered services in the various briefs do prepare and lodge separate bills of costs against the liable clients.

21. Because the reference herein was occasioned by the taxing officer's errors, parties to this reference shall bear their respective costs.

22. Lastly, the reference having succeeded, the advocate's notice of motion dated 21/6/2018 fails. Parties shall bear their respective costs of the said application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF FEBRUARY 2021**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Adano for the advocate for the Applicant

Court Clerk: June Nafula