REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. 88 OF 2015

ISSA & COMPANY ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

ANHUI CONSTRUCTION

ENGINEERING GROUP CO.....1ST RESPONDENT/APPLICANT

CHINA AERO-TECHNOLOGY INTERNATIONAL

ENGINEERING CORPORATION (CATIC) .....2ND RESPONDENT/APPLICANT

RULING

1. This ruling relates to a chamber summons application dated 20th September 2018, brought under the provisions of paragraph 11(2) of the Advocates Remuneration Order and Section 1, 1A, 1B, 3 & 3A of the Civil Procedure Act, and all other enabling provisions of the law.

2. It is filed by the Respondents (herein "the Applicants") who are seeking for orders that -

a) the application be heard in priority to the notice of motion dated 10th July 2018, filed by the Applicant (herein "the Respondent");

b) in the alternative, the application be directed to be heard together with the notice of motion dated 10th July 2018 scheduled to be heard on the 27th September 2018;

c) the decision of the taxing officer delivered on 17th March 2016, in so far as it relates to taxation of the entire advocate/client bill of costs (herein "the bill") dated 12th February 2015, be set aside and/or vacated;

d) the bill be remitted back to a different taxing officer for re-taxation and the court do give appropriate directions on how it should be done;

e) in the alternative, the court be pleased to re-tax the bill; and

f) the costs of the application be provided for.

3. The application is premised on the grounds on the face of it and an affidavit dated 20th September 2018, sworn by Xu Aichao, on behalf of the Applicants. He deposed that, on 17th March 2016, the taxing officer taxed the subject bill as drawn in the sum of; Kshs. 174,283,035. The Applicants being aggrieved by the colossal amounts awarded for "merely getting an order to have a contract signed between themselves and the procuring entity", filed and served a notice of objection dated 22nd March 2016, and requested for reasons for the decision. A reminder was sent on 23rd March 2016 but the reasons were not given.

4. Subsequently, the Applicants filed a Reference without the reasons. The Reference was opposed. It was heard inter parties but was struck out vide a ruling delivered on 16th April 2018, on the ground that it was incompetent for lack of reasons for the decision. Therefore it was not heard on merit but the Applicants were granted leave to file a competent Reference.

5. The Applicants being determined to have the Reference heard on merit send further letters of reminder on 3rd May 2018 and on 14th May 2018to the taxing officer Hon. Elizabeth Tanui. The reasons were not given. But the Applicants were determined to file the Reference, within fourteen (14) days given by the court, and due to expire on or before, 2nd September 2016, therefore they send a further reminder to the taxing officer on 6th September 2018. The reasons were received on 18th September 2018, and Reference herein filed on 2oth September 2018.

6. The Applicant avers that, on 17th March 2016, when the bill was taxed, the matter had been fixed for mention to confirm the filing of submissions by the Applicants and not for taxation and that the taxing officer had no jurisdiction to allow a bill during a mention date meant to confirm the filing of submissions.

7. That it is trite law that no substantive orders can be made during a date for mention and that in default of submissions by client, the taxing officer should have re-fixed the bill for Taxation under paragraph 14 of the Advocates (Remuneration) Order than proceed as she did.

8. The Applicants further argued that the taxing Officer totally abdicated her judicial discretion under paragraph 16 of the Advocates Remunerations Order, by failing to ascertain whether the charges in the bill were necessary or proper for the attainment of justice. This was misdirection and an error as such discretion is not dependent on whether the Applicants had filed its submissions or not.

9. That indeed, taxation is a sui generis procedure which unlike ordinary Civil Applications under the Civil Procedure Rules, it does not require filing or Replying papers instead it only requires an itemized bill for the taxing officer's consideration and taxation.

10. The Applicant avers that they wrote to the taxing officer on 23rd March 2016, requesting for reasons for taxation but the taxing officer has failed to furnish the reasons and that amounts to an error of principle.

11. Further, that, it amounted to an error of principle, when the taxing officer failed to indicate the schedule of the Advocates Remuneration Order under which Item 1 was taxed at Kshs 75,000,000. It was argued that the Review of the subject matter of the Taxation, was merely seeking that a contract be signed between the Client and the Procuring Entity as the Award of the tender had already been awarded. Thus the relief sought was essentially superfluous as the client had already accepted the notification of the tender as the winning bidder.

12. Further the Award of getting up fees of Kshs. 25,000,000 is an error of principle as the same is only recoverable under Schedule VI in relation to proceedings in the High Court where issues are joined by the pleadings and for getting up and preparation for trial. In this case, the subject matter was before a Statutory Tribunal under the Public Procurement and Disposal Act and therefore Getting up fee is thus irrecoverable.

13. That even then, the indication that the Bill was taxed under Schedule XI as indicated in the bill is an error of principle, since there is no Schedule XI in the Advocates Remuneration Order and if the indeed the bill was taxed under Schedule V, there is an error of principle since there was no election made by the Advocate under paragraph 22 of the Advocates Remuneration Order.

14. Finally, it was argued that the taxing officer suffered an error of principle in failing to take into account relevant factors to wit that the Advocate had conceded as shown at Paragraph 186 of the Advocate's Affidavit filed on 3rd June 2015, and page 47 of the Tribunal's ruling, that the Tender award to the client had not been terminated. As such this had a bearing on item 1 which in the circumstances the taxation of the same at Kshs. 75,000,000 Million is manifestly excessive as to justify inference that it was based on an error of principle. Accordingly, the Taxation Reference should be allowed as prayed with costs.

15. The Respondent filed grounds of opposition dated 13th November 2018 in opposition to the Reference and described the same as misconceived, bad in law, without any legal merit and an abuse of the court process. That it is incompetent and defective as it does not comply with Rule 11(1) of the Advocates Remuneration Order, 2009 and does not correctly invoke the jurisdiction of the Honourable court, as it seeks to set aside the decision of the taxing officer in its entirety.

16. The Respondent further averred that, the prayers sought for in the Reference are moot on the following grounds:-

a) *the Reference is entirely comprised of issues that were not pleaded or raised before the Honourable taxing master;*

b) the Respondents/Applicants did not challenge any item contained in the bill of costs dated 12th February 2015 and therefore the quest to vacate and set aside the entire ruling is wrong in law, untenable and is an abuse of the court process;

c) the application is fatally defective as it does not comply with the rules as to the challenge of a taxation;

d) The Respondents/Applicants did not oppose the bill of costs nor did they place any material before the taxing master to exercise her discretion to decrease the amount allowed under the scales with respect to instruction fees or any other item.

10. The Respondent argued that, there was no bar to grant substantive orders, when the case was scheduled for mention for directions in respect of the taxation, provided that the taxing officer granted both parties an opportunity to be heard as was the case herein. That Paragraph 14 of the Advocates Remuneration Order 2009 applies to default of attendance of an Advocate and therefore it is wholly inapplicable in the present case.

11. It was argued that, the entire bill including item 1, was taxed under Schedule V of the Advocates Act, which is the applicable Schedule for fees in respect of business, the remuneration for which is not otherwise prescribed and the Respondent's submissions before the taxing officer were clear in this regard. Further the taxing master's discretion was judiciously exercised and in consonance with the legal principles

set out in the binding precedents in the cases of; *Joreth Ltd vsKigano and Associates (2002) 1 EA 92 (CAK)* and *First American Bank of Kenya vs Shah (2002) 1 EA 92*. Thus the Reference is merely calculated to delay the inevitable payment of the Respondent's fees and the much deserved enjoyment of the fruits of the taxation of the bill. It should be dismissed with costs to the Respondent.

12. The Respondent also filed a Replying affidavit dated 9th November 2018, sworn by Mansur Muathe Issa, an Advocate of the High court of Kenya and the proprietor of the Respondent's firm. He argued that, it is pertinent for the court to appreciate the background facts germane to the instant matter, in that, on 13th February 2015, the Applicant's firm filed the subject bill dated 12th February 2015 and was set for taxation on 13th May 2015, wherein their Advocates on record took directions on the hearing of the taxation and the parties agreed to dispense the same through written submissions.

13. That the Respondent's firm duly filed an affidavit sworn on 2nd June 2015, together with written submissions and a list of authorities both dated 4th June 2015 in support of the bill. The parties attended court on 23rd July 2015, for purposes of confirming filing of submissions whereupon the Applicants were granted 14 days to respond. Thereafter, the parties attended before the taxing officer severally for taxation and the Applicants persistently failed to file their submissions for over six (6) months, despite being granted numerous opportunities by the taxing officer to do so.

14. On 18th February 2016, the taxing officer noticed the incessant delay by the Applicants who were granted final fourteen (14) days to put in their submissions in opposition to the bill, but by 17th March 2016, the Respondents had unsurprisingly still not filed their written submissions and the court after hearing the arguments from both the parties' Advocates noted that the bill was unopposed and supported by the documents on record and proceeded to tax the same as prayed.

15. That, the subject matter that gave rise to the bill was not merely the signing of a contract with an award having already been granted to the Applicants as falsely stated. The correct position is that; the subject matter was in relation to a tender for the construction of the Greenfield Passenger Terminal Complex and Associated works at Jomo Kenyatta International Airport worth Kshs. 64,745,354,315.00, issued to the Applicants and cancelled. The Respondent's firm filed a request for review on behalf of the Applicants before the Public Procurement Oversight Authority to challenge the decision to cancel the tender and successfully challenged the cancellation of the award and the Procuring Entity (Kenya Airports Authority) compelled to sign the contract with the Applicants.

16. The Respondent argued that, the Request for Review was novel, precedent setting and extremely complex as compelling a procuring entity to sign a contract was virtually unheard of at the time and the Applicants would not have enjoyed the fruits of the contract if not for the Respondent's hard work and toil. Therefore, the Respondent's firm was justified in requesting the Deputy Registrar to enhance the instruction fees. That, if the matter had been before the High court, the Applicant would have been entitled to a minimum of; Kshs. 809,678,928.00, hence the sum awarded by the Deputy Registrar is not only modest but very fair in the circumstances.

17. It was thus argued that, the Applicants have totally failed to demonstrate that the taxing master erred either in law or in fact or to judiciously exercise the discretion conferred by the Advocates Remuneration Order. Therefore, the Reference should be dismissed with costs to the Respondent's firm.

18. The parties disposed of the application by filing submissions. The Applicants submitted in a nutshell that, there is no jurisdiction under the Advocates Remuneration Order for a taxing officer to allow a bill of costs as drawn during a mention of the matter for confirmation of compliance. It is trite law that, no substantive orders can be made during a mention. If the Applicants did not file submissions, the taxing officer should have re-fixed the bill for taxation under Paragraph 14 of the Advocates Remuneration Order 2009 and accorded the Applicants a hearing on a day appointed for taxation.

19. The Applicants relied on the Court of Appeal decision in *Wanjiku v. Esso Kenya Ltd (1995-1998) 1 EA 332 CAK* where the Court stated that, where a matter is fixed for mention, the court has no business determining the substantive issues therein on that date, and it can only do so, if the parties so agree and of course after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. There must be good reasons for adopting contrary procedure repugnant to the administration of justice.

20. The Applicants further submitted that, Paragraph 13(2) of the Advocates Remuneration Order is explicit that, due notice of the date fixed for taxation must be given to both parties, who shall be entitled to attend and be heard. As this did not happen in this case, the ensuing taxation decision is unlawful. Further, there is no provision in the Advocates Remuneration Order 2009, for taxing a bill as drawn because it is unopposed. In allowing the bill 'as drawn', the taxing officer completely failed to take into account the requirement to evaluate the bill and only allow necessary and proper charges, costs and expenses. Reference was made to the case of; *First American Bank v. Shah & others (2002) 1 EA 64 (CCK)*, where the court held that, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

21. It was submitted that, unlike ordinary civil applications under the Civil Procedure Rules, taxation is a *sui generis* procedure which does not require filing of replying papers but only an itemized bill of costs for consideration and taxation by the taxing officer. That, the sum of; Kshs. 75,000,000 awarded as instruction fees was so manifestly excessive and amounted to an error of principle under Paragraph 1 of Part II of schedule V of the Advocates Remuneration Order 2009, ostensibly "given the nature of the proceedings" and without the taxing master elaborating what that nature was or justifying the award under the criteria set out in that paragraph.

22. That the reasons given for the decision was in barely three (3) pages and were only furnished to the Applicants on 13th September 2018, more than two years after the same were requested for. The Applicants made reference to several authorities inter alia; *Ramesh Naran Patel vs. Attorney General & another (2012) e KLR*, *RameshNaran Patel vs. Attorney General & another (2012) eKLR and* ***Republic vs. Minister For Agriculture*** *& 2 Others Ex Parte Samuel Muchiri W'Njuguna & 6 Others (2006) eKLR.*

23. It was further submitted that, the taxing officer suffered an error of principle when she took the tender amount to be the value of the subject matter yet, there was no monetary prayer, as the only prayer in the appeal to the PPARB, was to compel the procuring entity to

formally execute a contract with the Applicants who were the successful bidders and as was legally required of it. That the taxing officer was carried away by the sum of Kshs. 60,000,000,000 value of the tender, and forgot that, it was not the money the Applicants were going to earn but the total cost of putting up a mega modern International Airport Terminal. Thus the value of the subject matter cannot be based on the value of the tender to the client but on the fees the client would derive from performing the tender. Reference was , made to the case of; *Arimi Kimathi & Company Advocate vs Baseline Architects Limited Civil Miscellaneous Application 325 of 2013*. Further the value of the subject matter is itself not necessarily conclusive as to the complexity of a case as held in the case of; *Republic v Public Procurement and Administrative Review Board & 2 others Ex-Parte Sanitam Services (EA) Limited Misc. Application No. 204 of 2013.*

24. The Applicants further submitted that, the taxing officer suffered an error of principle when she proceeded to award getting up fees of Kshs. 25,000,000 under Schedule V, yet the same is only recoverable under Schedule VI of the Advocates Remuneration Order 2009, in relation to proceedings before the High Court. The subject matter herein was before a statutory Tribunal under the Public Procurement and Disposal Act and not the High Court. Further, the increase of the total award by a whopping sum of; Kshs. 50,081,332, ostensibly as Advocate-Client fees simply because it was contained in the bill is an error of principle and alien to schedule V of the Advocates Remuneration Order, 2009 under which the taxing officer ostensibly taxed the bill.

25. Finally the Applicants submitted that the total award of Kshs. 174,283,035 was arbitrary, capricious, excessive, unreasonable and unjustified and gratuitously given to the Advocate. It amounts to unjust enrichment on the part of the Advocate which is against the principles of taxation. Reference was made to the cases of; *Paul Ssemogere & Another vs Attorney General SCCA No. 5 of 2001* and *PremchandRaichand ltd v. Quarry Services of East Africa ltd (no. 3) {1972} EA 162* where the court held that, costs should not be allowed to rise to a level as to confine access to justice to the wealthy.

26. However the Respondent filed its submissions and argued that the Applicants have totally failed to demonstrate that they complied with the very provision within which they have moved the court. That a reference is not an omnibus application, it must be succinct and the Applicants must specify what specific items contained in the bill are being contested. The Reference and the notice of objection before the court fall well short of this standard. A casual perusal of the grounds on the face of the application, reveals that the Applicants only takes issue with items 1 and 2 of the bill and yet prays for the setting aside of the decision with respect to all other items. Therefore the present application is not a Reference but disguised Appeal against a decision arising out of uncontested proceedings before the taxing master.

27. The Respondent further submitted that the assertion that the taxing master erred by taxing the bill during a mention and that no substantive orders can be made during a mention does not hold any weight based on the factual background of the matter. The Respondent argued that the case of; *Wanjiku vs. Esso Kenya Ltd (supra),* cited by the Applicants supports the action taken by the taxing master, as the record indicates that, counsels for both parties were present in court and were allowed to submit before the taxing master taxed bill. Further reference was made to the case of; *Star Publication Limited & Another vs. Ahmednasir Abdullahi & 5 Others [2015] eKLR* where the court held that, it has a duty to handle all matters presented before it, where the parties had been properly notified of the mention for directions.

29. It was submitted that the taxing master's decision cannot be impugned based merely on issues of quantum per se. Reference was made to the case of; *First American Bank of Kenya vs. Shah And Others [2002] 1 EA 64 (CCK)* to argue that the sum awarded was commensurate to the work done. Reference was further made to the case of; *Joreth Limited vs Kigano & Associates (supra)* to argue that the value of the subject matter of a suit for the purposes of taxation of a bill, ought to be determined from pleadings, judgments or settlement. That the taxing master herein was guided by Schedule V of the Advocates Remuneration Order 2009, which is the scale applicable in respect of business the remuneration for which is not otherwise prescribed.

30. That the Respondent was awarded a modest sum of Kshs. 75,000,000.00 as instruction fees, after it unsuccessfully sought to have this figure enhanced to Kshs. 100,000,000.00. Reference was made to the case of; *Wambugu, Motende& Company Advocates vs. Attorney General [2013] eKLR,* where the Advocates were appointed by the Government of Kenya to defend proceedings in a claim whose value was Kshs. 1,554,922,350.00. The taxing officer initially awarded instruction fees of Kshs. 4,000,000.00. However, Retired Justice Havelock reviewed the instruction fees and awarded the Advocates the sum of Kshs. 25, 000, 000.00 under Schedule V of the Advocates Remuneration Order. The Respondent argued that as such there is no basis to interfere with the discretion of the taxing master in awarding the sum of Kshs. 75,000,000.00 as instruction fees.

31. The Respondent further submitted that, according to Paragraph 2 of the Schedule VI, the Advocate is entitled to getting up fees where denial of liability is filed or where issues of trial are joined by the pleadings. Reference was made to the case of; *Directors and Shareholders of Nakumatt Investments Limited Vs County Government of Mombasa & Another [2017] eKLR.*

32. Finally, the Respondent submitted that the Applicants did not raise the issues now raised before the taxing master That as held in the case of; *Galaxy Paints Co Ltd Vs. Falcon Guards (2000) 2EA 385,* issues for determination in a suit generally flow from the pleadings and a trial court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination and unless pleadings are amended, parties are confined to their pleadings .

32. Further the Applicants had not raised any issues touching on the quantum of the bill before the taxing master and have raised a fresh objection towards the awarding of; Kshs. 50,081,332, as an increase of basic fee, through their submissions. As such they are precluded from raising new grounds of challenge to the same. Further reference was made to the case of; *Kenya Shell Limited vs Kileleshwa Service Station Limited (2006) eKLR* where the court relying on the cases of; *Chalicha F.C.S. Ltd. vs Odhiambo & 9 Others [1987] KLR 182* and *S. N. Shah Vs. C.M. Patel & Others [1961] 1EA 397* held that cases must be decided on the issues on the record and not outside the pleadings.

33. Finally reliance was laid on the case of; *Salem Ahmed Hasson Zaidi vs. Faud Hussein Humeidan 1960 EA at Page 92* where it was held that; "if a party neglects to produce evidence and prove the claim as he is bound to do, the court can proceed to decide the suit on such materials as is actually before it and the decision so pronounced, shall have the force of a decree on the merits notwithstanding the defaults of the party". Thus the Reference was described as an abuse of the court process and supported by the case of; *John Mathiaka Kimundu vs. Lawrence Mwangi T/A Lawrence Mwangi & Co Advocates [2015] eKLR.*

34. I have considered the Reference in light of the arguments advanced and the submissions filed. I find the following issues have arisen for determination:-

a) Whether there is a competent Reference;

b) Whether the Applicants have satisfied the criteria for setting aside the decision of the taxing officer herein;

c) Whether the court should grant the prayers sought; and

d) Who should bear the costs.

35. I have considered the first issue and note as aforesaid that the first Reference dated 25th August 2016, was struck out for being incompetent following the objection raised by the Applicant/Respondent. The Respondent argued that:-

"it is trite law that a Reference flows from the decision of a taxing master and without the same, the Applicants' grounds will be based purely on conjecture and guess work/speculation as to what the reasons were".

36. The court then concurred with that argument and found that, it would not be able to evaluate the Application on merit without the reasons or the basis upon which the decision was based. That it would not be able to make a finding as to whether; the amounts awarded are excessive, unwarranted or otherwise. The court then held as follows:-

"In my considered opinion Applicants should have sought for reasons from the Taxing officer as soon as the Court delivered the ruling allowing them to file the Reference herein. If the Taxing officer refused and/or declined to provide the same the Applicants should (sic) have simply moved the Court on one ground of (sic)the Taxing officer's failure to give the reasons and seek for setting aside the taxed bill".

37. In conclusion the Court found that;

"as the Applicants maintain that they were not supplied with reasons, the Reference herein remains incomplete and incompetent. In that case it cannot be evaluated on its merit. The Court has no option but order and I hereby order that the Application is struck out with costs to the Respondent".

38. The findings above informed the current Reference, hence, the question whether there is a competent Reference before the Court. I note from the documents annexed to the affidavit sworn in support of the application, a document marked "XA8", being a letter from the taxing officer, forwarding the reasons for taxation. In that regard, the Reference is prima facie deemed to be competent.

39. Having held so, I shall now delve into the merits of the application. The next issue raised is whether, by the Applicants seeking, under prayer (3) of the chamber summons, that the decision of the taxing officer delivered on 17th March 2016, in so far as it relates to the "entire bill" be set aside and/or vacated, renders, the application as incompetent, in view of the fact that, under Rule 11(1) and (2) of the Advocates Remuneration Order 2009, the aggrieved party is required to specify the particular items, to be challenged at the hearing of the Reference.

40. The provisions of Rule 11(1) of the Advocates Remuneration Order 2009, states as follows:-

"11 (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 <u>of the items of taxation to which he objects</u>" (emphasis added)

41. Thus the items challenged should be stated in the notice of objection lodged. I have taken note of the "notice of objection" dated 22nd March 2016, filed by the Applicants pursuant to the requirements of Rule 11(1) and (2) of the Advocates Remuneration Order 2009, and note that it reads as follows;

"Take Notice that the 1st and 2nd Respondents object "to the decision of the taxing officer delivered on 17th March 2016 in so far as the same relates to taxation of the <u>"entire"</u> Advocate/Client Bill of costs dated 12th February 2015 and requests for the reasons thereof as provided for under paragraph 11(2) of the Advocates (Remuneration) Order." (emphasis added)

42. It is thus clear from both the notice of objection filed by the Applicants and prayer (3) of the chamber summons application that, the Applicants are challenging the taxation of the "entire" bill and not specific items. However, it is noteworthy that Rule (11) (1) is not couched in a mandatory terms. It states the party "may" give notice to the taxing officer of the items objected to. Even then, the argument advanced by the Applicants is that, the bill was not heard and determined on merit and therefore the issue of objecting to specified items does not arise.

43. In my considered opinion, taking into account the circumstances of this case, which I find to be unique and which I shall be delving into in depth herein, and in view of the fact that courts should hear and determine matters on substantive issues in the interest of justice, as stipulated under the provisions of Article 159(2)(d), that; justice shall be administered without undue regard to unprocedural technicalities, I hold that, the failure to specify the items objected to; cannot render the Reference incompetent for want of compliance with the requirements of rule 11(1) and (2) of the Advocates Remuneration Order 2009. The objection raised by the Respondent can only be considered as one of the grounds for determining the Reference of merit.

44. The next issue to consider is whether the taxing officer erred by taxing the bill on the date set for mention to confirm the filing of submissions by the parties. The Court was referred to Paragraph 13(1) and (2) of the Advocates Remuneration Order which states as follows:-

> *"13(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form;*
>
> *(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard."*

44. Further Reference was made to Paragraph (14) which states:-

> *"Any advocate who after the due notice without reasonable excuse fail to appear on the date and at the time fixed for taxation or on any date and time to which such taxation is adjourned, or who shall in any way delay or impede the taxation, or put any other party to any unnecessary or improper expense relative to such taxation shall, on the order of the taxing officer, forfeit the fees to which he would otherwise be entitled for drawing his bill of costs and attending the taxation, and shall in addition be personally liable to pay for any unnecessary or improper expense to which he has put any party; and the taxing officer may proceed with such taxation ex parte."*

45. The Applicants relied on these provisions to argue that, a bill of costs cannot be taxed unopposed where the opposing party has not been given an opportunity to be heard. In my considered opinion, it is clear from the above provisions that, before a bill is taxed, notice of taxation must be given to both parties. A perusal of the proceedings herein, reveal that on 18th February 2016, counsels for both parties appeared before the taxing officer, whereupon the Respondent's counsel was granted fourteen (14) days within which to file their submissions on the bill. The order of the taxing officer is very clear that the matter was then stood over to the 17th March 2016 "to confirm compliance".

46. Indeed on 17th March 2016, the counsel for the Applicant/ Respondent is on record saying that the purpose of the mention on that date was to confirm whether the Respondents/Applicants had filed their submissions, since the same had not been served. The Respondents/Applicants counsel in response informed the taxing officer that, they had not filed their submissions as they were negotiating a settlement and requested for two weeks to file the submissions, in case the negotiations did not succeed. The request was opposed by the Applicant/Respondent's counsel.

47. After considering the request for time and objection thereto, the taxing officer held that, the Respondents/Applicants had failed to comply with directions given and stated "notwithstanding the Respondents has failed to comply with the court's directions. The bill of costs dated 12th February 2015, stands unopposed." With utmost respect to the taxing officer, there was no order and/or notice to the parties that, the date of; 17th March 2016, was set down for the hearing of the taxing of the bill. It was for mention for confirmation of filing of submissions. Therefore in accordance with the provisions of Rule 13(2) and 14 of the Advocates Remuneration Order 2009, due notice was not given to the parties before the taxation. In that regard, I uphold the submissions by the Applicants, that the bill could only have been allowed unopposed while no notice had been given to them and they had failed to attend to the taxation.

48. The other issue closely related to the issue of notice, is whether both parties were heard on the taxation of the bill before the same was taxed. The Respondent argues that both parties were heard before the bill was taxed. The Applicants argue to the contrary. A perusal of the Court record reveals that, after the taxing officer declined to grant the Applicants more time to file their submissions, and held that the bill of costs stood unopposed, the taxing officer went on to state as follows;-

> *"the same is supported by documents on record and submissions filed by the Applicant. I allow the same as drawn at Kshs. 174,283,035/=."*

49. From this record, there is no indication that the parties were heard by the taxing officer before the bill was taxed. The circumstances under which a bill may be taxed ex parte are clearly stipulated under Rule 14 of the Advocates Remuneration Order reproduced herein above. The counsel who draws the bill should not fail to appear on the date fixed for taxation and/or in any other way delay or impede the expeditious disposal of the taxation to the detriment of the other party. That is not the case herein. Even then the consequences of the conduct of the counsel are clearly spelt out and include forfeiture of the fees to incur personal liability. Those are not the circumstances herein.

50. In my considered opinion, whether the Applicants had filed submissions or not, they should have been given an opportunity to be heard and/or given reasons why they would not be heard. The provisions of Article 48 of the Constitution of Kenya, gives every person a right to access to justice. It is also a rule of natural justice that a person should not be condemned unheard. I therefore concur with the arguments advanced by the Applicants that they were not heard on merit and therefore the reasons of challenging the entire bill.

51. The Applicants further argued that no substantive orders could be made on a date fixed for mention of the matter. However based on the arguments advanced and authorities cited by the parties and referred to herein, in particular the cases of; *Wanjiku v. Esso Kenya Ltd (supra), and Star Publication Limited &Another Vs. AhmednasirAbdullahi&5 Others (supra)* the court can hear and determine substantive issues at a date fixed for mention where the parties agree and/or are given an opportunity to be heard. In that regard, I uphold the submissions by the Respondents that substantive orders can be made on a mention date, but again as stated the taxing officer should have adjourned the matter and/or accorded the parties an opportunity to be heard before the decision was made.

52. I shall now turn to the merit of the decision. As can be noted from the record, the taxing officer did not give any reasons on record at the time of the taxation of the bill. The record does not indicate that the reasons would be given later. Indeed, from the documents annexed to

the application, the Applicants wrote to the taxing officer on 19th April 2016 seeking for the reasons. There is no indication that they were given the reasons and that led to the striking out of the first Reference, filed by the Applicants as herein stated. After the ruling delivered on 16th April 2018, striking out the Reference, the Applicants wrote to the taxing officer on 2nd May 2018 for the reasons. They were not given, necessitating a reminder dated 11th May 2018. On 15th June 2018, the taxing officer responded and notified the Applicants that she was working on the same. On 6th September 2018, the Applicants send a further reminder. Subsequently the taxing officer forwarded the reasons for taxation vide a letter dated 13th September 2018.

53. Thus it is noteworthy that the reasons for taxation were rendered after a challenge to the taxation of the bill. I have considered the same and basically the taxing officer lays the chronology of events that prevailed before the taxation, from the service of the bill of costs, to the directions given to the parties to file and serve the response to the bill and/or file submissions thereto. The taxing officer further observes that, the parties had not extended effort towards the alleged negotiations to settle the matter. The taxing officer then deals with the merit of the bill.

54. Before I consider the same, I shall make reference to the legal principles that govern taxation of bills and/or References generally. The principles to consider while dealing with a Reference were set down in the case of; *First American Bank of Kenya vs Shah & Others (2002) 1 EA 64*, as follows:-

> *a) That the 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 manifestly excessive as to justify an inference that it was based on an error of principle;*
>
> *b) It would be an error of principle to take into account irrelevant factors or omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;*
>
> *c) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;*
>
> *d) It is within the discretion of the taxing officer to increase or reduce the instructions fees and the amount of the increase or reduction is discretionary;*
>
> *e) The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;*
>
> *f) The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;*
>
> *g) The mere fact that the Defendant does research is not necessarily indicative of the complexity of the matter as it may well be indicative of the Advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.*

55. It follows from the above principles that, the taxing officer has the discretion in the taxation of a bill of costs. However in the exercise of that discretion, the taxing officer must clearly set out the factors taken into account in arriving at the decision made. In that regard the Court held in the case of; *Republic vs Minister for Agriculture & 2 others exparte Samuel MuchiriW'Njuguna& 6 Others (supra)* inter alia that:-

> *"the taxing officer ought to describe accurately the nature and responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.....*

56. The Court further stated that :-

> *".....since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served without either a specific statement of the authorizing clause in the law or a particularized justification of the mode of exercise of any discretion provided for.....the complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated....."*

55. In the same vein in the case of; *Joreth Limited Vs. Kigano and Associates (supra)*, the Court held that:-

> *"A Taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances."*

56. Similarly, the provisions of; Paragraph 1 of Part II of schedule V of the Advocates Remuneration Order states that among the factors to consider in assessing fees are;-

a) Care and labour required by the advocate;

b) the number and length of the papers to be perused;

c) The nature and importance of the matter;

d) The value (where ascertainable) of the subject matter;

e) Interest of the parties;

f) Complexity of the matter, and

g) Novelty of the matter

57. In the instant case, the taxing officer had this to say on the merits of the case;

(ii) "Secondly and on merits of the Bill of costs, the same was taxed as drawn as follows;-

(a) The value of the subject matter was indicated to be USD 653,782,814.5 (Kshs. 60,148,018,970) and given the nature of the proceedings and the value of the subject matter, a sum of Kshs. 75,000,000/= as instruction fees as per the provisions of both Schedule V and XI of the Advocates Remuneration Order is a fair amount allowed as instruction fees;

(b) On getting up fees, the same is usually drawn from the instruction fees. It is a third of the amount. Consequently one third of Kshs. 75,000,000 is Kshs. 25,000,000/=;

(c) The rest of the items on perusal and disbursement were unopposed. They were allowed as prayed."

57. As can be noted from the above, there are no details of the factors the taxing officer took into account in taxating the bill and in particular in determining the instructions fees, as guided by the legal principles stated above. In the case of; *Opa Pharmacy Ltd vs Howse & Mcgeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) EA 233*, it was held, "the failure to give any reasons for the decision amounts to an arbitrary determination of the figure and is not a judicial exercise of one's discretion. In that case, it is proper to conclude that, the taxing officer, herein wrongly disregarded factors or principles which were proper for her to consider in determining the amounts to award. An omission *of the relevant factors amounts to an error of principle and material* misdirection, which justifies interference by the Judge. Reference is made to the case of; *Preller and others v Jordaan 1956 (1) SA 483 (A) at 492 G-H.* Thus in my considered opinion, the taxing officer fell in error of principle when she held that the bill was unopposed and taxed it as prayed. Therefore in the absence of the details of factors that the taxing officer considered which includes but are not limited to: nature and responsibility on the counsel, the input in terms of skill, research and the nature of the cause the decision cannot stand

58. However, the conduct of the Applicants before the taxation and thereafter cannot be left unnoticed and/or disregarded. The Court record and the decision of the taxing officer indicate that, the Applicants were given an opportunity to file a response to the bill of costs, but they did not. They were then given indulgence for a long time to file and serve submissions on the same and they did not. Technically, they could only be heard on principles of law. Even then, after the taxation, the Applicants did not move the Court immediately. In the meantime the Respondent moved and filed an application for enforcement of the certificate of taxation. The Applicants then filed a Reference that turned to be incompetent as herein stated.

59. As at this stage of the proceedings, the Respondent has filed a second application dated 10th July 2018, to enforce the certificate of taxation. The Applicants had sought herein that the notice of motion application be heard after this application and/or in the alternative, both applications be heard together. Obviously that has been overtaken by events, by the hearing of this application on priority to the Respondent's motion.

60. Be that as it were, as previously stated herein, the Applicants do not dispute retaining the Respondent's law firm to act for them in the subject matter that informed the bill. The Respondent is therefore entitled to payments whatever the figure. In that case they cannot therefore by their conduct of indolence, continuously wade off the Respondent from their right to fees. The principles of Equity stipulates that; "equity assists the vigilant and not the indolent" In the same vein for justice to be done, the scale therefore must balance.

61. In that regard, if the Applicants have to be accorded any further opportunity to be heard on the bill, then the grant of such an order must be conditional to guard against any continued delay. I therefore order that, the subject bill of costs herein be remitted to a different taxing officer to be taxed on priority basis. To expedite the matter the taxing master shall have regard to the documents filed by the parties and shall be at liberty and exercise discretion to hear the parties on any other issue considered important in the interest of justice.

62. However, in the meantime, the Applicants shall deposit 50% of the disputed taxed sum in an interest earning account in a reputable bank and/or financial institution (to be agreed on by the parties) in joint names of the lawyers representing the parties. The deposits shall be made within twenty one (21) days of this order. In default thereof; the Respondent shall be at liberty to set down its pending notice of motion application for hearing and determination, irrespective of whether the Reference filed by the Applicants will have been heard and/or determined or not.

63. The costs related with this application shall abide the compliance with the conditions set herein in relation to the deposit of the funds. For clarity, if the Applicants do not comply with the orders then they shall bear the costs in favour of the Respondent. If the Applicants comply, the costs shall be in the cause.

64. It is so ordered

Dated, signed and delivered on this 12th day of September, 2019 in an open court.

GRACE L NZIOKA

JUDGE

In the presence of;

Ms. Gachomba for the Applicant/Respondent

Ms. Kamau for the Respondents/Applicants

Dennis----------Court Assistant