**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. (REFERENCE) APPLICATION NO. 250 OF 2017**

**KOINANGE INVESTMENT AND DEVELOPMENT LTD.....APPLICANT**

**-VERSUS-**

**GITONGA MUREITHI & CO. ADVOCATES.....RESPONDENT**

**RULING**

1. Before me is a Chamber Summons Reference by the applicant dated 23rd June, 2017. The same is supported by the grounds set out on the body thereof and the sworn affidavit of *Eddah Wanjiru Mbiyu*. The following orders are sought therein:

> ***i) Spent***
>
> ***ii) THAT the decision of the taxing master given on 30th May, 2017 be set aside.***
>
> ***iii) THAT the Bill of Costs be taxed afresh before a different taxing master or the decision of 30th May, 2017 be reviewed by the taxing master.***
>
> ***iv) THAT a declaration be made that the respondent cannot tax his bill against the applicant.***

2. In her affidavit, Eddah Wanjiru Mbiyu (a director of the applicant) stated that at the onset, two (2) separate suits had been filed to which the applicant was a party, that is, HCCC No. 709 of 2004 (Sifa International Limited-vs-Koinange Investment & Development Limited) and ELC No. 111 of 2008 (Koinange Investment & Development Limited-vs-Eddah Wanjiru Mbiyu & Another). That the aforesaid suits were subsequently consolidated.

3. The deponent averred that the applicant had previously appointed the firm of Beatrice Kariuki & Associates and later on, Kangethe Waitere & Co. Advocates to represent it in the said suits, and that the respondent was improperly appointed by a rogue director of the applicant, one Paul Mbatia. That judgment was entered in the consolidated suits on 17th August, 2009 wherein the court held that the faction led by Paul Mbatia was illegitimate whereas the faction led by the deponent was legitimate.

4. That the respondent thereafter irregularly proceeded to file a Bill of Costs against the applicant and the same was taxed on 30th May, 2017. The deponent added that there was no dispute of ownership in the suits and what was in issue was the lease agreement between the parties in HCCC No. 709 of 2004 mentioned hereinabove. As such, it was her assertion that the value of the subject matter ought to have been assessed in accordance with Schedule II of the 1997 Advocates Remuneration Order by taking into account the annual rent stipulated in the lease.

5. In response to the Reference, the replying affidavit of *Stephen Gitonga* was filed. The deponent largely stated that after the Bill of Costs was filed on 22nd January, 2010, the applicant through its advocates filed a Notice of Preliminary Objection in response to the same. That the Preliminary Objection was eventually dismissed and the matter proceeded for taxation.

6. It was the deponent's further averment that the respondent was engaged to take over from the firm of M/S Asiema & Co. Advocates in representing the applicant in the course of the suit and that this was laid out in the judgment by the trial court. That the fees charged was based on the conservative value of the subject property and that the travelling costs are evidenced in the judgment since the trial proceedings took place both in Nakuru and Kericho. The deponent added that the Reference is not only incompetent but that it has already been overtaken by events since there is already in place an application seeking to convert the Certificate of Taxation to a decree.

7. Parties dispensed with the Reference through written submissions which were later highlighted before this court. In its submissions dated 9th August, 2018, the applicant argued inter alia that the application was properly before this court by virtue of Rule 11 of the Advocates

Remuneration Act. The applicant went ahead to restate that the instruction fees were erroneously taxed since the suit concerned the landlord-tenancy agreement between the parties and not the subject property, in addition to failure by the taxing master to appreciate the provisions of Schedule VI 1 (b) of the Advocates (Remuneration) Order 1997 leading to an excessive award on fees.

8. In its rival submissions, the respondent asserted that the application is incompetent on the basis of the *res judicata* principle and by virtue of the fact that the applicant participated in the taxation proceedings. On the issue of the instruction fees, the respondent maintained that the taxing officer is empowered by the Advocates Remuneration Order to consider the value of the subject matter in addition to other factors. That further to this, the matter was complex in nature, heavily contested and quite involving. Various authorities were cited in that regard. In the respondent's view-point, the taxing master correctly applied the necessary principles in assessing the instruction fees. As concerns the retainer, the respondent reiterated that this was confirmed in the trial court's judgment and the subject is therefore *res judicata*. The respondent was careful to add that the issue of items 5-14 of the Bill of Costs was not raised in the course of taxation and cannot therefore arise at this point in time. That in any case, the respondent in entitled to the travel expenses incurred.

9. In highlighting her submissions, *Ms. Adunya* advocate for the applicant paved the way by arguing that it is unfair for the respondent to tax the bill against the applicant whereas the instructions were not given by the said applicant. In reaffirming the filed submissions, the counsel cited *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR* on the principles applicable in setting aside the decision of a taxing officer.

10. On her part, *Ms. Odundo* counsel for the respondent recapped their filed submissions, indicating that the Reference was filed in an entirely new cause and ought to be struck out on this basis. That the applicant cannot state that it was not instructed and yet one of its directors gave the instructions for legal representation to the respondent. In opposing the applicant's argument that the suit was based purely on rent, Ms. Odundo submitted that the issues addressed by the trial court were multiple and not merely limited to rent.

11. I have considered the grounds canvassed in the application; the supporting and the replying affidavits and rival submissions, both oral and written. I wish to first deal with the issue of *res judicata* raised by the respondent in respect to the taxation proceedings. It is true that the parties herein participated in the taxation proceedings and a ruling was delivered by Honourable F. Rashid on 30th May, 2017 thereby giving the reasons for her decision.

12. The applicant thereafter filed the Reference on 23rd June, 2017. According to *Paragraph 11 (2)* of the Advocates Remuneration Order:

> ***"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."***

13. A reading of the above reveals that any party who is dissatisfied with the reasoning and decision of a taxing master is at liberty to file a reference before the High Court. Whereas the respondent has indicated that it has already applied to have the Certificate of Taxation converted into a decree, I have perused a copy of the Certificate annexed to the Replying Affidavit and noted that the same is dated 29th June, 2017 and thus preceded the filing of the Reference. Consequently, the Reference cannot be said to have been overtaken by events. I am satisfied that the Reference was not only filed within reasonable time but was properly filed under a separate cause. The *res judicata* principle therefore cannot apply in this case.

14. Similarly, there arose the issue on whether or not the applicant had instructed the respondent to represent it. Having considered the parties' respective stand-points on this subject, I now turn to the judgment delivered by Justice M.A. Ang'awa. In paragraphs 29 and 30 of the same, the Honourable Judge indicated that originally, the firms of Beatrice Kariuki Associates and R.W. Mbanya were on record for Koinange Investment Development Co. Ltd No.s 1 and 2 correspondingly. That the parties later consented to have the firm of R.W. Mbanya replaced with M/S Asiema & Co. Advocates and subsequently, with the respondent. It is therefore apparent that the respondent took over representation of Koinange Investment Development Co. Ltd No. 1.

15. That said, the abovementioned judge in the substance of her judgment appreciated that the applicant had two (2) sets of conflicting directors. In her conclusion, the judge determined that Eddah Wanjiru Mbiyu was the lawful director of the applicant and that though Paul Mbatia was similarly a director, his actions were declared null and void. As such, I am convinced that the respondent indeed represented the applicant notwithstanding the controversies in directorship. In any case, the question on who constituted the rightful directors was determined by the trial court after instructions had been given to the Respondent and he had already acted on the same. It is therefore proper for the respondent to claim costs from the applicant.

16. I shall now address my mind to the question of whether or not the taxing master's decision ought to be set aside. The fundamental bone of contention concerns the taking into account of the value of the subject matter together with the attendance costs awarded to the respondent. I draw guidance from the case of *Premchand Raichand Ltd & Another v Quarry Services E. Africa Ltd (1972) E.A. 162* where the court reasoned as follows:

> ***"…every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit…"***

17. It emanates from the above that the value of the suit property may be taken into consideration where necessary, coupled with other factors. To add on, any costs awarded to an advocate for services rendered ought to be commensurate to the work done. No advocate should be permitted to unjustly enrich himself or herself. This was well articulated in *Rosa Associate v KTK Advocates [2018] eKLR* where reference was made to the Court of Appeal's analysis in **Moronge & Company Advocates-v-Kenya Airports Authority [2014] eKLR** in this sense;

> ***"…The advocate's pay however must be commensurate to his work otherwise shall be what is termed as "unjust enrichment". The same must be a reasonable compensation for professional work done. The court shall interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances…"***

18. I have perused the impugned taxation ruling and noted that the instruction fees was calculated purely on the value of the suit property. I have also noted that the suit related mainly to the landlord-tenancy relationship between the applicant and Sifa International Limited but also issue of the directorship of the applicant. At no point did the ownership of the subject property come into dispute and there was no reason for the same to be considered by the taxing master. This would mean the taxing master erred in taking into account the value of the said property.

19. In furtherance of the above, the taxing master was expected to have considered the other factors such as the fact that the respondent joined the proceedings as the applicant's counsels mid-stream; the amount of work undertaken by the respondent; the complexity of the matter et cetera and yet this was not done. Also therein constituted a consolidation of two (2) separate matters and issues of directorship. The taxing master should have taken into account all relevant factors indicated hereinabove. Reliance was placed solely on the value of the subject property (which was irrelevant) and I am satisfied that the instruction fees awarded was erroneous and ought to be interfered with. My findings are supported by those of the court in the case of *Anthony Thuo Kanai t/a A. Thuo Kanai Advocates v John Ngigi Ng'ang'a [2014] eKLR* that:

> ***"…the taxing master is vested with discretion to increase or decrease instruction fees and that in exercising such discretion, the taxing officer must act judicially by taking into account relevant factors stipulated in the Advocates (Remuneration) Order 2009 including importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances."***

20. In view of the above, my take is that the applicable provision would have been Schedule V of the Advocates Remuneration Order as opposed to Schedule VI for the simple reason that Schedule V allows the taxing master a wider discretion in considering all relevant factors in calculating the instruction fees.

21. Having established the above, I am now left to determine the award on items 5-14 of the Bill of Costs. In my view, contrary to the averments by the applicant that the respondent ought to have availed proof of having incurred the necessary expenses, I would suppose the relevant court records were relied upon by the taxing master in confirming the attendances and find no basis on which to interfere with the same. In any case, the awards made on the aforesaid items appear reasonable.

22. In the end, I will allow prayers ii) and iii) of the reference by setting aside the award on the instruction fees and hereby order that the matter be referred back to the taxing master for purposes of reviewing the award made on the said instruction fees. Each party shall bear its own costs.

**Dated, signed and delivered at NAIROBI this 14th day of February, 2019.**

**L. NJUGUNA**

**JUDGE**

In the presence of:

.....for the Applicant

.....for the Respondent