



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 291 OF 2018**

**IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA**

**IN THE MATTER OF ADVOCATES ACT (REMUNERATION) (AMENDMENT) ORDER 2014**

**AND**

**IN THE MATTER OF TAXATION OF PARTY AND PARTY BILL OF COSTS DATED 17<sup>TH</sup> APRIL, 2019**

**BETWEEN**

**FURAHA EUGENES.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOMO KENYATTA UNIVERSITY OF**

**AGRICULTURE AND TECHNOLOGY.....DEFENDANT/APPLICANT**

**RULING**

1. This is the Chamber Summons dated 16<sup>th</sup> December 2019 brought under order 11(1) and (2) of the Advocates Act (Remuneration) (Amendment) Order, 2014, Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders:-

- 1. That this honourable court be pleased to vary and/or set aside the Deputy Registrar's ruling of 23<sup>rd</sup> October, 2019 in respect to the Applicant's Bill of Costs dated 17<sup>th</sup> April 2019.*
- 2. That this honourable court be pleased to refer the matter back for re-taxation of the applicant's bill of costs before a different taxing master.*
- 3. That in the alternative to prayer 2, this honourable court exercises its inherent jurisdiction and be pleased to re-tax the applicant's bill of costs dated 17<sup>th</sup> April 2019.*
- 4. That the costs of this reference be provided for.*

3. The grounds are on the face of the application and are:-

- a. That the Deputy Registrar erred in law and principle by failing to peg instruction fees on the subject matter in the pleadings filed in ELC NO 291 of 2018.*
- b. That the Deputy Registrar erred in law and principle by failing to consider the number of folios under items 2 and 3.*
- c. That by pegging instruction fees on the judgment delivered by the commercial court of Nyarugenge at Ruanda, the taxing officer arrived at a wrong and erroneous decision.*

***d. That it is in the interest of justice that the said orders be granted.***

4. The application is supported by the affidavit of Patrick Lutta, Advocate of the High Court of Kenya, sworn on the 16<sup>th</sup> December 2019 and a further affidavit sworn on 20<sup>th</sup> May 2020.
5. The is opposed. There is a replying affidavit sworn by Furaha Eugenes, the respondent herein sworn on the 3<sup>rd</sup> July 2020. The respondent also filed a notice of preliminary objection on 10<sup>th</sup> February 2021.
6. The court with the consent of the parties directed that the application and the preliminary objection be canvassed by way of written submissions.

**The Applicant's Submissions**

7. The plaintiff commenced the instant suit vide a plaint dated 22<sup>nd</sup> July 2018 for accrued rent in respect of the two lease agreements executed on 1<sup>st</sup> August 2012 and 1<sup>st</sup> November 2013. The prayers sought on the plaint was for USD 2,138,331.00 which is equivalent to Kshs.213,833,100.00.
8. On 10<sup>th</sup> April 2019 the plaintiff withdrew this suit on account of the defendant's preliminary objection dated 24<sup>th</sup> July 2018 seeking that the suit be struck out as the court had no jurisdiction to entertain the suit and that the same was res judicata on account of judgment of the court of Nyarugenge in the Republic of Rwanda being **R Com 01249/2017/TC/NYGE:Furaha Eugenes vs Jomo Kenyatta University of Agriculture and Technology**.
9. The defendant was subsequently awarded costs of the suit and filed a bill of costs dated 17<sup>th</sup> April 2019 for Kshs.3,791,916.00 pegging instruction fees and costs incidental to the suit on the subject matter being Kshs.213,833,100.00 as ascertained from the pleadings.
10. Notwithstanding, that the plaintiff admitted that the defendant is entitled to instruction fees at Kshs.75% as drawn on the Bill of Cost, the Deputy Registrar delivered her ruling on 23<sup>rd</sup> October 2019 taxing the defendants instruction fees at Kshs.621,817.22 in disregard of the value of the subject matter as ascertained from the pleadings.
11. In response to the preliminary objection the applicant submits that:-

***a. This honourable court has jurisdiction to entertain the instant reference arising from the Deputy Registrar's Ruling of 23<sup>rd</sup> October 2019.***

***b. The reference herein was filed within time and in accordance with paragraph 11 of the Advocates (Remuneration) Order, 1962.***

***c. The Deputy Registrar erred in law and principle by failing to peg instruction fees on the subject matter as ascertained from the pleadings filed in ELC NO 291 of 2019.***

***d. The Deputy Registrar erred in law and principle by taxing off items 1, 2, 3, 8, 9, 18, 19, 20 and 21 of the Bill of Costs dated 17<sup>th</sup> April 2019.***

***e. The plaintiff admitted in his submissions dated 20<sup>th</sup> September 2019 that the defendant is entitled to 75% of Kshs.3,407,496.50 being instruction fees under item 1 of the Bill of Costs dated 17<sup>th</sup> April 2019.***

12. Pursuant to the provisions of paragraph 11 of the Advocates (Remuneration order, a party aggrieved by the decision of the taxing officer may move to the High Court by way of reference to exercise its inherent jurisdiction to annul or set aside the said decision. It has put forward the cases of **M/s Behan & Okero Advocates vs National Bank of Kenya Limited [2008] eKLR; Moronge & Company Advocates vs Kenya Airports Authority [2014] eKLR; Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board Civ Appeal No 220 of 2004 (UR)**.

This court has jurisdiction to entertain this reference.

13. The defendant filed its notice of objection to the decision of the deputy registrar on 30<sup>th</sup> October 2019 within seven (7) days from the decision of the Deputy Registrar hence within the statutory timeline provided under paragraph 11(1) of the Advocates Remuneration Order. The Deputy Registrar served the defendant with their reasons of her decision or the taxation of the bill of costs on 10<sup>th</sup> December 2019 whereof the defendant filed this reference on 16<sup>th</sup> December 2019 within the statutory timelines under paragraph 11 of the Advocates (Remuneration) Order. No leave was required to file the instant reference out of time as the same was filed within the statutory timeline provided under paragraph 11(1) and (2) of the Advocates (Remuneration) Order.

14. The subject matter of the plaintiff's suit is Kshs.213,833,100. The taxing officer erred in calculating the instruction fees on the value of the subject matter as Kshs.38,807,308/-. This figure is not anywhere in the plaintiff's pleadings. This is an error apparent on the face of the record.

15. The taxing officer correctly quoted the law and principles applicable, in the amount payable as instruction fees as held by the courts and

relied on **Joreth Ltd vs Kigano & Associates [2002] eKLR** but proceeded to apply the wrong method of calculating instruction fees. The correct figure should have been Kshs.2,556,622.40.

16. Though the matter was withdrawn at a preliminary stage, a defence was filed in the matter hence entitling the defendant to instruction fees. It has put forward the case of **George Arunga Sino t/a Jone Brooks Consultants Limited vs J. O. & Geoffrey D. O. Yogo t/a Atieno Yogo & Co. Advocates [2012] eKLR**. Having worked out instruction fees payable to the defendant and item 1 as Kshs2,555,662.40 the court ought to exercise its powers to tax off the sum of Kshs1,186,874.10 from Kshs3,742,496.50 appearing on the Bill of Costs.

17. In respect of items 2, 3 and 9 the defendant prays that they be taxed as drawn on the Bill of Costs dated 17<sup>th</sup> April 2019. It also prays that items 8, 18, 19, 20, 21 being attendance should be allowed as drawn.

18. It prays that the court do vary and/or set aside the Deputy Registrar's ruling of 23<sup>rd</sup> October 2019 in respect of the Defendant's/applicant's Bill of Costs dated 17<sup>th</sup> April 2019. The defendant instruction fees be taxed at Kshs.2,555,622.40 items 2, 3 and 9 be taxed at Kshs 6,750/-, Kshs3,150/- and Kshs. Respectively. Items 8, 18-21 be taxed at kshs3,000 respectively.

### **The Respondent's Submissions**

19. The honourable court lacks jurisdiction to hear and determine the application herein for the sole reason that the reference had not been made within the requisite time frame as stipulated under the Advocates (Remuneration) Order. This reference is lodged 53 days after the decision was rendered. The failure and/or delay by the Deputy Registrar to furnish reasons for her said ruling should not have prevented the applicant from filing a reference on time. She has put forward the case of **Evans Gaturu** and paragraph 11 of the Advocates (Remuneration) Order.

20. The applicant having been aware of the ruling as of 23<sup>rd</sup> October 2019 had upto 6<sup>th</sup> November 2019 to file a reference. The application was lodged 53 days following the ruling.

21. The time for lodging a reference having lapsed, the only avenue of redress that was open to the applicant was that provided under paragraph 11 (4) of the Advocates (Remuneration) Order for enlargement of time; the applicant has made no such prayer in its instant application.

22. A reference filed out of time without leave of court cannot later be deemed properly filed and parties are bound by their own pleadings. She has put forward the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others [2014] eKLR; Vishisit Talwar vs Anthony Thuo Kanai t/a A. Thuo Kanai Advocates [2014] eKLR**. The application dated 16<sup>th</sup> December 2019 ought to be dismissed.

23. There has been in excusable delay on the part of the applicant in presenting the application. She has put forward the cases of **Union of India vs Iota Yodogawa Ltd: Hilda Kaari Mwendwa vs Zakayo M Magara & 2 Others [2016] eKLR; Governors Balloon Safaris Ltd vs Skyship Company Ltd & Another [2015] eKLR** where the court held that a delay of 48 days after delivery of the taxation ruling had rendered the reference fatally incompetent. The instant reference was filed 53 days after the ruling. The application ought to be dismissed with costs.

24. The decretal amount having been fully satisfied renders the reference an abuse of the court process. The applicant is acting in bad faith in pursuing a reference while well aware the matter was settled.

25. From Rule 11 (1) of the Advocates (Remuneration) Order, the expiration of the period of limitation prescribed for filing a reference gives rise to a right in favour of the Certificate of Taxation to treat the same as binding between the parties.

26. I have considered the chamber summons dated 16<sup>th</sup> December 2019 and the preliminary objection filed on 10<sup>th</sup> February 2021. I have considered the affidavit in support and the replying affidavit. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

*i. Whether the reference is incompetent for being filed out of time.*

*ii. Whether the taxing officer erred in law and in principle by failing to peg the instruction fees on the subject matter in the pleadings filed in ELC No 291 of 2018.*

*iii. Whether the taxing officer erred in law and in principle by failing to consider number of folios under clauses 2 and 3.*

27. I have gone through the court record, the taxing officer delivered her ruling on taxation on 23<sup>rd</sup> October 2019. The applicant filed a notice of objection to the decision on taxation dated 29<sup>th</sup> October 2019 on 30<sup>th</sup> October 2019. By a letter dated 5<sup>th</sup> December 2019 the taxing officer replied to M/S Lutta & Co. Advocates for the applicant, citing that the reasons for her decision were contained in the ruling dated 23<sup>rd</sup> October 2019. This application was filed on 16<sup>th</sup> December 2019. This is fifty three (53) days after the ruling by the taxing officer.

28. The ruling by the taxing officer was a comprehensive one; about three (3) pages long. The same is already typed. One wonders what other reasons the Applicant was seeking from the taxing officer.

29. **Rule 11** of the Advocates (Remuneration) Order provides that:-

**“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 fixed for subparagraph (1) or subparagraph (2) for the taking of any steps; 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”.**

In the case of **Vishisit Talwar vs Anthony Thuo Kanai t/a Thuo Kanai Advocates [2014] eKLR**, the court stated thus:-

**“The learned judge referring to a decision in the Court of Appeal in Machira & Co. Advocates vs Arthur K. Magugu & Another CA 199/2002 [2012] eKLR stated that: “Rule 11 thereof provides for ventilation of grievances from such decisions through reference to a judge in chambers. The effect may be viewed as an Appeal or a Review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of Appeal and hearing of the same in open court reviews, however, would require provisions akin to those in Section 80 of the Civil procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate’s bill of costs through reference under Rule 11 of the Judge in Chambers”.**

From the foregoing, it is clear that the reference herein is filed out of time. There is no explanation for the delay and no leave of court was sought before filing the same.

30. In the case of **Governors Balloons Safaris Ltd vs Skyship Company Ltd [2015] eKLR** the court held that a delay of 48 days after delivery of the taxation ruling had rendered the reference fatally incompetent. I find that the reference herein is incompetent for having been filed out of time and without leave of court. The same is dismissed.

31. I will however go ahead and consider the issue No (ii) It is the applicant’s contention that the taxing officer erred in law and in principle by failing to peg the instruction fees on the subject matter in the pleadings filed in ELC 291 of 2018. The circumstances under which this court can interfere with the taxing officer’s exercise of discretion are reaffirmed in the case of **First American Bank of Kenya vs Shah & Others IEA 64**. It was held:-

**“.....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 error of principle, on the fee awarded was manifestly excessive as to justify the interference. That it was based on an error of principle (see Steel Construction Petroleum Engineering (EA) 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. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and competence of the cause or matter, the amount of value of the subject matter involved, the interest of the parties and general conduct of the proceedings and any discretion by the trial Judge”.**

This position was restated in the case of **John Maina Mburu t/a John Maina Mburu & Co. Advocates vs George Gitau Munene (sued as Administrator of the Estate of Samuel Gitau Munene & 3 others [2015] eKLR**.

It is not in dispute that this suit was withdrawn at a preliminary stage. The suit did not proceed to full hearing.

32. The Defendant/applicant only filed a notice of preliminary objection dated 24<sup>th</sup> July 2018, a statement of defence dated 24<sup>th</sup> July 2018 and the defendants bundle of documents. In the case of **Joreth Ltd vs Kigano & Associates [2002] 1EA 92 at 99** the Court of Appeal stated that:-

**“.....the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be the case), but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account amongst other matters the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”**

33. In the instant case the taxing officer noted that **“the matter had already been heard and determined by a Rwandan Court on the 19<sup>th</sup> October 2017. A copy of the judgment is attached to the preliminary objection raised by the defendant which is dated 24<sup>th</sup> July 2018. The court will therefore use the amounts awarded there to calculate instruction fees.....”.**

34. The position taken by the taxing officer cannot be faulted. I find that she did not err in law and in principle by not pegging the instruction

fees in the subject matter in the pleadings in ELC 291 of 2018.

35. I also find that she did not err by failing to consider the number of folios on items No 2 and 3.

36. In conclusion, I find no merit in this application and the same is dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22<sup>ND</sup> DAY OF JULY 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Lutta for the Defendant/Applicant

Ms Nasimiyu for Mr. Osundwa for the Plaintiff/Respondent

Phyllis - Court Assistant