



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL CASE NO.719 OF 2003**

**PETER KAMAU IKIGU.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**PETERSON OGINO ONGARO.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this Court is the Reference from Taxation by way of the Chamber summons dated **25<sup>th</sup> October 2018**. The Plaintiff/Applicant **PETER KAMAU IKIGU** sought the following Orders:-

**“1. SPENT**

**2. The decision of the taxing officer given on 23-02-2016 together with all consequential orders be set aside forthwith.**

**3. The Honourable Court be pleased to Order the 1<sup>st</sup> Defendant’s Bill of Costs dated 2-8-2013 and the 2<sup>nd</sup> Defendant’s bill of costs dated 1-8-2013 be assessed a fresh.**

**4. Costs be in the cause.”**

2. The reference which was premised upon Paragraphs **11(2) and (4)** of the **Advocates, (Remuneration) Order, Sections 1A and 3A of the Civil Procedure Act, Chapter 21** of the Laws of Kenya and all the enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.

3. The 1<sup>st</sup> Defendant **BARCLAYS BANK OF KENYA** filed Grounds of Opposition to the Reference dated **14<sup>th</sup> November 2018**, whilst the 2<sup>nd</sup> Defendant **PETERSON OGINO ONGARO** similarly filed Grounds of Opposition dated **21<sup>st</sup> January 2019**. The Reference was canvassed by way of written submissions.

4. The Applicant filed his written submissions on **22<sup>nd</sup> February 2019**. The 1<sup>st</sup> Defendant filed its written submissions on **8<sup>th</sup> April 2019**. Whilst the 2<sup>nd</sup> Defendant filed its written submissions on **5<sup>th</sup> April 2019**. On **9<sup>th</sup> April 2019** Counsel for the parties appeared in Court to highlight the written submissions.

**BACKGROUND**

5. This Reference arises from the Taxation of the 1<sup>st</sup> Defendants Bill of Costs dated **2<sup>nd</sup> August 2013**, and the 2<sup>nd</sup> Defendant’s Bill of Costs dated **1<sup>st</sup> March 2013**. The Hon Taxing Master delivered her Ruling in respect of the two Bills on **23<sup>rd</sup> February 2016**. By that Ruling the 1<sup>st</sup> Defendant’s Bill was taxed at **Kshs.7,280,748** whilst the 2<sup>nd</sup> Defendant’s Bill was taxed at **Kshs.7,084,531**.

6. The Applicant is aggrieved by the taxing of the two Bills for a combined sum of **Kshs.14,365,279.00** yet the suit property was sold for **Kshs.3,500,000**. The Applicant contends that the taxing officer erred in fact and in law by allowing the two Bills of costs as drawn. They are aggrieved that the taxation of the Bills proceeded on a date set down for mention of the matter. On their part the Respondents contend that the present reference is a non-starter given that the same was filed out of time.

## ANALYSIS AND DETERMINATION

7. I have considered the rival submission filed in this matter. I have also considered the relevant law. Two main issues arise for determination as follows:-

(i) Was the Reference filed out of time?

(ii) Should the present Reference be allowed?

### **(i) Was the Reference filed out of time**

8. Paragraph 11 of the **Advocates Remuneration Order 2006** 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 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 those reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.**

9. The Respondent through the Grounds of Opposition dated **21<sup>st</sup> January 2018** contends that the application was filed out of time and is therefore a non-starter. Paragraph 11 clearly provides the time limit within which a reference should be filed, being fourteen (14) days from the date when the reasons for the taxation are supplied by the Taxing Master.

10. In this case the reasons for taxation were given vide the letter date **17<sup>th</sup> October 2018**. The present application is dated **25<sup>th</sup> October 2018** but was filed in Court on **2<sup>nd</sup> November 2018** that is sixteen (16) days **after** the reasons were given. The Plaintiff ought to have filed this Reference before the lapse of fourteen (14) days therefore they exceeded the stipulated timeline by two days.

11. The Respondents in support of their contention that this present reference is time barred relied on the case of **TWIGA MOTORS LTD – VS- HON DALMAS OTIENO ONYANGO [2015]eKLR** in which the Court held that:-

**“The time limits in rule 11 of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said timelines would mean that the application would be rendered incompetent in the first instance.”**

12. However in **REPUBLIC –VS- KENYATTA UNIVERSITY & Another Ex Parte WELLINGTON KIHATO WAMBURU [2018] eKLR** it was held as follows:-

**“...The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the reference out of time. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice...”**  
[own emphasis]

13. Although no reason has been advanced for the one day delay in filing this reference. I find that delay not to have been inordinate and find that indeed that delay could have been inadvertent. I am guided by the principles set out in **Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya** by which courts are exhorted to administer substantive justice. The two day delay ought not be a reason to turn the Plaintiffs away from the seat of justice. I therefore admit the Reference as filed.

### **(ii) Merits of the Reference**

14. The general rule is that the court ought not to interfere with the findings of the taxing officer except for an error of principle. The Court of Appeal in **Joreth Ltd Vs Kigano & Associates Civil Appeal No.66 of 1999 [2002] 1 EA 92, [2002] eKLR** 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. This exception to the general rule was pronounced by **Ringera J** (as he then was) in **First American Bank of Kenya Vs Shah and others [2002] E.A 64 at 69**, as follows:-

**“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.”**

15. The Applicant faults the Taxing Officer for proceeding to tax the Bills as drawn. The Applicant further contends that the Taxing Master erred in proceeding to Tax the Bills on a date when the matter had been set down for mention **not** for taxation. It is contended that the costs as awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which totaled **Kshs.14,365,279.00** was excessive and unreasonable as said costs amounted to twice the value of the suit properties.

16. On their part the Respondents submit that the Plaintiff failed to comply with the directions given on filing of written submissions and therefore cannot now cry foul after taxation had been done. The Taxing Maser in her ruling dated **23<sup>rd</sup> February 2016** stated as follows:-

**“Court The 1<sup>st</sup> Defendant’s bill of cost dated 2/8/2013 is not opposed. It is allowed as drawn at Kshs.7,280,748/=**

The Taxing Master then proceeded to rule as follows in respect of the 2<sup>nd</sup> Defendant’s Bill of costs.

**“Court The Affidavit of Service dated 18.1.2016 indicates that the Plaintiff was notified of the taxation of the 2<sup>nd</sup> Defendants bill of costs which stands unopposed. The same is allowed as drawn at Kshs.7,084,531.”**

17. The jurisdiction to tax Bills of Costs is conferred upon a Taxing Master by law. In the case of **MUGAMBI & CO. ADVOCATES VRS JOHN OKAL OGWAYO & Another [2013] eKLR**, the court held:-

**“The jurisdiction of a taxing officer is provided for in the Advocates (Remuneration) Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of the Court.”**

18. Therefore the Taxing Master is obliged to **tax** the Bill of Costs. In this case the Taxing Officer merely allowed both Bills as drawn. She ought to have taxed each bill individually taking into account relevant factors like pleadings, nature of the suit, value of the subject matter. Taxation of a Bill of Costs ought not be equated with an ex parte judgment which is given in absence of one of the parties. The taxing officer had a duty to interrogate each Bill notwithstanding the non-attendance of the counsel for the Applicants.

19. Counsel for the Respondent submitted that the Re- Amended Plaint did not indicate the value of the subject matter of the suit. They cited the letter dated **26<sup>th</sup> October 2005** in which indicated that the claim was for an amount of **Kshs.360 million**. This formed the basis for the 2<sup>nd</sup> Defendant’s claim for **Kshs.5,000,000** as instruction fees and **Kshs.1,600,000** as Getting –UP Fees.

In **Joreth Ltd Vs Kigano & Associates (2002) 1 EA 92** the Court of Appeal held that:-

**“The value of the subject matter for 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 ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking in account, amongst other matters, the nature and the 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.”**

20. I find that the Taxing Master erred in failing to properly interrogate the two Bills of costs in order to satisfy herself that they were properly drawn. She allowed the Instruction Fees claimed based on the wrong principles and in doing so awarded costs that were in the circumstances excessive thereby warranting the interference of this Court.

21. Aside from all the above there is also the irregularity of the Bills being taxed on a date which had been set down for **mention** of the matter. The record clearly indicates that on **18<sup>th</sup> January 2016**, the Deputy Registrar gave directions on the hearing of the two Bills of cost. The matter was then set down for **mention** on **16<sup>th</sup> February 2016**. Due to unavailability of the Deputy Registrar on that date the matter was re-scheduled for mention on **23<sup>rd</sup> February 2016**. On that date the Court agreed with Counsel that the two Bills were unopposed and allowed them as prayed. The Court ought to have set a hearing date for taxation and directed service of hearing notice upon the Plaintiff/Applicant.

For all the above reasons I allow this Reference. I direct that the two Bills of Costs be taxed a fresh by a different Taxing Officer. It is so ordered. Costs in the cause.

**Dated in Nairobi this 15<sup>th</sup> day of April 2020.**

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**Justice Maureen A. Odera**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

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**Justice Maureen A. Odera**