Paragon Electronics Limited & another v I&M Bank Ltd (aka Investment and Mortgage Bank); Velos Enterprises Limited & 2 others (Interested Parties) (Environment & Land Case E315 of 2022) [2024] KEELC 6615 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6615 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E315 OF 2022

JO MBOYA, J

OCTOBER 9, 2024

BETWEEN

PARAGON ELECTRONICS LIMITED ..... 1ST PLAINTIFF

BULENT GULBAHAR ..... 2ND PLAINTIFF

AND

I&M BANK LTD (AKA INVESTMENT AND MORTGAGE BANK) ..... RESPONDENT

AND

VELOS ENTERPRISES LIMITED ..... INTERESTED PARTY

THE CHIEF LAND REGISTRAR MINISTRY OF LANDS INTERESTED PARTY

NAIROBI CITY COUNTY GOVERNMENT ..... INTERESTED PARTY

RULING

Introduction and background

1. Vide Chamber Summons Application [Reference] dated 31st July 2024, brought pursuant to the provisions of Section 13 of the *Environment and Land Court Act*, 2015 and Section 1(A) and 1(B) and Section 3(A) of the *Civil Procedure Act*, CAP 21 Laws of Kenya and Paragraph 11 (2) of the Advocates Remuneration Order; the Plaintiffs/Applicants have sought for the following reliefs;

    i. That this Honourable Court be pleased to certify this matter as urgent.

    ii. That pending the hearing and determination of this Application, this Honourable Court be pleased to stay execution of the Ruling and Order issued on 24th July 2024.

iii. That this Honourable Court be pleased to review and/or set-aside the entire decision of the Taxing Master Hon. Omollo Deputy Registrar issued on 24th July 2024 in respect of the 1st Interested Party's Bill of Costs dated 14th May 2024;

iv. That this Honourable Court be pleased to re-assess the costs due to the 1st Interested Party's Bill of Costs in respect of the Bill of Costs dated 14th May 2024;

v. That in the alternative and without prejudice to prayer 2, this Honourable Court be pleased to remit the Bill of Costs dated 14th May 2024 to another Taxing Officer for review and reconsideration with direction on taxation.

vi. That this Honourable Court be pleased to make any further orders as it may deem just and fit to grant.

vii. That cost of this application be provided for

2. The Chamber Summons Application [Reference] herein is anchored on numerous grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit sworn by Bullent Gulbahar [the 2nd Plaintiff/Applicant] and which affidavit is sworn on the 30th July 2024.

3. Upon being served with the reference, the 1st interested party does not appear to have filed any grounds of opposition or replying affidavit. Nevertheless, the 1st interested party filed written submissions dated the 1st October 2024 and in respect of which same [1st interested party] has posited that the learned taxing officer correctly exercised her discretion in taxing the bill of costs.

4. Suffice it to point out that the reference herein came up on the 20th September 2024 whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions.

5. Arising from the directions of the court, the Plaintiffs/Applicants filed written submissions dated the 19th September 2024; whereas the 1st interested party filed written submissions dated the 1st October 2024. For good measure, both sets of written submissions form part of the record of the court.

Parties' Submissions:

a. Applicant's Submissions:

6. The Applicants filed written submissions dated the 19th September 2024 and wherein same [Applicants] have adopted the grounds contained in the body of the application as well as reiterated the averments contained in the body of the supporting affidavit sworn on the 30th July 2024.

7. Furthermore, learned counsel for the Applicant has thereafter proceeded to and highlighted three [3] pertinent issues for consideration by the court. Firstly, learned counsel for the Applicant has submitted that the learned taxing officer improperly exercised her discretion whilst taxing and awarding instruction fees to and in favour of the 1st interested party.

8. In any event, it has been contended that the learned taxing officer failed to appreciate that the 1st interested party had not filed a statement of defence in the suit and thus the 1st interested party was not entitled to charge instructions fees.

9. Additionally, it was contended that insofar as the 1st interested party had not filed a statement of defence, the assessment and award of instructions fees in favour of the 1st interested party was therefore premised/predicated on a serious misapprehension of the legal principle that applies to and in respect of instructions fees.

10. Other than the foregoing, learned counsel for the Applicants has also contended that in assessing and awarding instruction fees to and in favour of the 1st interested party, the learned taxing officer ignored and disregarded binding decisions of the court of appeal, which is contended to underpin the legal position that no instruction fees is payable where no statement of defence has been filed.

11. To this end, learned counsel for the Applicants has cited and referenced inter-alia the case of First American Bank of Kenya v Shah & Another [2002] 1 EA 64; Tononoka Steels Ltd v Eastern & Southern African Trade & Development Bank [PTA Bank] MLHCC No. 267 of 1998 and D Njogu & Co Advocates v Pan Africon Engineering Ltd [2006]eKLR, respectively.

12. Secondly, learned counsel for the Applicants has submitted that the learned taxing officer also misapprehended the basic scale fees prescribed pursuant to the provisions of the Advocates Remuneration Order and thereby proceeded to and awarded the costs on account of court attendance, drawing, printing, copies, perusal and service charges, beyond the scale fees.

13. Arising from the failure to appreciate the prescribed scale fees, learned counsel for the Applicants has therefore contended that the assessment and award of costs touching on the items in respect of court attendance, drawing, printing, copies, perusal and service, was/is erroneous.

14. Thirdly, learned counsel for the Applicants has submitted that the learned taxing officer failed to appreciate that the 1st interested party herein was not a primary party in the suit and thus the award of costs should reflect the status of the 1st interested party. For good measure, it was posited that the interested party herein played a nominal and peripheral role in the matter and thus same [interested party] should not be allowed to accrue unjust enrichment.

15. In support of the foregoing submissions learned counsel for the Applicants has cited and referenced the decision in the case of William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others; Muslim for Human Rights & 2 Others [Interested Parties] [2020]eKLR.

b. 1St Interested Partie's Submissions:

16. The 1st interested party filed written submissions dated the 1st October 2024; and in respect of which same [1st interested party] has highlighted and canvassed two [2] salient issues for consideration and determination by the court.

17. First and foremost, learned counsel for the 1st interested party has submitted that the learned taxing officer correctly appreciated and understood the principles attendant to the assessment and award of instructions fees and thereafter proceeded to and exercised her discretion appropriately.

18. At any rate, it was submitted that in assessing and awarding instructions fees, the learned taxing officer applied the decision in Masore Nyangáu & Co Advocates and Others v Supplies & Services Ltd [2018]eKLR, where the high court found and held that instructions fees accrues the moment an advocate receives instructions to act on behalf of a client.

19. Furthermore, learned counsel submitted that the charging of instruction fees does not require that a statement of defence be filed in the matter. For good measure, it was posited that instruction fees

accrues even where a preliminary objection or an application is filed in opposition to the suit, like in the instant case.

20. Secondly, learned counsel for the 1st interested party has submitted that the learned taxing officer did not import and misapply the principles that govern the taxation of advocate/ client bill of costs in respect of the instant matter. In this regard, learned counsel for the 1st interested party has submitted that the assessment and award of costs in respect of the instant matter, was governed by the Advocate Remuneration Order and not otherwise.

21. Arising from the foregoing, learned counsel for the 1st interested party has submitted that the Applicants herein have neither established nor demonstrated any error of principle that was committed by the learned taxing officer to warrant interference with the certificate of taxation arising from the ruling rendered on the 24th July 2024.

Issues Doer Determination:

22. Having reviewed the Chamber Summons application [reference] and upon taking into consideration the written submissions filed by and on behalf of the respective parties, the following issues crystalize and are thus worthy of determination;

    i. Whether or not the reference filed by the Applicants herein is competent or otherwise.

    ii. Whether the Applicants herein have established and/or demonstrated any error of principle that vitiates the certificate of taxation to warrant the setting aside of same.

Analysis And Determination

Issue Number 1 Whether or not the reference filed by the Applicants herein is competent or otherwise.

23. The matter before the court touches on and or concerns a challenge on the certificate of taxation arising from the ruling rendered/delivered by the taxing officer on the 24th July 2024. In this regard, there is no gainsaying that any party, the Applicants not excepted, who is aggrieved by the certificate of taxation is obligated to file/lodge a notice of objection to taxation.

24. Furthermore, there is no gainsaying that the notice of objection to taxation, if any, which is required to be lodged must not only be lodged and served within the stipulated 14 days period from the date of delivery of the ruling underpinning the certificate of taxation. Nevertheless, the notice of objection to taxation must also enumerate or highlight the items of taxation that are being objected to.

25. Given the importance of the notice of objection to taxation, it is apposite to cite and reference the provisions of Rule 11[1] of the Advocates remuneration Order, which essentially underpin the issuance and service of the said notice.

26. For ease of reference and appreciation, the provisions of Rule 11[1] [supra] are reproduced as hereunder;

> " 11
>
> (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 subparagraph (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 fixed 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."

27. From the wording of the provisions of Rule 11[1], it is evident and apparent that any party who is aggrieved with a certificate of taxation and is thus desirous to challenge the certificate of taxation, is called upon to lodge a notice of objection to taxation, highlighting the designated items that are intended to be challenged during the reference.

28. On the other hand, there is no gainsaying that the notice of objection to taxation must delineate the items sought to be challenged with necessary particularity and specificity. In this regard, any omnibus notice of objection to taxation, which does not highlight the impugned items will not suffice.

29. Other than the foregoing, it is imperative to underscore that the filing of a notice of objection to taxation in terms of the provisions of Rule 11[1] of the Advocates Remuneration Order is a jurisdictional prerequisite and same sets the foundation upon which the intended reference is anchored. In this regard, where there is no notice of objection to taxation duly filed and served, then the intended reference shall be mounted in vacuum.

30. Suffice it to posit that the notice of objection to taxation, which I have intimated constitutes a jurisdictional prerequisite, is synonymous with a notice of appeal which is required to be filed by any litigant who is desirous to file an appeal to the court of appeal. In this regard, it is my humble position that one cannot disregard the filing of a notice of objection to taxation and still imagine that a reference can validly be filed.

31. Nevertheless and without belabouring the point, it is appropriate to state that the significance of a notice of objection to taxation in terms of Rule 11[1] has been highlighted and elaborated upon in various decisions. To this end, it suffices to cite and reference the decision of the court of appeal in the case of Machira & Co. Advocates v Arthur K. Magugu & another [2012] eKLR.

32. For coherence, the court stated and held thus;

12. Sub-rule (1) requires the party objecting to give notice in writing within 14 days "of the items of taxation to which he objects." As the trial judge correctly found, the Respondents notice of 1st August 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.

13. As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If

vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.

33. Likewise, this court has also had an occasion to consider the import and tenor of Rule 11[1] of the Advocates Remuneration Order in the case of Murgor & Murgor Advocates v Kenya Airports Authority (Miscellaneous Application 36 of 2020) [2023] KEELC 18458 (KLR) (22 May 2023) (Ruling), where this court held as hereunder;

> 46. Notably, the provisions of Rule 11(1) of The Advocate Remuneration Order, stipulates that any Notice of Objection to Taxation, irrespective of the form in which same is filed, no doubt, the said notice must indicate and reflect the impugned items in respect of which reasons are being sought and by extension, which are intended to be challenged vide the anticipated Reference.
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> 47. From the foregoing, there is no gainsaying that the provision/ identification of the impugned items, which are sought to be challenged, is critical and essential. In any event, it is the itemization, of the items that forms the foundation of the intended reference.
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> Simply put, a proper and valid Notice of objection to Taxation anchors the Jurisdiction of the court while dealing with a Reference.
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> 48. Can an omnibus notice of objection to taxation, whether by letter or otherwise suffice? I am afraid that an omnibus notice, like the ones exhibited at the foot of the letters dated the 7th October 2022 and 14th October 2022, respectively, cannot be deemed to constitute the requisite Notice of objection to taxation, in the manner known to law.
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> 49. In this regard and to underscore the importance of a Notice of objection to taxation, it is imperative to take cognizance of and reiterate the holding of the Court of Appeal in the case of Machira & Co Advocates v Arthur K Magugu & Another (2012)eKLR,

34. Premised on the ratio decidendi highlighted in the decisions [supra], the question that I need to determine is whether or not the Applicants herein filed the requisite notice of objection to taxation and if not, whether such failure negates the reference beforehand.

35. To start with, I beg to state that I have searched through the CTS/Online Platform to discern whether any notice of objection to taxation was ever filed. However, my endeavour has not yielded any fruit. Simply put, there is no notice of objection in whatever form that was ever filed following the delivery of the impugned ruling.

36. Secondly, I have also reviewed the grounds at the foot of the chamber summons application [Reference] as well as the supporting affidavit thereto and there is no indication that any notice of objection to taxation was ever filed either as required under the law or otherwise.

37. To the extent that no notice of objection to taxation was filed and/or lodged in the manner prescribed under the law, the question that does arise is whether the reference beforehand which has been filed without a prior notice of objection to taxation being lodged, is competent.

38. To my mind, the answer to the question adverted to in the preceding paragraph is discernible in the decision of the Court of Appeal in the case of Machira & Co. Advocates versus Arthur K. Magugu

& another [2012] eKLR. For good measure, it was posited that a reference filed without the requisite notice of objection to taxation is vitiated and thus incompetent.

39. Arising from the foregoing, my answer to issue number one [1] is to the effect that the reference beforehand and which challenges the certificate of taxation arising from the ruling rendered on the 24th July 2024, is incompetent and thus invalid.

Issue Number 2 Whether the Applicants herein have established and/or demonstrated any error of principal that vitiates the certificate of taxation to warrant the setting aside of same.

40. Having found and held that the reference beforehand is incompetent and invalid, it would have been apposite to terminate the ruling and proceed to strike out the reference. However, for the sake of completeness, it suffices to venture forward and to consider whether or not the Applicants herein have established and demonstrated any error of principle that was committed by the learned taxing officer.

41. Suffice it to point out that the certificate of taxation issued by a taxing officer can only be reviewed and or set aside by a judge in limited circumstances. For good measure, the certificate of taxation issued by a taxing officer can only be impugned by a judge where it is demonstrated that the taxing officer either took into account erroneous factors; failed to take into account relevant factors or better still, committed an error of principle, which thus impacts on the validity of certificate of taxation.

42. To this end, it is imperative to take cognizance of the ratio decidendi in the case of Kipkorir,Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR, where the court of appeal stated and held thus;

> On a reference to a judge from the 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. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:
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> "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".
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> 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 – see Arthur v Nyeri Electricity Undertaking (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji v Kanji Naran Patel (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle.

43. Furthermore, the circumstances under which a judge can interfere with the certificate of taxation were also highlighted in the case of First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR, where the court held thus;

> I have considered the above submissions. First, I find that on the authorities, this court cannot 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 so manifestly excessive as to justify an inference that it was based on an error of principle. (See STEEL & PETROLEUM (E.A) LTD VS. UGANDA SUGAR FACTORY (Supra). Of course. It

would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

44. Duly guided by the decisions referenced in the preceding paragraphs, I am now minded to undertake the journey and to determine whether or not the Applicants herein have established and demonstrated any error of principle committed by the taxing officer in the course of taxation.

45. . Firstly, the Applicants contended that the learned taxing officer proceeded to and assessed instruction fees in favour of the 1st interested party even though the 1st interested party had not filed a statement of defence. In this regard, it was contended that the assessment and award of instruction fees in the absence of a statement of defence constituted an error of principle.

46. In my humble view, the 1st interested party herein instructed and retained an advocate to act for same immediately same [1st interested party] was served with the plaint and summons to enter appearance by the Plaintiffs/Applicants herein. Furthermore, the Advocates who was retained by the 1st interested party reviewed the pleadings filed and thereafter came to the conclusion that it was apposite to file an application to strike out the suit.

47. Suffice it to state that the filling of the application to strike out the Plaintiffs/Applicants suit was predicated on the instructions that had been given by and/or received from the interested party. To this end, the advocate was executing the instructions of the 1st interested party and hence at the time when the said instructions were executed, the advocates became entitle to charge instructions fees.

48. Arising from the foregoing, I do not share in the submissions and thinking of learned counsel for the Applicants that instructions fees would only be chargeable if the advocates for the 1st interested party had filed a statement of defence. On the contrary, I reaffirm the position that instruction fees is an independent item and which is chargeable the moment instructions are received [acted upon] by the advocate.

49. Furthermore, the charging of instruction fees is not dependent on the stage of the matter and the quantum/scope of work done. Simply put, instructions fees accrue at the onset and upon receipt of instructions to act on behalf of the client. Consequently, the moment action is undertaken in pursuance of the instructions by the client, instructions fees become due and payable.

50. To buttress the foregoing exposition of the law, it suffices to adopt and reiterate the holding in the case of Masore Nyang'au & Co Advocates & Others v Supplies & Services Ltd [2018]eKLR, where the court stated and observed as hereunder;

> 9. the first and common issue in the two references relates to the question as to whether the advocate was entitled to instructions fees in view of the fact that no defence was filed in the suit. This question is not new in Kenya's jurisprudence. The court of appeal in Joreth Ltd v Kigano & Associates [2002]eKLR made the following relevant pronouncement on instruction fees;
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> "Instruction fees is an independent and static item. It is charged once only and it is not affected or determined by the stage the suit has reached"

51. Likewise, the legal position that instructions fees accrues whether or not a defence is filed was also elaborated, nay, articulated in the case *SOFTA BOTTLING COMPANY LTD & OTHERS v NAIROBI CITY COUNCIL [2006] eKLR - Civil Case 263 of 2005*, where the court as hereunder;

> With respect to the submission that as no appearance or defence were filed by the respondent instructions fees were not earned, I am afraid that submission was misconceived. In my

> view, the respondent's preliminary objection was a form of denial and at the end of the day determined the applicant's entire suit. I detect no error of principle on the part of the taxing officer in finding that instruction fee had been earned. The respondent argued that it was served with the plaint as well as the interlocutory application. Its counsels were perfectly entitled to determine how best to handle the respondent's case. They chose to raise the preliminary objection. In my view instruction fee was clearly earned when the respondents Advocates acted on the instructions of the respondent by filing the Preliminary Objection. In my view, Ringera J as he then was in the First Bank of Kenya case (Supra) was not setting up an inflexible rule that instructions fees can only be earned the moment a defence is filed.

52. Other than the foregoing, the issue as to whether instruction fees accrues in the absence of statement of defence was also adverted to in the case of First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR, where the court stated as hereunder;

> I confess the matter is not cut and dried. In Mayers V Hamilton (Supra) the East African Court of Appeal opined that whereas an Advocate becomes entitled to an instruction fee the moment he is instructed, he will not ordinarily become entitled at the moment of instruction to the whole of the fee which he may ultimately claim and that the entitlement under the instruction fees grows as the matter proceeds. That view accords with what is stated in Judicial Hints On Civil Procedure VoL.1 at page 143. The present Court of Appeal has on the other hand expressed the view that in principle the instruction fee is an independent and static item, chargeable only once and is not affected or determined by the stage the suit has reached.

53. Even though the learned judge in First American Bank case [supra] proceeded to and posited that the filing of a statement of defence was a condition precedent to the charging of instruction fees, there is no gainsaying that the court of appeal for Eastern Africa has clearly stated that instruction fees accrued immediately upon receipt of instructions.

54. Similarly, it is not lost on this court that the court of appeal in the case of Joreth ltd v Kigano & Associates [2002]eKLR also reaffirms the position in the case MAYERS & ANOTHER V. HAMILTON & OTHERS [1975] EA 13, when the court stated thus;

> " Instructions fees is an independent and static item. It is charged only once and it is not affected or determined by the stage the suit has reached'

55. To my mind, the meaning to be attributed to the phrase the "stage the suit has reached"; includes, whether or not the matter is at the interlocutory stage or where instructions have been issued to defend an application filed in the suit or where a preliminary objection; or such other steps have been taken, in compliance with the instructions of the Client.

56. Quite clearly, there are various steps that can be taken by an adverse party upon receipt of instructions. Such steps may include the filing of a suitable application for striking out the suit or the raising of a preliminary objection, where apposite. In addition, it is not lost on this court that there are instances, like in a matter which is subject to Section 6 of the *Arbitration Act*, [1995] where a party is not called upon to file a defence, at the onset.

57. In a nutshell, I hold the view that instructions fees is an independent item and same accrues the moment instructions are received from the client and thereafter acted upon. This to my mind, is the import and tenor of the ratio decidendi of the court of appeal decision in Joreth Ltd v Kigano & Associates [supra].

58. In short, it is my finding and holding that the 1st interested party herein was entitled to instructions fees and that the instruction fees was properly assessed and awarded, irrespective of whether a statement of defence had been filed or otherwise.

59. The other aspect that has been adverted to by the Applicants to propagate a position that there was an error of principle, touches on the contention that the learned taxing officer awarded costs in respect of court attendance, drawing, printing, copying, perusal and service, beyond the prescribed [scale] fees.

60. Nevertheless, what I beg to state is that the question of taxation and in particular determination of what is reasonable, falls within the technical competence and discretion of the taxing officer. In any event, the mere fact that another taxing officer or better still a judge, would have awarded a different figure does not ipso facto demonstrate improper or injudicious exercise of discretion.

61. Furthermore, it is not lost on this court that before a judge can interfere with the exercise of discretion of the taxing officer and more particularly on the question of quantum, it must be shown that the award complained of is either manifestly excessive or manifestly low; so as to represent an error of principle.

62. Other than the circumscribed situation adverted to in the preceding paragraph, it suffices to underscore that a judge is called upon to defer to the taxing officer on matters pertaining to taxation [quantum of costs] which ostensibly fall within the technical competence and remit of the taxing officer.

63. To this end, it suffices to cite and reference the holding in the case of Republic –vs- Minister For Agriculture & 2 Others [2006] KLR it was held:-

> " The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will therefore not interfere with the award of a taxing officer particularly where he is an experienced officer...

64. While dealing with the circumscribed jurisdiction of the Judge to interfere with the discretion of the Taxing Officer and particularly, on matters of quantum of costs, the Court of Appeal in the case of Peter Muthoka v Ochieng & 3 Others [2019]eKLR, stated and held thus:

It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles.

When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in MBOGO -vs- SHAH (Supra), then the decision though discretionary, may properly be interfered with.

65. Finally, the circumscribed jurisdiction of the judge whilst entertaining a reference and in particular, the mandate to interfere with the certificate of taxation only in exceptional circumstances was also adverted to [elaborated upon] in the case of Attorney General of Kenya v Peter Anyang Nyong'o & 9 Others Taxation Reference No. 5 of 2010 [East African Court of Justice], where the court stated thus;

> Firstly, that I am not travelling in a virgin land in this legal field, as there is a plethora of persuasive authorities from national courts which say the following:
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> (a) As a general rule the allowance for instruction fee is a matter peculiarly in the taxing officer's discretion and courts are reluctant to interfere into

that discretion unless it has been exercised injudiciously. As stated in the Premachand's Case (supra) and by this Court in January 15, 2010 Modern Holdings (ea) Limited v Kenya Ports Authority – Taxation References No. 4 of 2010 (Kenya Ports Authority V Modern Holdings Ltd)

(b) A judge will not alter a fee allowed by a taxing officer merely because in his opinion he should have allowed a higher or lower amount (See: Kenya Ports Authority's Case (supra) which had followed the decision in Bank Of Uganda v. Banco Arabi Espaniol, Application No. 29 of 1999 of the Supreme Court of Uganda.

(c) Even if it is shown that the taxing officer erred on principle, the judge should interfere only o being satisfied that the error substantially affected the decision of quantum and that upholding the amount allowed would cause injustice to one of the parties (See BANK OF UGANDA's case (supra) and Kenya Ports Authority (supra) to mention just a few decisions on this point.

66. In a nutshell, I come to the conclusion that the Applicants herein have neither established nor demonstrated any error of principle that was committed by the taxing officer in the course of taxing the 1st interested party's bill of costs, to warrant the impeachment of the certificate of taxation.

67. Consequently, and in view of the foregoing, my answer to issue number two [2] is to the effect that the Applicants have not demonstrated a basis to warrant the grant of the orders sought at the foot of the reference.

Disposition:

68. Flowing from the analysis [details enumerated in the body of the ruling], it is evident that the reference beforehand was filed in contravention of the provisions of Rule 11[1] of the Advocates Remuneration Order which required that a party aggrieved by the certificate of taxation is obligated to file and serve a notice of objection to taxation.

69. Other than the foregoing, it is also crystal clear that the Applicants herein have failed to establish the existence an error of principle to warrant the invalidation of the certificate of taxation. Further and at any rate, there is no gainsaying that the circumstances under which a certificate of taxation can be impeached are circumscribed.

Final Orders:

70. In the circumstance, the final orders that commend themselves to the court are as hereunder;

i. The Chamber Summons application [Reference] dated the 31st July 2024 be and is hereby dismissed.

ii. Costs of the Reference be and are hereby awarded to the 1st interested Party.

iii. Costs in terms of clause [ii] hereof be and are hereby assessed and certified in the sum of kes.25, 000/= only.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Ms. Khadija Said h/b for Ahmednasir Abdulahi [Sc] for the Plaintiffs/Applicants.

Ms. Claire Mwangi for the 1st Interested Party.**//

N/A for the Defendant.**//

N/A for the 2***{{^nd**}}*** **&** **3***{{^rd**}}* Interested Party**//

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