



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 171 OF 2017

QUESTWORK LIMITED.....APPLICANT

-VERSUS-

TREBORUAMAK REAL ESTATE

INVESTMENT MANAGEMENT CO. LTD.....1ST RESPONDENT

TREBORUAMAK CAPITAL CO LTD.....2ND RESPONDENT

ROBERT KAMAU NJUGUNA.....3RD RESPONDENT

JUDE ANYIKO.....4TH RESPONDENT

RULING

By a Chamber Summons Application dated 27th March 2018, pursuant to **Rule 11(2) of the Advocates Remuneration Order** the Applicant herein sought orders;

a) That the decision of the taxing master the Hon. S. A. Opande made on 27th February 2018 on item 1 of the 2nd, 3rd and 4th Respondents' bill of costs dated 19th July 2017 and item 1 of the 1st Respondent's bill of costs dated 29th July 2017 be set aside.

The Application was based on grounds;

a) That the learned Taxing master erred in law and fact in holding that the Respondents were entitled to the sum of Ksh 100,000/- as instruction fees on the matter which amount is highly exaggerated.

b) That the learned Taxing Master erred in law and fact in failing to appreciate the fact that the matter herein was an ordinary application to transfer the main suit from the subordinate court to the High Court and the same was dismissed before going for hearing. The workload expended was very minimal to warrant an award of Ksh 100,000/- as instruction fees.

GROUND OF OPPOSITION

The 1st Respondent opposed the Applicant's Chamber summons dated 27th March 2018 on grounds that, the Taxing Master, Hon. S. A. Opande was correct to find that the provisions in **Schedule 6 paragraph 1 (c) (iii) of the Advocates (Remuneration) Order 2014** does not apply to this matter as had been put forward by the Applicant, because the said provisions relates to presenting or opposing an application brought within Appeal proceedings.

2ND, 3RD & 4TH RESPONDENT' WRITTEN SUBMISSIONS

Whether the Applicant has met the threshold to warrant the court to interfere with the decision of the taxing officer

It was the 2nd, 3rd, & 4th Respondent's submission that the guiding principles to assist a Court in determining whether or not to interfere with the decision of a taxing officer are well settled and were reiterated by the High Court in **Republic –vs- Competition Authority ex-parte Ukwala Supermarket Limited & Another [2017]eKLR**. It is within the discretion of the Taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.

ORAL SUBMISSIONS

Mr. Ligami counsel for the Applicant in his oral submission stated that, the Applicant challenged the Ruling of Taxing Master and the challenge was with regard to instruction fees for the 1st, 2nd, 3rd, and 4th Respondents

The basis of challenge of instruction fees,

- a) The doctrine of *stare decisis*
- b) Bills of costs filed before Taxing Master for the 1st, 2nd, 3rd, & 4th Respondents were filed after the application was dismissed and costs were amended. This application dated 6th April 2017 sought to transfer the matter to the High Court on grounds of pecuniary jurisdiction.
- c) When the Taxing Master taxed the Bill of Costs she/he found that the Motion was privy and administration motion but she/he still went on to tax the same as a separate and independent suit in Magistrate's court.
- d) The Deputy Registrar/Taxing Master taxed the same under schedule of the Advocates Remuneration Act. However in that, she should not have taxed it under **Schedule 6** but under matters arising under paragraph 1 (c)(viii) of schedule 8 of Advocates Remuneration Act.

He relied on the case of; ***Serah Chelangat Samoei –vs- Musa Kipkering Kosgei & another – Misc. App. No. 10 of 2013***; costs were taxed at Ksh 10,000/- for a matter transferred from Subordinate Court to the Environment & Land Court and the Application was certified as an application **under Section 18(1) (b) of Civil Procedure Act**.

e) With regard to *stare decisis* he made reference to the case of ***Premchand Raichand –vs -Quary Services EA Ltd No. 3 (1972) EA 162***, where the Court of Appeal laid down the following principles to be considered in a reference against the decision of a Taxing Master:-

- i) ***That costs should not be allowed to rise to a level as to confine access to the courts to the wealthy;***
- ii) ***That a successful litigant ought to be fairly reimbursed for the costs he has to incur;***
- iii) ***That the general level of remuneration of advocates must be such as to attract recruits to the profession; and***
- iv) ***So far as is practicable there should be consistency in the awards made."***

f) He stated that their objection is with regard to the 1st Respondent's cross reference which was filed out of time considering limit action period which was 14 days. It was filed on 29th May 2018 and the Taxing Officer rendered decision on 27th February 2018. The 1st Respondent did not seek time to file the cross reference out of time. Whether the cross reference should be awarded.

1ST RESPONDENT'S ORAL SUBMISSION

The 1st Respondent submitted as follows;

1. The 1st issue the Taxing Master relied on wrong provision of Advocates Remuneration order
2. The figure of the Ksh 100,000/- was too high an amount.
3. The issue of 1st Respondent's cross-reference.

The Applicant urged the Taxing Master to use **schedule 1 (c) (viii)** and in their opinion thus the wrong provision.

The Applicant did not provide the alternative provision of law in the absence of that the Taxing Master drew ought to be upheld.

The figure of Ksh 100,000/- was not high. The Taxing Master exercised judicial discretion, administrative action that falls under **schedule 6** – Ksh 76,000/- and raised it to Ksh 100,000/-. The Applicant's application was unmerited. It was not an application to transfer – if the court were to look at the pleadings/court file, they sought to settle the **matter** in the lower court.

The Taxing Master decision should be set aside on the said issue. The cross reference into increase the fee of Ksh 300,000/- taking into account conduct of the Applicant.

Schedule 6 A (1) (d) Advocates Remuneration Order – value of the subject matter could be determined from the pleadings. The basis of transfer was pecuniary jurisdiction and we asked the court to use that virtue of *sub judice*.

Delay of filing cross reference- there was no prejudice to allow the application/cross reference on record.

DETERMINATION

The Court considered the pleadings and submissions by Counsel and identified the following issues for determination;

a) Did the Taxing Master err in awarding Ksh 100,000/- as instruction fees against the Applicant for the Respondents?

b) Should Item 1 of the 1st Respondent's Bill of Costs be awarded at Ksh 373,620/=

ANALYSIS

The Reference and Cross Reference arise from **Milimani Chief Magistrate's Court Case Number 444 of 2017** whose Applicant filed an application to have the matter transferred to the High Court based on the pecuniary jurisdiction enhanced by the Counterclaim. The application to transfer the suit to the High Court was dismissed by the High Court with costs to the Respondents.

In assessing these costs the Taxing Master relied on **Schedule 6 (1) of Advocates Remuneration Order** which refers to costs of proceedings in the **HIGH COURT** -party and party costs -instruction fees. In the Notice of motion filed on 6th April 2017, the subject matter related to transactions valued over Ksh 1.2 million. In the **Schedule 6(1) (b) of Advocates Remuneration Order** suing or defending a subject-matter valued at Ksh 1,000,000/- is indicated at Ksh 75,000/-. The Taxing Master pegged the Instruction Fees at Ksh 100,000/-

The Applicant contended that the appropriate schedule that ought to have been applied was/is **Schedule 6 (1) (c) (Viii) ARO** which relates matters arising during proceedings. The Taxing Master explained in the Ruling, that the Schedule was inapplicable as there were proceedings both in the Magistrate's and High Courts each separate and concurrent proceedings; this fact is not contested but confirmed by the records. This court has nothing useful to add save to concur with the applicability of the relevant Schedule in the circumstances.

With regard, to the Applicant's submission that the Ksh 100,000/- figure in favour of the Respondents is too high yet it was a simple application for transfer of suit from the Magistrate's Court to the High Court; this Court concurs with the decision in the case of **Republic vs Competition Authority Ex Parte Ukwala Supermarket Ltd & Anor [2017] eKLR** which sets out the threshold to warrant interference with the Taxing Master's decision;

The principles include:

i) That 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 inference that it was based on an error of principle;

ii) It would be an error of principle to take account irrelevant factors or to omit to consider relevant factors and, according to the order itself, some of the relevant factors to be taken into account include the nature and the importance of the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

iii) 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 and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

From the foregoing, the amount assessed as Ksh 100,000/- is based on **Schedule 6 (1) (b) Advocates Remuneration Order** and the value of the subject matter is Ksh 1.2 million. It is not excessive or exorbitant in the circumstances.

Reference to the Cross Reference filed 60days later after the Taxing Master's Ruling of 27th February 2018, on 29th May 2018 instead of 13th March 2018 was clearly filed outside statutory period of 14 days from the date of receipt of written response by the Taxing Master of reasons for the decision upon being served notice as required **under Rule 11 of Advocates Remuneration Order**.

Despite non compliance, the 1st Respondent failed in pleadings filed to confirm reasons of the delay and/or explanation thereof for this Court to consider. Secondly, the 1st Respondent failed to plead enlargement of time and/or under **Order 50 Rule 6 CPR**. The 1st Respondent highlighted in submissions that striking out the Cross Reference due to non compliance of statutory timelines would be draconian as set out in **Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others [2013] eKLR**.

"To this; the Court finds that parties and the Court are bound by pleadings filed and served, nowhere in the Cross Reference is the issue of enlargement of time deposed. Parties only submit on pleadings filed and served and before the Court. The Cross Reference is dismissed with costs."

The Court cannot consider granting orders not pleaded or sought. The cross reference is dismissed.

DISPOSITION

1. The taxing master's ruling of 27th February 2018 is upheld.

2. The Reference filed on 27th May 2018 and Cross Reference filed on 29th May 2018 are also dismissed with costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 7TH FEBRUARY 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MS ONYIEGO H/B KINGATI FOR THE APPLICANT

MS KABURU FOR THE 2ND AND 3RD RESPONDENTS

MR TUPETT – COURT ASSISTANT