REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. 530 OF 2013

MWANGI KENG'ARA & COMPANY ADVOCATES............ADVOCATE/RESPONDENT

VERSUS

UPWARD SCALE INVESTMENT CO. LTD............................1ST CLIENT/RESPONDENT

LINMERX HOLDINGS LIMITED...2ND CLIENT/RESPONDENT

RICHWOOD LIMITED...3RD CLIENT/RESPONDENT

GEOMAX CONSULTING ENGINEERS LIMITET...............4TH CLIENT/ RESPONDENT

GATH CONSULTING ENGINEERS LIMITED.......................5TH CLIENT/RESPONDENT

JAMES RURIGI NJUGUNA...6TH CLIENT/RESPONDENT

TRIAD ARCHITECTS...7TH CLIENT/RESPONDENT

MASTERBILL INTERGRATED PROJECTS...........................8TH CLIENT/RESPONDENT

RULING

1. This ruling determines two applications; The client's application dated 10th February 2020 and the Advocate's reference dated 14th January 2020.

2. Through the reference dated 14th January 2020 the advocate seeks orders to set aside the ruling of the Taxing Officer dated 9th December 2019 wholly and that the Advocate bill of costs dated 5th December 2013 be remitted back for re-taxation. The advocate also seeks the costs of the reference.

3. The application is brought pursuant to Paragraph 11(2) of the Advocates Remuneration Order (ARO) is supported by the Affidavit of **Mercy Nduta Mwangi** and is premised on the grounds that: -

> ***1) THAT the applicant filed an objection to the ruling dated 17/12/2019***
>
> ***2) THAT this Honourable court issued the Advocate/applicant with a copy of the ruling dated 9/12/2019 entitled "RULING ON THE BILL OF COSTS AND THE REASONS FOR RULING" on 18/1/2019***
>
> ***3) THAT the ruling dated 9/12/2019 is resjudicata to extent that it purports to remove the 1st and 2nd Respondent from the taxation and thereby indirectly affects liability of the Respondents to pay the Advocates fees, which issue did not fall within purview of the Taxing Officers jurisdiction as delineated in the ruling delivered in MILIMANI H.C.C NO 14 OF 2013(ORIGINATING SUMMONS)LINMERX HOLDINGS LIMITED AND UPWARD SCALE INVESTMENT COMPANY LIMITED VERSUS MERCY NDUTA MWANGI KENG'ARA & CO. ADVOCATES on 19/11/2013, wherein the 1st and 2nd respondents had unequivocally admitted having jointly instructed the Advocate/Applicant to prepare the contract***

4) THAT the ruling of 19/11/2013 requires taxation for all contracts that the 1st and 2nd Client/ respondent owned up to having instructed the applicant to prepare, and after taxation the parties hereto to proceed with reconciliation, and on this basis, the indirect removal of the 1st and 2nd clients for this taxation is an unlawful and un procedural review of the said ruling.

5) THAT the Learned honourable Taxing Master applied a scale of percentages of 0.6% in assessing the instruction fees, which percentage is not provided for in the Advocates Remuneration Amendment Order 2006 or any other law and thereby fell into error of principle and law in the assessment of the instruction fees

6) THAT the Learned taxing master erred in principle and in law in failing to assess a separate fee for each contracting party in the shareholders' agreement and instead proceeded to award a global instruction fee.

7) THAT the Learned Honourable Taxing Officer erred in principle and in law awarding an instruction fees that was inordinately low and thereby denied the Applicant of her rightfully earned legal fees.

8) THAT the Learned Honourable Taxing master erred in principal and in law in failing to evaluate all the documents and submissions filed by the applicant and thereby misdirected herself and arrived at a wholly unjust and erroneous decision on the appropriate instruction fees.

9) THAT the decision of the Taxing Officer dated 9/12/2019 on instruction fees is manifestly wrong in law, substance and principle and the same ought to be set aside and the Bill of costs dated 5/12/2013 remitted back for re-taxation with appropriate directions.

4. The respondents opposed the application through the replying affidavit of **Joseph Gitau Mburu** who states that only the 4th, 5th, 6th, 7th and 8th 5th, 4th and 6th clients were part of the agreement and that any attempt to include the 1st and 2nd client/respondents into the agreement would go against the principle of privity of contract. He contends that the ruling of 19/11/2013 was in respect to the joint venture vehicle and that the bill of costs relates to the Richhood Limited Shareholders Agreement which was only binding on the parties to the agreement. He further states that Schedule V of the Advocates Remuneration Order 2003 does not provide for a scale which means that the 0.60% used to arrive at the instruction fees did not have any grounding in law.

Application dated 10th February 2020

5. The client's application dated 10th February 2020 is similarly brought under paragraph 11(2) of the ARO. The Client seeks the following orders;

1) THAT leave be granted by this honourable court to file this reference out of time.

2) THAT the ruling of the Taxing Master dated the 9th of December 2019 be set aside and the Bill of Costs dated 5th December 2013 be struck out and/or dismissed with costs.

3) THAT in the alternative, the Advocate/client Bill of costs dated the 5th of December 2013 be remitted back for taxation before any other taxing officer.

4) THAT the costs of this reference be provided for.

6. The application is supported by the affidavit of **Joseph Gitau Mburu** and premised on grounds that the client was furnished with the reasons for the taxation on 20th December 2019 and that the ***Taxing Master erred in principle and in law by arriving at an instruction fee using a scale that was not applicable to the case. He faults the Taxing Master for committing an error of principal by allowing value added tax (VAT) on instruction fees yet the same has no footing in law.***

7. The Advocate opposed the application through the replying affidavit sworn by **Mercy Nduta Mwangi** who states that application is incompetent and an abuse of the court process as it replicates the Advocates' reference that similarly seeks to set aside the impugned ruling of 17th December 2019. She further states that the application was files out of time and without leave of court and should therefore be struck out with costs. She further states that the client's objection to the impugned ruling on the basis of noncompliance of Schedule 5 of the ARO replicates the Advocates objection in her Application dated 1th January 2020.

8. Parties reiterated their respective positions through their written submissions. The first issue is whether the application dated 10th February 2020 is bad in law having been filed out of time.

9. The procedure for challenging the results of taxation is provided under Paragraph 11 of the *ARO* which provides as follows: -

1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

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 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.

10. In the present case, the clients contend that upon receipt of the impugned ruling, they wrote to court requesting to be furnished with the reasons for the ruling. They contend that the letter containing the reasons for the ruling was not served upon them but was collected in early March 2020.

11. In ***Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2) (2006) 1 EA 5*** it was held as follows: -

> ***"Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."***

12. **I**n the case of ***Evans Thiga Gaturu, Advocate vs Kenya Commercial Bank Limited [2012] eKLR*** **the court observed as follows regarding the reasons for taxation: -**

"However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference...."

13. In the instant case, I note that the reasons for the taxation are contained in the impugned ruling and I therefore find that there was no basis for requesting for the same from the taxing master. It is trite that failure to comply with the provisions of Rule 11 of the ARO has the effect of making an application incompetent. The court is nonetheless clothed with the discretion to allow an application for leave to file a reference out of time where the applicant demonstrates that there was sufficient cause for the delay. In this case, I am not persuaded that the clients have demonstrated that they are entitled to this courts discretion to extend time to file the reference.

14. On whether this court should interfere with the taxing officer's findings on taxation, I note that it is trite that the court will only intervene in the outcome of a taxation where there is an error of principle. This is the position that was taken in the case of ***Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others [2006] eKLR*** where Ojwang J. (as he then was) expressed himself as follows: -

"***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."***

15. In ***Machira & Co. Advocates vs. Magugu [2002] 2 EA*** Ringera J (as he then was) held that: -

"As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order."

16. *In the oft cited case of* **Joreth Ltd vs. Kigano & Associates [2002] eKLR** *it was* held that unless the taxing officer had misdirected himself on a matter of principle, the judge sitting on a reference against the assessment ought not to interfere with the findings.

17. In ***First American Bank of Kenya vs Shah and others [2002] E.A. 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 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."

18. *Similarly, in* **Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board [2005] eKLR** the Court of Appeal held as follows: -

"On 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."

19. In the present case, both the client and the advocate took issue with the taxing officer's findings on taxation and argued that there was an error of principle. The client argued that the taxing master erred in principle by assessing the costs using the scale contained in the 2014 ARO which resulted in the inflation of the taxed amount.

20. The advocate, on the other hand, faulted the taxing master for applying a scale that is not provided for in the ARO of 2006 or any law for that matter thereby falling into an error of principal.

21. I note that the taxing master stated as follows in the impugned ruling: -

> ***"Paragraph 21 of the Advocates Remuneration Order 1962 provides the formula for calculating scale fees. Clause 2.4 of the agreement provided that the business of the company" to acquire 16% shareholding of the equity of the capital of the developer at a share subscription price of Kshs 76 million financed through provision of various professional consulting services to the developer in lieu of the payment of the share subscription. I find that the consideration was Kshs 76 million. If the matter was for sale of land, the fees could have been 0.60 % amounting to Kshs 456,000/=. I have considered the consideration and the importance of the agreement to the parties and use my discretion to award Kshs. 500,000/- as instruction fees."***

22. My finding is that the applicable remuneration order was the ARO of Order 2006 that gives the applicable scale with respect to the taxation of bill of costs at 0.3%. I therefore find that the taxing master erred in principle in using the wrong formula in calculating of the bill of costs.

23. Consequently, I make the following final orders: -

> **a.** ***THAT the ruling of the Taxing Master dated the 9th of December 2019 is hereby set aside.***
>
> **b.** ***The Advocate/Client bill of costs dated 5th December 2013 is hereby remitted back to be taxed by a different Taxing Master in accordance with the applicable Advocates Remuneration order.***
>
> ***c. That each party shall bear its/his own costs for the two applications.***

Dated, signed and delivered via Microsoft Teams at Nairobi this 22nd day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Mwangi for the Advocate/Applicant.

Mr. Mirie for Kengara for Respondent.

Court Assistant: Sylvia