REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E792 OF 2020

AMUGA AND COMPANY ADVOCATES.....APPLICANT

VERSUS

KISUMU CONCRETE PRODUCTS LIMITED.....RESPONDENT

(Being advocate/client bill of costs in in the High Court of Kenya

at Nairobi Mililani law courts civil case no. 612 of 2012

kisumu concrete products limited v cementers limited)

RULING

Introduction

1. This ruling determines two applications, namely, the application dated **11th** November 2020 filed by Kisumu Concrete Products Limited (the client), (herein after referred to as the first application) and the Notice of Motion dated **20th** November 2020 filed by, M/S Amuga & Co Advocates (the advocate), (herein after referred to as the second application).

2. It is common ground that the client instructed the advocate to represent it in Nairobi COMM **612** of 2012. There is no dispute that the said case was compromised by consent on **16th** June 2020 and the advocate filed an Advocate/Client Bill of Costs dated **29th** June 2020. The Bill was taxed on **29th** October 2020 allowed as against the client in the sum of **Ksh. 4,549,046/=.** A Certificate of Taxation dated **13th** November 2020 was issued pursuant to the said taxation.

3. The point of divergence is that whereas the first application seeks to set aside the said taxation, the second application prays for entry of judgment in terms of the said Certificate of Taxation under section **51 (2)** of the Advocates Act.[1] For the sake of brevity, I will summarize the grounds and arguments for and against each application separately.

The first application

4. The core ground in support of the first application is that the Taxing Master erred in law and in fact in holding that there existed a retainer agreement between the client and the advocate. It argues that by a consent dated **16th** June 2020, the advocate/client retainer was extinguished and the responsibility of paying the fees was assigned to Cementers Limited.

5. Additionally, the client argues that the Taxing Master erred in law and in fact in: - arriving at the value of the subject matter; in finding that the advocate had instructions to defend the counter-claim; in finding that the value of the counter-claim was Kshs. **58,13,578/=**; in awarding instruction fees for interlocutory applications; and, in assessing costs under the items listed in prayer two of its application. It faults the Taxing Master for holding that the monies paid to the advocate should not be deducted from the taxed costs and in shifting the burden of proof to the client.

6. As a consequence of the foregoing, the client prays that the taxing master's decision made on **29th** October 2020 dismissing its Preliminary

Objection dated **25th** August 2020 be set aside and the Preliminary Objection be allowed.

7.Alternatively, it prays that the Taxing Master's determination on items numbers 6,9,13,14,16,18,20,22,23,25,27,32,34,36,46,51,57,58,65,69,75,77,79,119,121,123,130,132,135,139,149,155,162,168,173,179,183,186,193,199,195 and 200 be set aside. It also prays that the court sets aside the Taxing Master's decision refusing to deduct monies paid by the client from the final taxed costs, and, that the court refers the matter back to a different Taxing Master with appropriate directions on the principles for assessment of the above items. Lastly, it prays for costs of the application.

The Advocates' grounds of opposition

8. The advocate in his grounds of opposition states that the Taxing Master correctly dismissed the Preliminary Objection; that the client admitted the retainer; that the said consent was between the client and Cementers Limited and it did not terminate the Advocate/Client relationship.

9. The advocate also states that that the Taxing Master's determination on the contested items was correct, and that, the refusal to deduct monies allegedly paid to the advocate was correct because there was no evidence to show that the payments related to the said case. Lastly, the advocate states that the Reference is frivolous and vexatious.

The client's advocates Submissions

10. Mr. Onyango, counsel for the client argued that the consent recorded in HCCC No. **612** of 2012 provided that the advocates costs would be paid by Cementers Ltd, effectively transferring the retainer to the said company. He faulted the Taxing Master for disallowing the Preliminary Objection. Mr. Onyango cited *First American Bank of Kenya v Shah & others*[2] which enumerated the principles of taxation and faulted the Taxing Master for failing to appreciate the import of the consent which extinguished the advocates retainer. He submitted that the consent assigned all the responsibilities to the assignee. To buttress his argument, he cited *Haas v Wainaina*[3] which held that an assignment stops the assignor from claiming anything under the assigned agreement, hence the advocate had no legal right to file the Bill of Costs.

11. Additionally, Mr. Onyango submitted that the Taxing Master failed to take into account relevant factors in arriving at her decision, among them, that the advocate had no instructions to defend the counter-claim which he argued is a distinct suit which required client's fresh instructions. He argued that the value of the subject matter should have been inferred from the consent which settled the matter. He cited *Joseph Memba Syuma & 5 others v Oking Wandago & Co Advocates*[4] which upheld a decision of a Taxing Master under similar circumstances.

12. Additionally, he argued that the Taxing Master ignored evidence that the client had paid the advocate **Kshs. 1,000,000/=** and held that it was for the client to prove that the money was meant for the said suit and not any other matter. He submitted that the Taxing Master shifted the burden of prove to the client contrary to section **112** of the Evidence Act[5] by holding that the amount paid did not relate to the suit and relied on *Menye & Kirima Advocates v Kenya Commercia Bank*[6] where the court allowed a reference. Further, he submitted that the amount taxed was excessive opining that **Kshs. 25,200/=** on the instructions fees was reasonable. He submitted that the Taxing Master erred in holding that any time beyond one hour is charged half day, and in finding that there was no need for vouchers to support the said items.

The advocates submissions

13. Mr. Amuga submitted that the Taxing Master rightly dismissed the Preliminary Objection. He argued that it is undisputed that the client instructed the advocate to file and prosecute HCCC No. **612** of 2012 which gave rise to the Bill of Costs. He referred to a letter dated **12th** June, 2020 written to his firm by the client after the conclusion of the said case stating that "…the matter should be marked as fully and finally settled as of today except for your fees which they will settle as assessed by the court." He argued that in the said letter, the client acknowledged the existence of retainer and its liability to pay costs to its advocate. He pointed out that in reply, the advocate notified the client that the ultimate responsibility to pay the fees rested with the client.

14. Additionally, he argued that on **16th** June 2020 the client wrote stating that "all your fees or costs if any against Kisumu Concrete Products Ltd will be paid by Cementers Ltd as taxes (sic) by court." He referred to his letter to the client dated **17th** June 2020 stating that the "…*the obligation of Kisumu Concrete Products Limited to pay our fees cannot be the subject of compromise….*" Mr. Amuga submitted that the consent did not determine the retainer because the advocate was not a party to the consent.

15. Mr. Amuga also argued that in the said consent, the advocate's right to recover fees/costs from the client was expressly provided at Clause **5** which reads "the Plaintiff's said advocates reserve the right to recover the Advocate/Client fees/costs from the Plaintiff in the event that the Defendant fails or delays in settling the fees/costs" and Clause **2** which provided that "The Advocate/Client fees/costs will be agreed upon and in default of agreement, the same shall be taxed."

16. Counsel submitted that the Taxing Master considered the subject matter of the claim as pleaded in the Plaint, the amount awarded in the judgement, and the fact that the suit proceeded to full trial, and at the time of the settlement, the case was at its tail end. He cited *Ishmael & Co. Advocates v Bajaj Electrical Limited & Wayne Homes**[7]* which stated the principles upon which a court can interfere with the exercise of a Taxing Master's discretion and argued that the Taxing Master considered only relevant factors. He submitted that this court cannot interfere with the Taxing Masters discretion even if it is of the view that the award is a little higher than what this court would have awarded.

17. He also argued that the Taxing Master correctly held that there was no basis to deny the advocate costs for successfully defending the counter-claim. He submitted that the Taxing Master properly relied on *Kagwimi Kangethe & Company Advocates v Nairobi Mamba Village Limited* [8]in arriving at the decision, which cited *Amon v Bobbet**[9]* which held that "for purposes of taxation the claim and Counter-claim must be treated as independent action; that the costs of the Counter- claim followed the ordinary rule as to costs and that the Plaintiff was

entitled to have the costs of his defence to Counter-claim taxed on the High Court scale."

18. Mr. Amuga also cited *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 Others**[10]* which held : -

> "57. A Counter-claim contains assertions that a defendant could have made by starting a lawsuit if the Plaintiff had not already begun an action. It is governed by almost the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant files in response to the Plaintiff's claim. A Counter claim is therefore in all respects a suit by the Defendant.
>
> 58. The Applicant is therefore entitled to instruction fees on the Counter claim..."

19. Buttressed by the above decision, Mr Amuga argued that considering that the Taxing Master allowed only the basic instruction fees of **Kshs. 1,077,304/=** on a counter-claim for Kshs. **58** Million, there is no reason for this court to interfere.

20. Regarding the items listed at prayer **2** of the first application, Mr. Amuga submitted that the said items are provided for under Paragraph **5(a)** of the Advocates Remuneration Order which allows **Kshs. 25** for each copy, and, absence of receipts cannot be a basis to disallow the same. As for items **32** and **128**, he argued that the amounts allowed are supported by Paragraph **O(viii)** of the Advocates Remuneration Order which is basic fees allowed for opposed applications. Regarding items **119** and **135**, he argued that court attendances were allowed at **Kshs. 5,000/=** within the law.

21. On the alleged prior payment of **Kshs. 1,000,000/=,** Mr. Amuga submitted that the said allegation contradicted the client's earlier statement at Paragraph **4** of the Replying Affidavit of V. Rabaida, that "…under the agreement the applicant was to conduct this matter at no cost to the Respondent…" He argued that the advocate denied receiving the said sum in respect of the subject suit, and, that, the alleged payment was raised after the Bill of Costs was been filed in court.

The second application

22. The second application is expressed under section **51(2)** of the Advocates Act.[11]It seeks orders that judgement be entered in the sum of **Kshs. 4,549,046/=** being the certified costs against the client, interest on the certified costs at **14%** per annum from **16th** June, 2020 until payment in full, costs of the application and such further relief as the court may deem fit to grant.

23. The application is based on three grounds, one, that the Advocate-Client fees/costs have been taxed at **Kshs. 4,549,046/=** as against the client and a Certificate of Costs; that the Respondent has neglected, refused and/or failed to settle the said sum; and, that it is only fair and just in the circumstances that judgement be entered for the said sum plus interests from **16th** June, 2020 when an itemized bill of costs was delivered to the client.

24. The client did not file a reply to the advocates application.

The Advocates submissions on the second application

25. Mr. Amuga urged the court to dismiss the first application and enter judgment as in terms of the Certificate of Taxation dated **13th** November, 2020. He relied on *Eddy Nicholas Orinda & Associates v Victoria Commercial Bank Limited**[12]* which held that having dismissed the reference, the application for entry of judgment automatically succeeds as per section **51(2)** of the Advocates Act.[13] He submitted that the advocate delivered to the client an itemized Bill of Costs on **16th** June 2020 and under Paragraph **7** of the Advocates Remuneration Order, an Advocate is allowed to charge interest at **14%** per annum after expiration of one month from the delivery of the bill to the client.

Client's advocates submissions on Second application

26. Mr. Onyango argued that the advocates application is for all purposes an application for summary judgment and placed reliance on *Harit Sheth T/A Harit Sheth Advocates v Sharma Charania*[14] which held that to justify summary judgment the matter must be plain and obvious and where it is not obvious, a party is not to deprived of his right to have his case tried by proper trial where if necessary, there is discovery and oral evidence subject to cross-examination.

27. He cited *Dhanjal Investments Ltd v Shabahs Investments Ltd*[15]for the holding that if the defendant shows a *bona fide* triable issue, he must ne allowed to defend without conditions. Additionally, he cited *Olympc Escort International Co. Ltd & 2 others v Parminder Signh Sandhu & another*[16] where the Court of Appeal held that for the issue to be triable, it must be *bona fide*. He submitted that an application under section **51 (2)** cannot succeed where there is a dispute as to retainer or if there exist triable issues. He submitted in the instant case there is a dispute on the retainer and the amounts paid to the advocate. He cited *Menye & Kirima Advocates v Kenya Commercia Bank Ltd* where the court declined to allow a similar application and held that the case must go for trial.

Determination

28. I will first address the first application. Mr. Onyango argued the Taxing Master erred in disallowing his Preliminary Objection. This argument forms the nub of the client's case, hence, the need to carefully weigh it. The substratum of the Preliminary Objection is that the consent recorded in HCCC No. **612** of 2012 provided that the advocates costs would be paid by Cementers Ltd, hence, the said consent effectively transferred the retainer to the said company which was now required to settle the advocates fees. Mr. Onyango contended that being the position, the Bill of Costs could not be lawfully filed against his client. He faulted the Taxing Master for failing to uphold the said Objection maintaining that the consent terminated the retainer and assigned the liability to the said company.

29. Mr. Amuga on the other hand argued that the position taken by the client is incorrect. He referred to the said consent and correspondence exchanged between his firm and the client to support his argument. He contended that the client is ascribing a meaning to the consent which it does not bear.

30. To resolve the diametrically opposed positions taken by the parties, it is necessary to get the real meaning of the consent order. Resolving the said issue requires an understanding of the principles governing interpretation of court orders. Inevitably, the starting point is to restate the applicable principles. Court orders are intended to provide effective relief and must be capable of achieving their intended purpose. The principles governing the interpretation of a court order were expounded in *Firestone South Africa (Pty) Ltd v Genticuro AG*[17] as follows: -

> "...the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it….
>
> It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

31. In *Eke v Parsons*[18] it was stated: -

> "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."

32. In *Athwal v. Black Top Cabs Ltd*[19] the court set out the following principles of contractual interpretation: -

> [42] The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected.
>
> [43] Extrinsic evidence to explain the meaning of an unambiguous contractual provision is not admissible. Evidence of a party's subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract. This is particularly so where a contract contains an "entire agreement" clause.

33. Interpreting an order is a question of law and no deference is owed on review. It is an objective assessment on a standard of correctness.[20] There is an exception where a judge's interpretation of his own orders is entitled to considerable deference.[21] Where record of the decision is available, it will be necessary to conform the order to the decision.[22] In interpreting an order a court will use accepted principles of statutory and contractual interpretation to ascertain the intent of the ordering judge.[23] Those principles of statutory and contractual interpretation are analogous to the principles to be applied to looking at the intent of the ordering judge.[24] The contextual approach to interpreting statutes with necessary modification, apply to the interpretation of orders.[25]

34. I now examine the subject consent order. It provided as follows: -

> **a. That** the Defendant (Judgment-Debtor) will settle the Plaintiff's (Decree Holder's) Advocates fees/costs on an Advocate/Client fees/costs basis.
>
> **b. That** the said Advocate/Client fees/costs will be agreed upon and in default of agreement/ the same shall be taxed.
>
> **c. That** the said fees will be paid to the firm of Amuga & Co. Advocates on record for the Plaintiff/Decree-Holder.
>
> **d. That** upon payment of the Advocate/Client fees as per Clause 1 herein, the firm of Amuga & Co. Advocates will not demand any further fees from the Plaintiff (Decree-Holder) on account of legal fees for this matter.
>
> **e. That** the Plaintiff's said Advocates reserve the right to recover the Advocate/Client fees/costs from the Plaintiff in the event that the Defendant fails or delays in settling the fees/costs provided that the Plaintiff's said Advocates will issue 30 days' notice prior to taking such action.
>
> **f. That** the Defendant (Judgement-Debtor) will pay interest on the assessed Plaintiff's Advocates costs at court rates from the date of this consent until payment in full.

> **g. That** the decree herein and the entire matter or any proceedings arising therefrom be and are hereby marked as settled in the above terms and the Defendant's (Judgment-Debtor's) proposed appeal be and is hereby marked as withdrawn.

35. A faithful reading of paragraphs **(d)** & **(e)** extinguishes the client's argument that the liability was shifted to another party. The consent is clear that upon payment of the Advocate/Client fees as per Clause **1**, the firm of Amuga & Co. Advocates will not demand any further fees from the Plaintiff (Decree-Holder) on account of legal fees for the matter. Since no payment was made, this provision stands.

36. Second, and more important, the consent provided in clear terms that the Plaintiff's said Advocates reserve the right to recover the Advocate/Client fees/costs from the Plaintiff in the event that the Defendant fails or delays in settling the fees/costs provided that the Plaintiff's said Advocates will issue 30 days' notice prior to taking such action. A reading of this clause leaves no doubt that the argument propounded by the client is unsustainable. The interpretation ascribed to the consent order by the client amounts to unduly straining the language of the consent by introducing a meaning that was clearly not part of the consent or intended by the parties. The foregoing being the correct position, the client's argument premised on their erroneous interpretation of the consent including faulting the Taxing Master for disallowing the Preliminary Objection collapses.

37. The client also faults the Taxing Master for allegedly ignoring evidence that the client had paid the advocate **Kshs. 1,000,000/=** and instead holding that it was for the client to prove that the money was meant for the said suit and not any other matter. Mr. Onyango argued that the Taxing Master shifted the burden of prove to the client. This accusation collapses not on one but on several fronts. *First,* it ignores the fact it is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

38. Second, the client cannot simply allege that it paid without proving its allegations to the required standard and expect the burden to shift to the other party to rebut. *Third,* cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA vs Edmunds*[26] remarked: -

> "No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

39. Forth, whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[27] put it succinctly when he stated**: -**

> "The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

40. Fifth, whoever desires a court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side. Sixth,* the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In this case, the client seeks to shift the burden of prove to the defendant to rebut unproved allegations. The reverse is correct. A plaintiff must prove his case on balance of probabilities before the defendant can rebut them.

41. Sixth, a court of law can only weigh up the proved facts without concerning itself with speculating on evidence that was never adduced, or which does not follow by reasonable inference from the proved facts. Inference, it was observed by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [28] must be carefully distinguished from conjecture or speculation: -

> "There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation

42. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others,*[29] the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated: -

> "To come to a conclusion on the disputed issues, a court must make findings on: -
>
> i. The credibility of various factual witnesses;
>
> ii. Their reliability; and;
>
> iii. The probability or improbability of each party's version on each of the disputed issues

In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the lessor convincing will be the latter. But when all factors equipoised, probabilities prevail."

43. The onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. Where the onus rests on the plaintiff, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding, whether that evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities.

44. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff then the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

45. In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on evidence, "…by balancing probabilities select a conclusion which seems to be more natural or plausible conclusion amongst several conceivable ones, even though that conclusion may not be the only reasonable one."[30]

46. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,[31]Lord Denning said the following about the standard of proof in civil cases: -

> 'The… {standard of proof} …is well settled. It must carry a reasonable degree of probability…. if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

47. By merely alleging that it paid fees and providing receipts without linking them to the particular case, the client cannot claim to have discharged the burden of prove on a balance of probabilities. The Taxing Master had the benefit of hearing the parties first hand and in my view, she was better placed to weigh the material before her. Differently put, there is nothing to show that she overlooked relevant evidence or ignored material evidence. On the contrary, she considered the said evidence and made a finding on the issue. I find no basis to fault her findings on the issue under consideration.

48. Additionally, the client assaults the Taxing Masters assessment of the instruction fees and the fees awarded on the several items listed in prayer **2** of its application. The general principles governing interference with the exercise of the Taxing Master's discretion were authoritatively stated by a South African court***[32]*** as follows: -

> "The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

49. Before interfering with a decision of a Taxing Master, the court must be satisfied that the Taxing Master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the Taxing Master was wrong. The court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the Taxing Master. It only interferes when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate the ruling.[33] When a court reviews a taxation it is vested with the power to exercise the wider degree of supervision.[34] This means: -

> " . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.**[35]**

50. The Taxing Master is required to consider the time taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The definitive question is whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case. This requires this court to be satisfied that the Taxing Master was clearly wrong before interfering with her decision.[36]The quantum of such costs is to be what was reasonable fees and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles.

51. The exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.'[37]

52. In principle, costs are awarded, having regard to such factors as:- ***(a)*** *the difficulty and complexity of the issues;* ***(b)*** *the length of the trial;* ***(c)*** *value of the subject matter and* ***(d)*** *other factors which may affect the fairness of an award of costs.* The law obligates the Taxing Master to take into account these principles. The Ugandan Supreme court put it best when it stated: -[38]

> "Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer

is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, *even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."*

53. In Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others[39] 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 not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…. The 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 manifestly excessive as to justify an interference that it was based on an error of principle. 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 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment… A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved… Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for….The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs…"

54. The taxing master is also enjoined to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case. The discretion vested in Taxing Master is to allow fees, costs, charges and expenses as appear to him to have been necessary or proper, and not those which may objectively attain such qualities, and that such opinion must relate to fees and all costs reasonably incurred, but also imports a value judgment as to what is reasonable. The discretion to decide is given to the Taxing Master and not to this court. This discretion must be exercised judicially in the sense that the Taxing Master must act reasonably, justly and on the basis of sound principles with due regard to the circumstances of the case.

55. This court will not interfere with the exercise of the taxing master's discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper, or failing to bring his/her mind to bear on the question in issue, or acting on wrong principles. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue. The court must be of the view that the taxing master was clearly wrong i.e. its conviction on a review that he or she was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.

56. As was held in *Phemchand Raichand Ltd Another v Quarry services of East Africa Ltd and Another*[40] thus: -

i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.

ii. The taxing master was expected to tax each bill on its merits;

iii. The value of the subject matter had to be taken into account;

iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;

v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.

vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.[41]

57. The court in the above case stated that mere production of a long list of authorities does not necessarily mean that there was protracted research by counsel and that an advocate should not be reimbursed for what he has not spent. The court will not normally interfere with the taxing master's ruling simply because it thinks it would have awarded a different figure had it been the one taxing the bill. The court can interfere if it is proved that the amount taxed was manifestly excessive or low, or if there is proof that the taxing officer followed a wrong principle in reaching his decision.

58. A reading of the impugned ruling shows that she properly considered all the material before her and properly exercised her discretion in arriving at her decision and she was not only alive to the law and principles governing taxation, but also, she took into account the applicable principles and fully understood the task before her.

59. Mr. Onyango argued that a counter claim is a fresh suit and it required fresh instructions. This argument is legally frail and unsustainable. The said argument collapses on the face of the authority cited by Mr. Amuga. I say no more.

60. On the whole, the client failed to demonstrate that the Taxing Master misdirected herself or improperly exercised her discretion or arrived at inordinately high or unreasonable awards to warrant this courts intervention. In view of my conclusions arrived at above, it is my finding that the first application fails.

61. I now turn to the second application filed by the advocate expressed under section **51 (1)** seeking entry of judgment as per the Certificate of Taxation. Mr. Onyango argued that the tests applicable in applications for summary judgment apply in the instant application. This line of argument ignores section **51(2)** of the Advocates Act which stipulates the law in applications of this nature as follows: -

> "The certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the court, be final as to the amount of the costs recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."

62. The section in peremptory terms provides that the certificate unless set aside shall be final. Parliament in its wisdom used the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[42]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[43] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

63. The duty of the courts of justice is to try to get the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

64. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[44] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[45] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

65. The import of the above provision is that unless a Certificate of Taxation is set aside, it is final. In *Lubulellah & Associates Advocates v N K Brothers Limited**[46]*** the court observed that the law is very clear that once a taxing master has taxed the costs, issued a Certificate of Costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the applicant against the Respondent for the taxed sum indicated in the Certificate of Taxation.

66. In *Musyoka & Wambua Advocates v Rustam Hira Advocate**[47]*** it was held that section **51** of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has discretion to enter Judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This is a mode of recovery of taxed costs provided by law, in addition to filing of suit.

67. I have already declined the client's application seeking to set aside the Taxation. The import of my finding is that the Certificate of Taxation dated **13th** November 2020 still stands. Consistent with the provisions of section **51(2)** of the Advocates Act, the said Certificate is final. In line with the said provision, the advocate is entitled to judgment in terms of the Certificate of Taxation.

68. Rule **7** of the Advocates (Remuneration) Order stipulates that an advocate may charge interest at **14%** per annum on his disbursements and costs, whether by scale or otherwise, from the expiry to one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount has been paid or tendered in full. In line with this provision, I find that the advocate is entitled to the interest claimed.

69. Flowing from my analysis and determinations arrived at herein above, I find that the following orders are merited in the circumstances of this case: -

> **a. That** the client's application dated **11th** November 2020 is unmerited and the same is hereby dismissed with costs to the advocate.

b. That *judgment be and is hereby entered in favour of Amuga & co Advocates in the sum of* ***Kshs. 4,549,046/=*** against the client Kisumu Voncrete Products Limited being the certified costs as per the Certificate of Costs dated **13th** November 2020.

c. That the client, Kisumu Concrete Products Limited do pay the firm of Amuga & Co advocates the interest on the certified costs at the rate of **14%** per annum from **16th** June, 2020 until payment in full.

d. That the client, M/s Kisumu Concrete Products Limited do pay to the advocate the costs of the application dated **20th** November 2020.

Orders accordingly

SIGNED, DELIVERED AND DATED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2021

JOHN M. MATIVO

JUDGE

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[1] Cap 16, Laws

[2] {2002} 1 EA 64.

[3] {1982} e KLR.

[4] {2016} e KLR.

[5] Cap 80, Laws of Kenya.

[6] {2005} e KLR.

[7] {2020} e KLR.

[8] {2015} e KLR.

[9] {1889} 22 Q.B.D. 543.

[10] {2014} e KLR

[11] Cap 16, Laws of Kenya.

[12] {2020} e KLR.

[13] Cap 16, Laws of Kenya.

[14] {2014} e KLR.

[15] Civil Application No. 232 of 1997.

[16] {2009} e KLR.

[17] 1977 (4) SA 298 (A) Trollip JA

[18] {2015} ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29. See also *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC).

[19] 2012 BCCA 107 (B.C. C.A.).

[20] See *Royal Bank of Canada v Robertson*, 2016 NSSC 176 (CanLII), *per* Moir J, at para 11.

[21] See *Boily v Carleton Condo. Corp.*, 2014 ONCA 574 (CanLII), *per* Epstein JA (2:1), at para 71.

[22] See *Royal Bank of Canada v Robertson*, 2016 NSSC 176 (CanLII), *per* Moir J, at para 11.

[23] See *Canadian National Railway v Holmes*, 2015 ONSC 3038 (CanLII), *per*McEwan J, at para 18.

[24] See Robertson, Supra.

[25] Ibid.

[26]{1955} 1 WLR 948 at 955

[27]{2007} 4 SLR (R} 855 at 59

[28] {1939} 3 All ER 722 (HL) at 733.

[29] 2003 (1) SA 11 (SCA) at para 5.

[30] Cited in *Govan v Skidmore*, 1952 (1) SA 732 (N).

[31] {1947} 2ALL ER 372.

[32] In *Visser v Gubb* 1981 (3) SA 753 (C) 754H – 755C.

[33] See *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* [1984] ZASCA 2; 1984 (3) SA 15 (A) and *Legal and General Insurance Society Ltd vs Lieberum NO and Another* 1968 (1) SA 473 (A) at 478G.

[34]*Johannesburg Consolidated Investment Co. vs Johannesburg Town Council* 1903 TS 111.

[35]*Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18F C G.

See also the discussion by Botha J in *Noel Lancaster Sands (Pty.) Ltd. vs Theron and Others 1975* (2) SA 280 (T) at 282D C 283D for a discussion of the nature and limits of the judicial function in this context.

[36] (See: *Ocean Commodities Inc vs Standard Bank of SA Ltd* [1984] ZASCA 2; 1984 (3) SA 15 (A) at 18E-G).

[37] Per *SMIT AJP in Preller vs S Jordaan and Another* 1957 (3) SA 201 (O) at 203C - E.

[38]*Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC).*

[39]**{2006} eKLR).**

[40] {1972} EA 162. Their lordships also cited with approval the decisions in the cases of *Attorney General vs Uganda blanket Manufacturers* CA No. 17 of 1993 (SCU); *Bashiri vs Vitafoam (u) Ltd* civil application No. 13 of 1995.

[41] See Steel construction and Petroleum Engineering (EA) Ltd versus Uganda Sugar Factory Limited [EA] 141; Kabanda versus Kananura Melvin Consulting Engineers, supreme court civil application No. 24 of 1993; Makumbi and Another versus sole electrics (U) Ltd [1990-1994] 1 EA 306 (SCU).

[42]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[43] Ibid.

[44] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[45] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[46] {2014} e KLR.

[47] {2006} eKLR.