



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 529 OF 2013**

**MWANGI KENG'ARA & CO. ADVOCATES .....ADVOCATE**

**-VERSUS-**

**UPWARD SCALE INVESTMENT CO. LTD. .... 1<sup>ST</sup> CLIENT**

**LINMERX HOLDINGS LIMITED..... 2<sup>ND</sup> CLIENT**

**GEOMAX CONSULTING ENGINEERS .....3<sup>RD</sup> CLIENT**

**RULING**

1. This court by its Ruling of 15<sup>th</sup> May 2019 ordered that the advocates bill of costs, against the client, be re-considered by the same taxing master Deputy Registrar. The court required the taxing master to give reasons for her exercise of her discretion in the previous taxation in that reconsideration.

2. The advocate has moved this court by an application, a Notice of Motion dated 27<sup>th</sup> May 2019. The advocate seeks by that application for leave to appeal against the Ruling of this Court dated 15<sup>th</sup> May 2019 (the impugned Ruling). The advocate also sought stay of execution of that impugned Ruling pending the hearing and determination of the intended appeal.

3. The advocate based the prayers sought on the ground that the advocate desires to file an appeal; and on the ground that the advocate has an arguable appeal with high chances of success. The advocate stated that the impugned Ruling exposed the advocate to double jeopardy by subjecting issues previously determined for re-consideration.

4. The application is opposed by the client. In opposing the client argued that there is no justifiable reason advanced by the applicant to warrant the court to exercise its discretion in favour of the advocate; that the advocate has no arguable appeal; and that the advocate had failed to establish any likely loss to be suffered if the impugned Ruling was not stayed.

**ANALYSIS**

5. I have considered the parties affidavits, grounds of opposition and submissions. Just as I did while delivering the impugned Ruling I will try as best as I can the consideration of some of the submissions made by the parties so that I do not influence the taxing master in the final decision required by the impugned Ruling. My refusal to reproduce the full submissions of the parties is also informed by a Canadian decision, which is I find persuasive, that is **RAVELSTON CORPORATION LIMITED (Re), 2007 ONCA 268 (CanLii)**, thus:

***“A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal.”***

6. The above decision is also in the same vein as the local case **J.P. MACHIRA t/a MACHIRA & COMPANY ADVOCATES V WANGETHI MWANGI & ANOTHER (2002) eKLR** thus:

***“The considerations for the grant or refusal of an application for leave to appeal (a matter for the discretion of the Court) are few but familiar and we consider it desirable and useful to have them briefly stated.***

***The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of***

*the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration.”*

7. It is necessary to reproduce some parts of the impugned Ruling in order to appreciate what this court required the taxing master to do while re-considering the bill of costs. This is what was in part stated in that impugned Ruling:

*“14. I believe the challenge that I face in determining the Taxing Master’s determination of the taxed amount is because she failed, throughout her ruling, to identify the item numbers in the Bill of Costs she was referring to and failed to marry them to the figures in her ruling.*

*15. I also need to state that I was not clear what the professional fees were. Was it the instruction fee? That was not clear.*

*16. On the whole, I agree with submissions of the Respondents, that because of the lack of clarity highlighted above, it is necessary for the Bill of Costs to be re-considered but I party company with the Respondents that the Bill of Costs be re-taxed by another Taxing Master. This is because by his ruling of 27th June 2014, Justice E. K. O. Ogola stated that the series of Bill of Costs between the Advocate and the three Respondents should be considered by one Taxing Master.*

*17. I will therefore interfere with the Taxing Master’s exercise of her discretion because she failed to set out the reason why she taxed the bill costs as she did. I believe such interference of exercise of discretion, by this Court, is in keeping by analogy with what was stated in the case STANLEY KAUNGA NKARICHIA V MERU TEACHERS COLLEGE L& ANOTHER [2016] eKLR where the Appellant Court found the trial Court’s failure to state the reason it decided that costs should not follow the event, as provided in law, permitted the Appellant Court to interfere with the trial Court’s discretion.....*

*18. Similarly in this case, for the reasons stated above, this Court shall interfere with the Taxing Master’s exercise of her discretion because of lack of clarity on what led her to exercise her discretion as she did.*

*19. For the avoidance of doubt, I will not permit the parties to re-submit before the Taxing Master on the Bill of Cost. What the Taxing Master is required by this Court to do is re-consider the taxation by clarifying the issues raised above and any other issues raised by the Respondent. In so doing, she will issue a ruling of her taxation without receiving any further submissions from the parties.*

*20. To that end, the Taxing Master will give reasons for not upholding the Preliminary Objection dated 5th May 2015, which objection I was unable to trace in the Court file. She shall also give reasons for declining to allow the cross-examination of the Advocate, as sought by the Respondents, amongst others.”*

8. The above quote from the impugned Ruling will show that this court did not, at all, direct the taxing master to re-determine what has been determined previously – not all. What this court required the taxing master is to give reason, and I repeat give reasons, which led to the taxing master to tax the bill of cost in the manner it was taxed. And that is why the taxing master in re-considering the taxation was not required to receive any fresh submissions from the parties.

9. It is for the above reason that I find that there is no legitimate arguable point raised by the advocate. To grant leave to appeal or stay of the impugned Ruling would interfere with the reconsideration of the bill of costs, as ordered by the impugned Ruling, which would then interfere with the normal progression of this matter and the final conclusion of this taxation. It is for that reason that I find the application for leave to appeal against the impugned Ruling is without merit because, in my view, the proposed appeal has no realistic prospect of success.

10. Accordingly the chamber summons application dated 27<sup>th</sup> May 2019 is hereby dismissed with costs to the client.

11. At the reading of this Ruling a date will be given for parties to appear before the taxing master C. Wanyama for the said taxing master to give her reasons for the taxation as required by this court’s Ruling of 15<sup>th</sup> May, 2019.

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 17th day of December, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling read in open court in the presence of**

Court Assistant.....Sophie

.....for the Advocate

.....for the Clients