



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MISCELLANEOUS APPLICATION NO 497 OF 2017**

**WAIGANJO WACHIRA & CO ADVOCATES.....APPLICANT**

**VERSUS**

**PACIS INSURANCE COMPANY LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Respondent's Chamber Summons application dated 7<sup>th</sup> February 2019 and filed on 13<sup>th</sup> February 2019 was filed pursuant to the provisions of Rule 11 (2) of the Advocates (Remuneration) Order, 2009, Article 159 (2) (d) of the Constitution of Kenya and all other enabling provisions of the law. It sought the following orders:-

**1. THAT the decision of the Taxing Officer dated 15<sup>th</sup> November 2018 on the Bill of Costs dated 2<sup>nd</sup> October 2017 be set aside and the Bill of Costs be placed before a different Taxing Master.**

**2. THAT in the alternative to prayer (2) above, the decision of the Taxing Officer dated 15<sup>th</sup> November 2018 on the Bill of Costs dated 2<sup>nd</sup> October 2017 be set aside and the Bill of Costs be taxed at such amount as this Honourable Court may deem appropriate.**

**3. THAT the costs of this application be provided for.**

2. Its Written Submissions were dated 7<sup>th</sup> June 2019 and filed on 12<sup>th</sup> June 2019 while those of the Applicant were dated 13<sup>th</sup> May 2019 and filed on 15<sup>th</sup> May 2019.

3. The Parties requested the court delivers its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE RESPONDENT'S CASE**

4. The Respondent's present application was supported by the Affidavit of its Senior Legal Officer, Njoki Kinyua, that was sworn on 12<sup>th</sup> February 2019.

5. It pointed out that it filed a Notice under Paragraph 11 of the Advocates (Remuneration) Order on 29<sup>th</sup> November 2018 but that the Taxing Officer did not respond to the same. In a letter dated 21<sup>st</sup> December 2018, it applied for a copy of the Taxing Officer's Ruling and on 30<sup>th</sup> January 2019, it was availed the said Ruling wherein it noted that the reasons for the decision were contained therein.

6. Through its Senior Legal Officer, the Respondent contended that the Applicant's Bill of Costs in the sum of Kshs 95,943/= was taxed in the sum of Kshs 89,604/= but that it was dissatisfied with the same as the Taxing Officer allowed several items that were not provided in the Advocates (Remuneration) Order and further allowed items based on the higher scale or at an exaggerated figure.

7. It therefore urged this court to allow its application as had been sought therein,

**THE APPLICANT'S CASE**

8. In response to the said application, the Applicant filed Grounds of Opposition. The grounds were as follows:-

- 1. THAT the applicant's application was unmeritorious, lacking in substance, incompetent, fatally defective and an abuse of the court process.**
- 2. THAT the said application was unnecessary, vexatious and therefore an abuse of the court process.**
- 3. THAT the application was an afterthought and meant to delay the case.**

#### **LEGAL ANALYSIS**

9. The Client submitted that the Applicant's grounds of opposition were general, speculative and could not be taken as a serious response to its application. It was categorical that it could not be blamed for the failure by the Taxing Officer to forward the reasons for his decision and that it could only be deemed to have received the reasons on 30<sup>th</sup> January 2019.

10. It reiterated the error by the Taxing Officer as had been set out in the Affidavit in support of its application and was emphatic that the primary suit was filed in the lower court. It added that the Applicant acted without instructions for the reason that the instruction letter had been addressed to the firm of M/S Rodgers Ombachi & Co Advocates.

11. On its part, the Applicant argued that whereas there was time to apply for the reasons of the decision was not limited, the same had to be sought within the time provided in the Advocates (Remuneration) Order and consequently, the Respondent was indolent as it ought to have requested for reasons to enable it file its Reference within fourteen (14) days from the date the decision was delivered.

12. It relied on the case of **Lawrence Mwangi & Co Advocates vs John Mathiaka Kimundu [2019] eKLR** amongst other cases where the common holding was that the procedure of challenging the decision of the taxing master was well set out in the Advocates (Remuneration) Order.

13. It further stated that a court should not interfere with the decision of a taxing master unless it could be shown that the decision was based on the wrong principles or the award was manifestly excessive so as to justify interference. It was its contention that the taxing master applied the proper principles and exercised his discretion judiciously in arriving at the decision that he did.

14. It was emphatic that the taxation of costs was not a mathematical exercise and that it was based on opinion based on exercise. It added that it provided proof of the items it had sought to be disbursed. It placed reliance on the case of **S.M. Kibira t/a Muteithia Kibira Advocates s Prodigy Properties Limited [2017] eKLR** and **Alfred Ochieng Opiyo t/a Ochieng Opiyo & Co Advocates vs Hydro Pump and Services (Africa) Limited [2019] eKLR** to buttress its arguments.

15. On the question of whether or not the Reference was defective and incompetent for not having been filed within fourteen (14) days from the date of delivery of the decision, this court noted that the reference ought to have been filed by 29<sup>th</sup> November 2018.

16. The Respondent did not contend in its Affidavit evidence whether or not its advocates were present at the time of delivery of the decision or if the reasons of the Ruling were read out or if they were given a copy of the Ruling. Evidently, they were entitled to request for the reasons of the taxing master within fourteen (14) days from the date of the delivery of the decision by the taxing master. They did this on 29<sup>th</sup> November 2018 when they filed a Notice for objection of the taxation in accordance to Paragraph 11 (1) of the Advocates (Remuneration) Order that stipulates that:-

**“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.”**

17. The party objecting to the decision of the Taxing Master need not file a reference within the fourteen (14) days of the date of delivery of the decision of the taxing master for the reason that he can still request for those reasons on the fourteenth (14<sup>th</sup>) day. However, that person is required to file a reference within fourteen (14) days of receipt of the reasons of the taxing master as provided for in Paragraph 11(2) of the Advocates (Remuneration) Order.

18. The said Paragraph 11(2) of the Advocates (Remuneration) Order states that:-

**“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.”**

19. It did appear from the Respondent's advocates' letter dated 21<sup>st</sup> December 2018 that they had not received the reasons by the time they filed the letter on 30<sup>th</sup> January 2019. There is no time limit within which the taxing master should forward the reasons of his taxation. Suffice it to state that an objecting party must file his reference within fourteen (14) days of receipt of the said reasons. As it was not clear whether or not the taxing master read his entire decisions containing the reasons the furnishing of the entire Ruling to the Client was necessary as often times, courts do not read the entire decision leaving parties to read the entire decision once they apply and obtain a certified copy of the same.

20. In view of the fact that this court could not discern exactly what happened as the Applicant did not file any affidavit evidence, this court

was persuaded to find and hold that having received a copy of the Ruling that had been requested vide the Respondent's advocates' letter filed on 30<sup>th</sup> January 2018, the Respondent's application was filed within fourteen (14) days of the receipt of the typed Ruling of the taxing master. The Applicant's submissions that the present application was fatally defective thus fell by the wayside.

21. The Respondent had objected to item Nos 2, 4, 7, 9, 11, 13, 14, 15, 16, 19, 21, 22, 25, 27, 28 and 29 of the Advocate- Client Bill of Costs. The Applicant submitted that item Nos 2, 4, 7, 9, 11, 13, 14, 15, 16, 19, 21 and 22 related to the drawing of letters, drawing of pleadings, perusing correspondence and effecting service which were all provided for in Schedule 6 of the Advocates (Remuneration) Order.

22. It added that item No 3 related to the drawing of the demand and facilitating service of the same which it had sought Kshs 12,000/= and that after considering the distance covered, the taxing master taxed the amount he deemed was most reasonable. It was its contention that the taxing master did not act on the wrong principles merely because he did not tax off the sum as had been proposed by the Respondent herein.

23. The Taxing Master awarded the sum of Kshs 25,200/= on the ground that the suit was defended. A perusal of the documents that were submitted to the court by the Respondent showed that the Defendants in **CMCC No 8232 of 2013 Diana Dakoa Akrofi vs John Kibere & Another** did not enter appearance. On 9<sup>th</sup> November 2015, the Applicant requested for entry of judgment against them for having failed to file a defence within the prescribed time. The question of whether or not the Taxing Master proceeded on the correct principles in assessing the instruction fees in the lower court matter was therefore pertinent.

24. Accordingly, having considered the affidavit evidence, the Written Submissions by the respective parties and the case law that they relied upon, it was the considered view of this court that so as to give the parties an opportunity to challenge the quantum that would be assessed in the event they were aggrieved by the same at the High Court, it was prudent that the Advocate-Client Bill of Costs be taxed by a taxing master. In any event, a taxing master was best placed to consider the same as he would be seized of the original file in the lower court from where the Advocate- Client Bill of Costs emanated from.

### **DISPOSITION**

25. Accordingly, the upshot of this court's decision was that the Client's Chamber Summons application dated 7<sup>th</sup> February 2019 and filed on 13<sup>th</sup> February 2018 was merited and the same is hereby allowed in terms of Prayer No (1) therein.

26. The effect of this Ruling is that the Taxing Master's decision that was delivered on 15<sup>th</sup> November 2018 is hereby set aside and/or vacated.

27. It is hereby ordered and directed that the Advocate- Client Bill of Costs dated 2<sup>nd</sup> October 2017 and filed on 4<sup>th</sup> October 2017 be and is hereby remitted for taxation before any Taxing Master in the High Court Milimani Law Courts Civil Division other than to the Taxing Master who taxed the aforesaid Advocate-Client Bill of Costs.

28. The costs of the application will be in the cause.

29. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 12<sup>th</sup> day of February 2020**

**J. KAMAU**

**JUDGE**