REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC APPL. NO. 510 OF 2012

GICHUKI KING'ARA & COMPANY ADVOCATES.....ADVOCATE/RESPONDENT

VERSUS

KING'ORANI INVESTMENTS LIMITED

TRANSFLEET LIMITED

TRANSFLEET EPZ LIMITED..CLIENT/APPLICANTS

R U L I N G

1. The application dated 24th February, 2016 seeks orders that the decision of the Taxing Officer delivered on 17th November, 2015 in respect of the Bill of Costs dated 14th September, 2012 be set aside entirely.

2. The application is predicated on the grounds stated therein and the supporting and the supplementary affidavits sworn by John M. Ohaga, Counsel for the Applicant. The Applicants are aggrieved by the Ruling herein by the Taxing Officer delivered on 17th November, 2015 wherein the Bill of costs herein dated 14th September, 2012 was taxed at Ksh.11,675,079/=. It is averred that the Taxing Officer failed to determine the question whether there was in existence an agreement between the Advocate and the client on the fees payable. It is also contended that the award of Ksh.7,000,000/= as instructions fees is manifestly excessive as to represent an error of principle on the part of the Taxing Officer.

3. It is further averred that the Applicants being dissatisfied with the said ruling filed a Notice of Objection objecting to the entire Ruling of the Taxing Officer and requested for reasons of the said Ruling. That the copy of the Ruling was obtained on 16th February, 2016.

4. In a replying affidavit filed in opposition to the application, it is stated that the application at hand is an afterthought and an abuse of the court process and meant to cause delay. The Respondent gave a chronology of the events herein and decried the multiplicity of applications herein. It is contended that Rule 11(2) of the Advocates Remuneration Order deals with References before a judge and not orders of setting aside as prayed herein. That the Applicants have failed to follow the rules in respect of the filing of a Reference. The Respondent urged the court not to hear the Applicant until security for the decretal sum is furnished.

5. The application was disposed of by way of written submissions which I have considered.

6. On whether the application was filed within the stipulated time, the Applicant has exhibited the Ruling by the Taxing Officer dated 17th November, 2015 which is the subject of the instant application. The said ruling was certified as a true copy of the original on 16th February, 2016. A letter by the Applicants' Advocates to the Taxing Officer dated 25th January, 2016 has also been exhibited. The same was stamped as received on 16th February, 2016. There is no evidence to controvert the 16th February, 2016 as the date the ruling was made available. The said ruling contains the reasons for the decision. It would therefore have been superfluous for the Applicants to seek for the reasons for the taxation.

7. As stated in the case of **Evans Thiga Gaturu Advocate v. Kenya Commercial Bank Limited [2012] eKLR** the court held that:

> **"In the present case, the ruling on taxation was made on 6th July, 2011. If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he could request for the same in writing, in which case, he would be bound to wait for the same."**

8. Rule 11(2) Advocates Remuneration Order:

> **"(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."**

9. Bearing in mind that the Ruling of the Taxing Officer which contained the reasons for the taxation was certified on 16th February, 2016, this court's finding is that the application at hand which was filed on 25th February, 2016 was filed within the time provided by the law. The Notice of objection is stamped as received in court as 18th November, 2015.

10. The issue whether the application at hand is *res judicate* has been raised. Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya provides as follows:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

11. It has been argued by the Respondent's side that the application dated 13th February, 2013 brought by the same Applicants herein against the Respondent was litigated before Hon. Lady Justice Kamau who delivered a ruling on 30th August, 2013. That another ruling was delivered by Hon. Lady Justice Njuguna in an application for entry of judgment herein which matter was between the same parties.

12. I have perused this file. I have seen the ruling herein by Hon Lady Justice Njuguna in respect of the application dated 17th December, 2015 which sought orders for entry of Judgment for the taxed sum of Ksh.11,675,079/=. The said ruling was delivered on 9th June, 2016 and dismissed a Preliminary Objection raised against the application and allowed the application. Subsequently thereto, Hon Lady Justice Njuguna delivered a ruling on 31st October, 2016 in respect of the application dated 28th July, 2016 and reviewed and set aside the ruling delivered on 9th June, 2016. The instant application is therefore not *Res judicata* the orders made by Hon. Lady Justice Njuguna.

13. The ruling by Hon. Lady Justice Kamau delivered on 30th August, 2013 in HCC Misc. Appl. No. 548/12 was in respect of the application dated 30th February, 2013 which sought orders that the Bill of Costs dated 14th September, 2012 be struck out. The court held as follows:

> **"After a careful perusal of the submissions by the parties I am of the view that, firstly, this court does not have jurisdiction to stay the determination of the Bills of Costs once the same were lodged, unless the same are stayed for any other lawful cause. The arguments advanced by the client...before the Taxing Master. This court's jurisdiction can only be invoked where there is a Reference under paragraph 11 of the Advocates (Remuneration) Order and not before the said Bills of Costs are taxed."**

> **"Secondly, I did note the client assertions that the sum of Ksh.30,000,000/= that was paid to the Advocates was in settlement of all claims. Evidently, this is not a matter that this court can determine unless it unlawfully and illegally assigns itself the duty of interrogating the items in the Bill of Costs...was said to have been in full and final settlement of several matters that the Advocate was handling on behalf of the client. The Taxing Master is better placed to determine in which matters the said sum related to and if a wrong decision was arrived at, for the aggrieved party to come to the High Court of Kenya under a Reference as provided for under the Advocates (Remuneration) Order..."**

14. Hon. Lady Justice Kamau then proceeded to dismiss the application. The word **"dismissed"** must be looked at in the context of the said Ruling. The court clearly stated that it had no jurisdiction to deal with the matter and that the jurisdiction lay with the Taxing Officer. Therefore the issue was not heard and finally determined.

15. The ruling by the Taxing Officer makes no mention of the agreement between the parties although the issue was raised in the submissions made by both parties herein. It was pertinent for the Taxing Officer to make a finding on the question of the agreement as per the ruling by Hon Lady Justice Kamau.

16. The ruling by the Taxing Officer observed that the parent suit did not involve a prayer of a monetory nature. The Taxing Officer considered the principles set out in the case of **First America Bank of Kenya v Shah & others 2002 1 EA 04** which included the nature of the matter, the amount or value of the subject matter, the interest of the parties, the general conduct of the proceedings and any direction by the judge. The instruction fee was then taxed at Ksh.7,000,000/= out of the Ksh.47,043,000/= requested.

17. Items No. 1 was reflected in the Bill of costs as **"receiving instructions to file a criminal Revision application against the Respondents seeking orders that the court be pleased to call for and examine the record of criminal proceedings before the SPM Makadara in Misc. Cr.Appl.No.1 of 2007 for purposes of satisfying itself of the correctness legality and or propriety of the finding made on 15th June, 2007 reinstating the warrants of search and seizure of the assets of Mugoya Construction and Engineering Ltd without exclusion of the Applicants assets."** Other reliefs sought included stay of the warrants of search and seizure pending the hearing and determination of the application and finally the review and setting aside of the orders complained of.

18. The taxing of the instruction fee at Ksh.7,000,000/= in this court's humble view is excessive and does not reflect a fair value of the responsibility undertaken by the Respondents. Same in the circumstances amounts to an error of principle. As stated in the case of **Kipkorir, Totoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** which considered examples of what would constitute error of

principle:

> **“An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see Arthur v Nyeri Electricity Undertaking (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (**see **Devshi Dhanji v Kanji Naran Patel (No.2) [1878] KLR 243. We have no doubt that if the Taxing Officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a Taxing Officer finds that the Taxing Officer has committed an error of principle the general practice is to remit the question of quantum for the decision of Taxing Officer (**see **D’souza v Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (**see **Devshi Dhanji v Kanji Naran Patel (No.2) supra”**

19. With the foregoing, I find the application has merits and allow the same. The Bill of Costs to be taxed afresh by a different Taxing Officer.

Dated, signed and delivered at Nairobi this 7th day of Nov. 2019.

B.THURANIRA JADEN

JUDGE