



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU.

MISCELLANEOUS CIVIL CASE NO. 15 OF 2017.

MUNYUA KARIUKI & CO. ADVOCATES.....APPLICANT

-VERSUS-

MARGARET NJERI MBURU (suing as the Legal Administrator

of the estate of SILAS MBURU GICHUA).....1ST CLIENTS

MUTATI TRANSPORTERS.....2ND CLIENTS

RULING

1. This Ruling is with respect to two applications: one is dated 18th April 2018 and was filed by the Advocate (Munyua Kariuki & Co. Advocates)(hereinafter “Advocate”); the other is 4th May 2018 and is filed by the clients (Margaret Njeri Mburu (suing as the Legal Administrator of the estate of Silas Mburu Gichua) & Mutati Transporters). For purposes of this ruling, I will refer to these two as “Clients”.

2. It is undisputed that the Clients instructed the Advocate to sue the National Bank of Kenya (NBK) respecting a dispute between the Clients and NBK. The gravamen of the suit was an amount of Kshs. 38,667,176.30 which NBK was demanding from the Clients on account of an overdraft facility extended to them. The bank’s claim was at the pain of the bank exercising its statutory power of sale over a parcel of land which was charged to secure the loan.

3. It is undisputed that the Advocate brought suit as instructed and conducted the matter until, as it sometimes happens, the relationship between the Advocates and the Clients unraveled. The Advocate filed a Bill of Taxation before the Deputy Registrar. That Bill of Taxation was taxed by the Honourable N. Makau who delivered a ruling dated 06/04/2018. The Taxing Master arrived at an overall figure of Kshs. 5,253,078. Upon evidence that the Clients had paid Kshs. 940,000/- the Learned Taxing Master deducted that amount from that overall figure and required the Clients to pay to the Advocate Kshs. 4,313,078/-.

4. It is that decision by the Taxing Master that has spawned the two Applications before me. The Application dated 18th April 2018 is brought under Section 51 (2) of the Advocates Act. It seeks for orders that:

a. The Certificate of costs dated 13th April 2018 be adopted as judgment of this honourable Court.

b. Costs be provided for.

5. The Application is premised on the Supporting Affidavit of Josephat Munyua Kariuki. The Advocate argues that the Clients have failed to pay the taxed amount and that it is in the interests of justice and fairness that the Application be allowed.

6. That Application was, naturally, opposed by the Clients who filed Grounds of Opposition dated 16th July 2018. The main ground, as I understand it, is that the Clients find the Application to be premature because it was filed in violation of Rule 11 the Advocates (Remuneration) Order. Of course, the Clients also strongly contest that the taxed bill of costs should be executed as taxed.

7. Application dated 4th May 2018 is expressed to have been brought under Section 1A & 3A of the Civil Procedure Act, Rule 11 of the Advocates Act (Remuneration Order 2009 and all other enabling provisions of the Law seeking for Orders;

a. Spent.

b. Pending the hearing and determination of this application inter parte there be a stay of recovery of the costs taxed herein and the Certificate of costs issued herein on the 13th April, 2018.

c. The court be pleased to set aside and/or vary the ruling and the order of Hon. N. Makau delivered on the 6th April 2018 with regard to item number 1 on the instructions fees to Kshs. 1,120,000/= as opposed to a sum of Kshs. 3,000,000/= awarded.

d. The court be pleased to set aside and/ or vary the ruling and order of Hon. N. Makau delivered on the 6th April 2018 with regard to awarding half the instructions fees of Kshs. 1,500,000/= which item never formed part of the bill, and do further find that the learned Deputy Registrar acted [in error] by adding such item.

e. The court be pleased to set aside and/or vary the ruling of learned Deputy Registrar on items 8, 10 & 11 of bill to Kshs. 2,100/= as opposed to Kshs. 5,040/=.

f. The court be pleased to set aside and/ or vary the ruling on item 12 in tabulation of the final figure and item on VAT for lack of proof of receipt or certificate.

g. The court to grant such other or further order as it deem fit in the circumstance.

h. Costs of the application

8. The Application was premised on the affidavit of Margaret Njeri Mburu deponed on 27th June 2018 and on the grounds that she objects to the taxed amount of Kshs. 4,313,078/= being too high considering the matter did not proceed for hearing and the advocate had ceased acting for them. The Clients argues that the Taxing Master over taxed the amount by awarding Kshs. 3,000,000/= as instructions fees, 5,040/= as attendance fee and awarded VAT without producing a receipt for the said payment and the same should be reviewed and/or varied.

9. In opposition to the said Application grounds of opposition dated 9th July 2018 was filed stating that the application is grossly incompetent, bad in law, an abuse of the court process, unmeritorious, not legally sound, seeking to introduce new evidence on appeal, it is an afterthought and meant to delay justice. The Advocate states further that the Clients failed to file an affidavit on the value of the property before the Deputy Registrar despite numerous adjournment and the application has been brought after long and unreasonable delay.

10. Directions were taken on 10th July 2018 that the two applications be canvassed together and both parties filed their respective submissions.

11. The Advocate filed his submissions dated 12th October 2018 and filed on the same day. He primarily relied on two decisions: *Onyango Kibet & Ohaga Advocates Vs Peter Muthoka* and *Arthur V Nyeri Electricity Undertaking (1961) EA 497*, to strongly make the argument that the standard of review in matters of taxation is very high: that a Judge can only interfere with the Taxing Master's discretion in instances where the Taxing Master erred in principle in assessing costs; that a Judge cannot interfere with such a decision merely because the Judge would have awarded a different amount.

12. On the issue of instruction fees, the Advocate defended the amount awarded by the Learned Taxing Officer by citing *Joreth Limited Vs. Kigano & Associates Civil Appeal no. 66 of 1999 (2002) 1 EA 92* where it was held that *"In principle the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached."*

13. On VAT, the Advcoate argued the Clients were introducing new evidence on appeal and this can only be done in exceptional circumstances and with the leave of the Court. He relied on *Joginder Auto Service Ltd V Mohammed Shaffique & Another (2001) e KLR (Civil Appeal application No. Nai 210 of 2000)* where the court laid down the three broad principles of exercising discretion.

14. Finally the Advocate submitted that the Clients' Notice of Objection was prematurely filed hence has violated Rule 11 of the Advocates (Remuneration) Order. As I understand the argument, the Advocate seems to be arguing that the Clients did not give notice in writing to the Taxing Officer of the items objected to and requesting for reasons for her decision. For this proposition, the Advocate relied on *Charles Nyaga Njeru V independent Electoral Commission (2015) eLKR*.

15. I have carefully considered the applications, Grounds of Opposition and submissions from both parties. Let me begin with the technical objections. Quite remarkably, both parties rely on Rule 11 of the Advocates Remuneration Order to find the Application of the other to be pre-mature. That Rule reads 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 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.

16. The Advocate complains that the Clients did not give a "Notice" in writing that they were objecting to particular items given the Taxing Master's ruling of 06/04/2018. The Advocate's position seems to be that the Clients 06/04/2018 within fourteen days. Only after receipts of those reasons would they have been on good standing to file an objection to this Court.

17. The Clients, on the other hand, believe that the structure of Rule 11 requires that an Advocate waits for 30 days before he files for an

action to recover the taxed amounts. This is because, if an advocate files for recovery before the expiry of the 30 days, then Court might act out of turn: order for enforcement while an Objection might still be on the way.

18. In my view, both technical objections are unhelpful to object to the consideration of the matter on its merits. The Advocate is surely wrong that the Taxing Master has not given reasons for her decision. She did vide her ruling dated 06/04/2018. By the strict reading of Rule 11(2), then, the Clients ought to have filed their objection within fourteen days of that date. They did not. It is them, therefore, that have run afoul of the strict reading of the Rule in question. The Clients' structural reading of the Rule is correct but it is inapplicable in this case since, in fact, the reasons for the decision were given on 06/04/2018. They, therefore, ought to have filed their objection within fourteen days thereafter. In fact, their Notice of Motion is dated 04/05/2018.

19. Ultimately, neither of these objections is of substantive nature sufficient to move the Court to outright to dismiss the other party's application: both are technical in nature. To the Advocate's objection, the response is, as aforesaid, that the ruling dated 06/04/2018 was, indeed, the reasons for the decisions by the Taxing Officer for purposes of Rule 11 of the Advocates Remuneration Order. To the Clients' objection, the response is that while technically premature, the Client's objection to the taxation is also time-barred. It will take this Court acting under the discretion provided under Rule 11(4) to save the Clients' objection. I readily do so by extending time for its consideration.

20. So what is the substantive issue to be determined? The main question, to my mind, is whether there are sufficient grounds to interfere with the decisions of the Taxing Master. The Taxing Master arrived at the conclusion that since there was a stated figure in the Plaintiff (that is Kshs. 38,667,176.30), that would be the figure she would use for taxation purposes. This was against the objection by the Clients that the case had not been completed and that, therefore, the Taxing Officer needed to discount the scheduled fees.

21. The Taxing Master reached the conclusion that the instruction fees should be Kshs. 3,000,000/-. The Taxing Master obliquely stated that she relied on the principles laid down in *Joreth Ltd v Kigano [2002] eKLR*. **It is unclear to me which aspects of the case the Learned Taxing Master was referring to. Suffice to say that that famous case has two paragraphs which, in context, the Learned Taxing Master might have had in mind. The first one is this:**

By the first ground thereof the Clients states that instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct.....The Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and direction by the trial judge and all other relevant circumstances."

22. The second relevant paragraph would be this:

We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.

23. Both principles are well accepted principles of taxation. However, what is still a mystery is how the Learned Taxing Master used the amount in the Amended Plaintiff (Kshs. 38,667,176.30/-) and arrived an instructions fees of a flat figure of Kshs. 3,000,000/-.

24. It is true that a Judge of the High Court must treat the decisions of the Taxing Master to award particular amounts with deference as stated in the cases cited above. However, that deference can only be accorded where the reason for the decision is explained so that the Court can determine if there is an error in principle capable of being revised or revised. I am unable to do so in the present case.

25. In the circumstances, it is my considered opinion that the only correct course of action is to remand the Bill of Taxation back for taxation. The same is to be taxed by a Deputy Registrar other the Learned N. Makau who initially taxed the Bill.

26. I will make no order as to costs on both Applications.

27. Orders accordingly.

Dated and delivered at Nakuru this 6th day of June, 2019

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JOEL NGUGI

JUDGE