



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISC. APPLICATION NO. E252 OF 2019**

**MURI MWANIKI & WAMITI ADVOCATES.....ADVOCATE/APPLICANT**

**VERSUS**

**DRAFT & DEVELOP ENGINEERS LIMITED.....CLIENT/RESPONDENT**

**RULING**

**CHAMBER SUMMONS**

The Applicant filed a Chamber Summons Application dated **20<sup>th</sup> May 2020** for orders; -

1. The Ruling of the Deputy Registrar Hon. S. A. Opande delivered on **8<sup>th</sup> May 2020** be set aside and any resultant Certificate of Taxation to the extent that it related to the reasoning and determination pertaining to taxation of the following items in the Advocate/Client Bill of Costs dated 25<sup>th</sup> June 2019;

a. Item No. 1

b. Item Nos. 10, 17, 28, 29, 33, 44, 46, 90, 96, 100, 107, 119, 128, 132, 148, 153, 156 & 161.

2. The Items of the Bill of Costs dated 25<sup>th</sup> June 2019 as set out above be taxed.

3. In the alternative to prayer 2, the items of the Bill of Costs set out above be remitted to another Taxing Officer for taxation with direction on the taxation.

Which Application was supported by the sworn Affidavit of **Martin G. Mwaniki** dated **20<sup>th</sup> May 2020** on the grounds that; -

1. The Taxing Officer erred in law and in principle in taxation of item No. 1 on instructions particularly on;

a. The finding that the jurisdiction of the court to adjudicate on the matter had been ousted since arbitration had been determined as the arena for dispute resolution, yet the Court in **HCCC No. 11 of 2011**, the suit subject of the taxation, was well seized with jurisdiction under **Section 7 of the Arbitration Act** to grant injunctive reliefs sought.

b. The finding that since the arena of the dispute was determined as arbitration, the move to the Court in **HCCC No. 11 of 2011** was 'merely to seek interim protection', yet the jurisdiction of the court granted under **Section 7 of the Arbitration Act** is substantive jurisdiction on which protection of substantive rights of the Respondent, as Plaintiff in the subject suit, was brought and obtained by way of injunctive reliefs from, *inter alia*, termination of a large contract.

2. The Taxing Officer erred in law, erred in principle and failed to apply his discretion on proper basis in arriving at an unreasonable and inordinately low amount of **Kshs.300, 000** in taxation of Item No. 1 on instruction fees, particularly that:

a. The Taxing Officer failed to consider matters regarding **HCCC No. 11 of 2011** relevant to exercise of his discretion aforesaid including the following matters;

i. The Applicant instituted the suit and conducted proceedings for the protection of the Respondent/Client from exposure to jeopardy in a contract of **Kshs.824, 457, 120.49**. but which upon variations and revised scope was

appraised by the Respondent/Client to a contractual entitlement in jeopardy of **Kshs.1, 476, 955, 955.79.**

ii. The consequent Arbitration yielded settlement in Arbitration for terms, *inter alia*, that payment is made to the Respondent/Client of the sum of **Kshs.534, 464, 310.56** plus interest at **3%** above the Central Bank rate from **12<sup>th</sup> March 2016.**

iii. The matter involved drawing as well as receiving and perusing voluminous documents and also entailed the understanding and application of highly technical construction agreement governed by the FIDIC (Federation Internationale des Ingenieurs Conseils') General Conditions of Contract.

3. The Taxing Officer erred in law and misdirected himself in principle in taxation of items Nos. 10, 17, 28, 29, 33, 44, 46, 90, 96, 100, 107, 119, 128, 132, 148, 153, 156 & 161 on court attendances at lower scale and at an average period spent on one hour per attendance. The taxation was for amount less than that conceded and proposed by the Respondent of Kshs.3, 360 per attendance for items Nos. 10, 17, 29, 33, 96, 119 and 148.

### **REPLYING AFFIDAVIT**

The Application was opposed vide the sworn Affidavit of **Peter Kibe** dated **10<sup>th</sup> December 2020** and stated that;

1. The Taxing Officer correctly held that **HCCC No. 11 of 2011** could not be treated as a substantive suit subject to **Schedule 6 (1) (b) of the Advocates Remuneration Order** as the said suit was merely to facilitate Arbitration where the jurisdiction of the Court was ousted by the Arbitration Agreement.

2. The Taxing Officer exercised proper discretion to assess the instruction fees at **Kshs.300, 000** within the applicable limit of the Advocates Remuneration Order and the Applicant has failed to demonstrate that the exercise of that discretion is not within the applicable limit of the law and therefore the Taxing Officer's decision must remain undisturbed.

3. Even if items Nos. 10, 17, 28, 29, 33, 44, 46, 90, 96, 100, 107, 119, 128, 132, 148, 153, 156 & 161 of the Bill of Costs were to be charged on a higher scale, it would not change the total sum of the outcome as the Respondent had paid the Applicant Kshs.5, 373, 000 which the Applicant admitted was received. Therefore, the decision of the Taxing Officer was merited.

4. It is in the interest of justice that the Taxing Officer's ruling of 8<sup>th</sup> May 2020 on the said items remains undisturbed as the Applicant has failed to demonstrate any excesses on the application of the law by the Taxing Officer or improper exercise of discretion and there are no grounds put forward for the Bill of Costs to be remitted to another Taxing Officer or for the said decision to be set aside.

### **ADVOCATE/APPLICANT'S SUBMISSIONS**

The Applicant submitted that the Bill of Costs emanated from **HCCC No. 11 of 2011** where the Respondent, who was the Plaintiff, and the Advocate/Applicant represented the Respondent and sought injunctive orders in the High Court under **Section 7 of the Arbitration Act** by way of interim measure of protection pending Arbitration.

The gist of the Taxing Officer's taxation of item No. 1 on instruction fees was that the jurisdiction of the court to substantively act on the matter had been ousted since Arbitration was the arena for dispute resolution and thus considered the said suit as one 'merely to seek interim measure of protection' and that it would be a procedural duplicity to treat the said suit as a substantive suit for taxation. It was envisaged that the Advocates fees payable on the main subject matter of the dispute would rest from the proceedings in the Arbitration. In the exercise of the Taxing Officer's discretion instructions were assessed at **Kshs.300, 000.**

It was a misdirection to rule that the jurisdiction of the court to substantively adjudicate on the matter had been ousted since arbitration had been determined as the arena for dispute resolution. On the contrary, the High Court in **HCCC No. 11 of 2011** was itself exercising substantive jurisdiction granted by statute under **Section 7 of the Arbitration Act**; -

***It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.***

The Taxing Officer did not exercise his discretion judiciously when assessing the instruction fees at a low sum of **Kshs.300, 000** as he failed to take into account relevant considerations and thus committed an error of principle. In **Lucy Waihera & 2 Others vs Edwin Njagi T/A E. K. Njagi & Company Advocates [2017] eKLR**, the Court of Appeal stated; -

***"It is evident from the aforesaid paragraph that the taxing officer exercises a discretionary power in taxing the Bill of Costs. Such power has to be exercised judiciously in that it must be done in accordance with the scale provided in the Remuneration Order, and where discretion is given for variation, justification must be given for such variations. Thus, in a reference one of the reasons that can justify interference with the decision of the taxing officer is if the discretion has not been exercised judiciously. It is trite that the taxing officer's decision is not exercised judiciously where relevant consideration has not been taken into account, or irrelevant considerations have been taken into account and this would amount to an error of principle."***

It was the Applicant's submission that the Taxing Officer in the exercise of discretion in determining instruction fees in the matter was required to take into consideration the nature and importance of the matter, the amount involved, the interest of the parties, the general

conduct of the proceedings and all other relevant considerations. In Joreth Limited vs Kigano & Associates [2002] eKLR the court stated;

**“We would at this stage point out 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.”**

In view of the factors set out above, the sum of **Kshs.20, 000, 000** sought by the Applicant for assessment of instruction fees under item No.1 was reasonable and the figure of **Kshs.300, 000** awarded was low as to be unreasonable and an error in principle.

In the case of Premchand Raichand Ltd and Another –versus- Quarry Services of East Africa Ltd and Another (No. 3) [1972] E. A 162 the court at page 163 stated;

**“First, the general level of the remuneration of advocates must be such as to attract worthy recruits to an honorable profession. Secondly, there must, so far as is practicable, be consistency in the awards made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocates very approximately, for the kind of case contemplated, is likely to be his potential liability for costs.”**

### **RESPONDENT’S SUBMISSIONS**

The Respondent submitted that the Taxing Officer applied the correct principles in assessing item No. 1 of the Bill of Costs by arriving at the conclusion that the High Court jurisdiction was to adjudicate substantively over the matter ousted by the Arbitration Clause and that it would amount to procedural duplicity if the adjuvant action of **HCCC No. 11 of 2011** was to be treated as action under **Schedule 6 (1)(b) of the Advocates Remuneration Order**. In the case of Commercial Bank of Africa vs Lalji Karsan Rabadi & 2 Others [2012] eKLR, Odunga J. held;

**“The overriding objective, in my view, is tailored to enable the court deal with cases justly and includes allotting cases their appropriate share of the court’s resources, while taking into account the need to allot resources to other cases. The rationale for taxing the costs at the end of the trial is to avoid multiplicity of proceedings in form of taxation which may lend themselves to references. The court ought to avoid the possibility of entertaining multiplicity of similar legal proceedings since such multiplicity has the effect of allotting a case more judicial time and resources at the expense of other cases.”**

It was the Respondent’s submission that the taxation of Bill of Costs is primarily the prerogative of the Taxing Officer and the scope of intervention is usually limited. In First American Bank vs Shah [2002] Ringera J. (as he then was) held;

**“The High Court should not interfere with the decision of the taxing master unless the decision is based on an error of principle or that the amount awarded to the Plaintiff is manifestly excessive or too low as to justify an interference.”**

The Applicant had not put any plausible grounds to demonstrate and justify any errors in principle committed by the Taxing Officer to warrant the Court’s interference with the decision of the Taxing Officer.

### **DETERMINATION**

The issue for determination is whether The Taxing Officer erred in law, erred in principle and failed to apply his discretion on proper basis in arriving at an unreasonable and inordinately low amount of legal costs/fees with regard to the subject-matter.

Although, the Applicant instituted the suit and conducted proceedings for the protection of the Respondent/Client from exposure to jeopardy in a contract of **Kshs.824, 457, 120.49/-** later increased to **Kshs.1, 476, 955, 955.79/-** and the consequent Arbitration yielded settlement of the sum of **Kshs.534, 464, 310.56** plus interest at 3% above the Central Bank rate from 12<sup>th</sup> March 2016, The Applicant/Advocate was/is of the view that the Legal Costs of **Kshs 1,994,914/-** was too low taking into account the value of the subject-matter and the resultant Arbitral Award.

The Applicant instituted the suit for the sole purpose of seeking Interim measures by Court under **Section 7 of Arbitration Act 1995**, which is for the sole purpose of preserving the subject-matter and/or maintaining *status quo* pending hearing and determination before the parties’ choice of forum in Arbitration proceedings. These Court proceedings were not complex, protracted and did not involve settling of parties’ rights and obligations in the dispute as the Court’s jurisdiction is ousted by the parties’ Arbitration Agreement.

In the absence of any, an elaborate explanation whether and why in this instance it took long to prosecute the Application in Court and/or it was protracted or complex, the matter was in Court merely to protect the subject-matter of the suit before hearing by the Arbitral Tribunal.

Therefore, taxation of the Bill of Costs herein would not entail the value of the subject-matter as it was not a full hearing and determination of the subject-matter in Court. Secondly, during Arbitration proceedings; parties’ Counsels, Arbitrator or Arbitral Tribunal agree of Legal Fees upfront, that is where, the value of subject-matter, complexity, length of time other incidental expenses are considered and visited on the clients/parties for payment. To do the same in Taxation proceedings would amount to double charge and payment. So, taxation of Bill of Costs herein relates only to what transpired in Court, in this case, pursuit of Interim orders and/or recognition and enforcement of Arbitral award which was not confirmed on the record.

In Joreth Limited vs Kigano & Associates (supra), the issues to consider are; nature and importance of the cause or matter, interest of the parties, the general conduct of the proceedings – presumably in court, and direction of the Trial Judge.

These considerations are relevant to the matter heard and determined in Court. In this case, the matter was heard and determined through Arbitration proceedings and this is where preparation and perusal of voluminous documents would be in order to determine the dispute. Secondly, the amount taxed was **Kshs 1, 994, 914.98** and the Respondent had paid **Kshs 5, 000, 000** which catered for legal services rendered in Court.

For these reasons the Court finds the Taxing Officer applied correct principles and applied the discretion judiciously.

In Republic Vs Ministry Of Agriculture & 2 Others Exparte Muchiri W'njuguna & 6 Others [2006] eKLR, OJUANG J (as he then was) stated;

**“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 Taxing Officer, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award is too high or too 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 error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle.”**

#### **DISPOSITION**

1. The Ruling of the Deputy Registrar Hon. S. A. Opande delivered on 8th May 2020 upheld.

2. The Application of 20<sup>th</sup> May 2020 is dismissed with costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 21<sup>st</sup> JULY 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. KANGETHE H/B FOR THE APPLICANT

COURT ASSISTANT: TUPET