REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CAUSE NO. 23 OF 2016

1. ELIUD KIPCHIRCHIR BETT

2. MWENDA THURANIRA.....PLAINTIFFS

VERSUS

1. CANYON PROPERTIES LTD

2. ABDULHAKIM ABDALLA ZUBEDI

3. TWAHA ABDALLA ZUBEDI

4. MOHAMED ABDALLA ZUBEDI.....DEFENDANTS

R U L I N G

1. This ruling regards a reference brought pursuant to Rule II, Advocate Remuneration Order, in which the judgment/debtor applicant prayed for orders that the order on taxation given on the 18/9/2018 be set aside and the several bills by the defendants/decree-holders/Applicants be remitted back for taxation by a deputy Registrar other than Hon. D. Wasike.

2. In the reference the Decree-holder/Applicant challenges the decision by the taxing office in which it was held that the filling of separate bills of costs was improper and unnecessary and proceeded to tax the costs for all the defendants in the sum of Kshs.1,857,902.00. In the four Applications and the related written submissions the defendants main contention is that even though a joint appearance was entered, all defendants filed separate statements of defenses and were thus each entitled to separate bills as against each of the plaintiff.

3. In opposition the plaintiffs/judgment-debtors filed grounds of objection in which it is contented that the suit against the defendants having been one to which an appearance was filed, there was no good reason to file separate statements of defence which were in way event the same a substantially similar and to thereafter file separate and duplicate bills of by each of the defendants against each of the two plaintiffs. It is equally contended that the reference offended Order 21 Rule 7(2) of the Rules and that the application did not meet the threshold of setting aside a tax decision by taxing master on taxation. In particular it is contended that the dictates of Rule 11(I) had not been met within time and at all and therefore the application did not lie as its laydown foundation, the reasons for the decision by the taxing master, were lacking.

4. Parties did file respective submissions which I have benefitted from and I will take into account in my determination. Having done so I do consider that the following issues are due for determination by the court:-

- **Whether there was compliance with Rule II(I) Advocate Remuneration Order?**

- **If answered is the negative, what is the consequence?**

- **Whether the taxing officer committed any error in principle to entitle this court to interfere with the order made on taxation?**

- **What orders should be made as to costs?**

Compliance with Rule 11(i) and (ii)

Advocate Remuneration Order

5. Rule 11of the Advocates Remuneration Order provides thus:-

> **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 of taxation 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 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.**

While it is true that the rule could be construed to be mandatory that objections be made and the taxing officer be requested and gives reasons for taxation, the fact that the taxing officer has not been asked for his reasons for the ruling is not fatal to the reference if there are reasons in the ruling sought to be challenged.

6. *Odunga J, in* **Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited [2012] eKLR** held, and I wholly agree with the reasoning, as follows:-

> **"First, and foremost, the above provisions presuppose that in delivering their decisions on taxation, the taxing officers only pronounce the results of the taxation without the reasons behind them. In most cases, the court is aware that, taxing officers, in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons, thereafter. In such circumstances it would be foolhardy to expect the taxing officer to redraft another "ruling" containing the reasons. In my view, this is another provision that requires to be looked into afresh. I do not see the reason why the taxing officer cannot be at the time of making his decision to do so together with the reasons therefore".**

7. That decision was not isolated on its own but followed previous decision by Ochieng j ***Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5*** and the court of appeal in ***Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board Civil Appeal No. 220 of 2004 [2005] 1 KLR 528*.** **For judge Ochieng', in Amednassir's case, the Rule had a purpose of enabling the court in a reference know the basis of decision by the taxing officer and '*not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling*'. The court of appeal on its part was sufficiently affirmative that failure to give reason is by itself a ground for reference and is no bar to a competent reference being filed.**

The court said:-

> ***If a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference".***

8. In this matter the taxing office did record elaborate and detailed reasons for the finding that separate bills were unnecessary and it would have served no meaningful purpose to request for the same reasons afresh. That would, in my view, be unnecessary and mere adoration of the technicality in the rules rather than pursuit for the just determination of the dispute between the parties. It may be the time now for the duty-bearer in promulgation of the Advocate Remuneration Order to relook some of these Rules, Rule 11 in particular, and save the litigating public the anxiety and dilemma of whether to ask for reasons from the taxing officer, even when the reasons are in the decision, before filling their references. On my part I do find that the reasons for the decision on taxation were in the ruling and it was thus unnecessary to expect the applicant to request for the same reasons before filling his reference. Consequently the reference is properly before the court and I will seek to determine it on the merits.

9. There is however the requirement, which I consider mandatory, that a person who desires to object to a decision on taxation, gives a notice of objection in writing. In this matter I have not seen such notice of objection which should have been the initiator of the reference. However, the parties did not address the court on that ground and I would not make it the foundation of my decision at this juncture and without the parties' input.

Did the Taxing officer commit any error to

warrant reversal by this court?

10. Even though called a reference, the proceedings take the character of an appeal and being the first challenge and on a matter based on judicial discretion; this court has the duty and mandate to re-evaluate the proceedings at taxation afresh so as to satisfy itself that no error of principle was committed by the taxing officer. I think an over-emphasis or under-emphasis on the difficulty and industry expected in prosecuting or defending an action would pass as an error in principles applicable and would invite interference by this court.

11. In this reference the dispute is not on the figures assessed, at least from the application and the submissions filed, now that I do not have the grounds of objection, but on the decision by the taxing officer to strike out 7 of the 8 bills of costs and to tax only one bill between the parties. The decision under challenge was rendered in the following words:

> **"Were these separate pleadings necessary? They were not. As state, a perusal of the Defences shows that they were more or less similar. The joinder of parties was not such as to warrant separate pleadings on the issues. However as the Defendants chose to file separate pleadings, these costs were unnecessarily incurred and should not be burdened on the Plaintiffs. Therefore the filing of separate Bills of Costs by the Advocates is also an unnecessary expense which the Plaintiff will not be condemned to pay.**

As it were, the Advocate cannot purport to charge every item 4 times when only the Defences were separate but the appearances in court were one, other documents filed on record were one for all the defendants. This is akin to unjust enrichment. The Court will therefore only tax one Bill of Costs for all the Defendants.

On the second issue of a Bill of Costs against each Plaintiff, the suit was joint. The documents being filed in court or appearances were not separate for each Plaintiff. Therefore the Defendants to purport to file Bills of Costs against each Plaintiff separately when the suit was one is also another unnecessary and improper expense. It is to seek double costs in the suit.

It is trite that costs are not awarded to enrich a party but to act as a compensation for the expenses they have incurred in the suit. In this case, the Defendants filing 8 Bills of Costs is not only a waste of the Courts time but also a case of trying to enrich themselves by getting instruction fee and costs which they incurred once or they improperly incurred 8 fold.

I therefore strike out 7 Bills of Costs and will proceed to tax only one Bill of Costs for all the Defendants as against the Plaintiffs jointly".

12. Can it be said that the taxing master committed any error in the ruling? It is obvious that that the taxing officer was guided by rule 62 in coming to the determination she reached. That Rule provides:-

> ***"Where the same advocate is employed for two or more plaintiffs or defendants, and separate pleadings are delivered or other proceedings had by or for two or more such plaintiffs or defendants separately, the taxing officer shall consider in the taxation of such advocate's bill of costs, either between party and party or between advocate and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed."*** *(Emphasis added)*

13. the rule clearly and unequivocally vests upon the taxing office the power and discretion to interrogate and be convinced if there was a necessity or indeed justification to file separate bills. In undertaking that task it is apparent that the officer read the defenses filed and considered the same to amount to same defence even though filed differently but on the same day the joint appearance having been entered earlier. I do not find any error on the taxing officer in her appreciation of the law applicable where separate defenses are filed. Instead I do agree with her reasoning that to allow the separate bills would be to encourage self-enrichment and thus escalate costs of litigation a scenario that portend a threat to access to justice.

14. The spirit of the law in empowering the taxing office to consider the propriety and reasonableness of costs incurred run through the Order and not confined to rule 62 only. Rule 16, in particular, is explicit that costs incurred out of over-caution, negligence, mistake or decision to pay special or unusual charges are not recoverable. In my view, even though these Rule preceded the current constitution, the principles of the constitution were long imbued therein that cost of litigation must not be prohibitive so as to scare citizens from pursuit of legal right.

15. the court of appeal in underscoring the same principles held, in **Desai Sarvia & Pallan Advocates v Tausi Assurance Company Limited [2017] eKLR,** held and said of separate bills of cost for one transaction:-

> **"In our view, the respondent instructed the appellant to protect its interest as an insurer by representing the defendants in the suit. In doing so, the respondent engaged the appellant to act on its behalf in a single transaction, that is, protect its interest in the suit. Moreover, the liability of the 2nd defendant automatically gave rise to the liability of the 1st defendant and by extension to the respondent's liability under the insurance contract. Thus, it would be unconscionable for the appellant to charge the respondent twice for the same transaction. Of course, the outcome would have been different if each of the defendants instructed the appellant separately or where the respondent engaged the appellant to act for it in different transactions".**
>
> (Emphasis mine)

16. I have on my own perused the statements of defenses filed and I do agree with the taxing officer that the defenses by 2nd 3rd and 4th defendants were word for word the same and therefore that there was no good reason to file the three separately. On the same footing, it being admitted that the 2nd-4th defendants were directors of the 1st defendant, the three were the personification of the 1st through whom it could instruct the lawyer and there was no evidence that instructions were given and rendered separately. For those reasons and the fact that the suit as one by the plaintiffs jointly, there was no reason to file different bills by each of the defendants against each of the plaintiffs.

17. The upshot is that I do find no merit in the four references which I hereby dismiss with costs.

Dated, **signed** and **delivered** at **Mombasa** this **2nd** day of **May 2019**.

P J O OTIENO

JUDGE