



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 284 OF 2015

(CONSOLIDATED WITH MISC. 175, 187, 208, 210, 285, 286 AND 287 ALL OF 2015)

ROBINSON ONYANGO MALOMBO T/A

O.M ROBINSON & CO. ADVOCATES.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

The Application

1. The Amended Notice of Motion dated 24.10.16 prays for the following orders:

- (a) That this matter be certified as urgent and be heard ex parte in the first instance.
- (b) That this Amended Motion be allowed, and the Proceedings be taken on the basis of the same.
- (c) That this Honorable Court be pleased to review or vary its Decree made on the 20th April 2016, and consequently have the same set aside.
- (d) The Judgment entered herein on the 13th April 2016 in favour of O.M. Robinson & Company, Advocates, in the sum of Ksh. 232, 116, 814.20 and all consequential orders therefrom be wholly set aside.
- (e) An Order that the time allowed for making a reference to the High Court in respect of the Ruling of the Taxing Officer dated 11th February 2016 (and all the Bills of Costs taxed by the firm of O.M. ROBINSON & COMPANY ADVOCATES against the Respondent/ Applicant) be extended by at least 30 days to enable the County Government of Mombasa to file a reference to this Court, challenging the quantum of the Advocates Bill of Costs taxed at a sum of Ksh. 232, 116, 814.20.
- (f) In the alternative and without Prejudice to Prayer (e) above for the reasons set out in the Affidavit in support of the Motion, the Court do exercise both its Inherent Power and Inherent Jurisdiction as a Court of Law, and set aside both the Ruling of the Taxing officer dated 11th February 2016, and the certificate of Costs dated 23rd February 2016, with a direction that the Advocates Bill of Costs herein be taxed afresh by a different Deputy Registrar.
- (g) That the Costs of this application be provided for.

2. The application is premised on the grounds set out therein and is supported by affidavit of Jonathan Nyongesa sworn on 24.10.16 and a Further Affidavit sworn on 17.2.17.

3. The Applicant's case is that there is an error apparent on the record as the costs being taxed was between Advocate and his client and not party-party; accordingly, the decree could only be issued after the institution of suit by way of Plaintiff in a different cause (under Section 48 of the Advocate Act (Cap.16); that after institution of a suit and service, Section 49 of the Advocates Act requires sufficient time be given for defence to be filed by the Applicants herein if there is no agreement as to costs; that accordingly the application made for summary judgment within the same miscellaneous cause is a nullity and the same cannot stand; to date, no suit has been filed nor has a Plaintiff been filed or served upon the County Respondents herein; there is an error on the face of record as the Court fell into error by equating a taxation with a suit; the same grounds are relied upon for all matters filed in this series by the same advocates against the Respondent herein; that the application for review has good chances of success as is apparent on the finding of the said judgment itself;

4. Alternatively the Applicant states that Section 51(2) of the Advocates Act, pursuant to which the Notice of Motion application dated 21st March 2016 for entry of Judgment was made does not make provision for that application to be heard and determined *ex parte*; further the Applicant in the said application dated 21st March 2016 did not adduce any affidavit evidence or otherwise to demonstrate to the Court that the issue of retainer between Advocate and client was not in dispute, before the Court could proceed to enter judgment as prayed in that application; it was the duty of the Applicant to satisfy the Court that there was no dispute between him and the client on the issues relating to retainer before any judgment could be entered in his favour. That burden was not discharged by the Applicant in the Notice of Motion dated 21st March 2016; the subject Bill of Costs was taxed on the pretext that High Court Miscellaneous Civil Application No. 41 of 2012 from which that Bill arose was heard by this Court on the 27th June 2012, when that suit (No 41 of 2012), is still pending, and has not been heard; further, High Court Misc. Civil Application No. 41 of 2012 aforesaid was last in Court on the 22nd November 2012, before the Hon. Mr. Justice Tuiyot, when the same was stood over generally; for the above reasons, the firm of O. M. Robinson & Co. Advocates misrepresented to the Court when at its item No. 26 of the said Bill, it claims for a getting up fee for trial, which trial it further states was held/conducted on the 27th June 2012, when that firm was at all times fully aware that no hearing had taken place in High Court Misc. Application No. 41 of the 2012, which is still pending; accordingly, the entire Bill for taxation was prematurely presented to Court, and is based on outright misrepresentations;

5. The Applicant further states that it has paid to the firm of O. M. Robinson & Company Advocates, a sum of Ksh.73,200,000.00 between the months of January 2014 and June 2014. For this reason, the said Advocates were under a Mandatory obligation and duty in law to disclose this sum as having been paid to it, and the terms upon which the same was paid, and where applicable, give credit to the client for that sum; and the jurisdiction of the taxing officer to tax the subject Bill of Costs and in many others, had not arisen, if at all, and the same was not properly invoked in the circumstances.

6. At Paragraph 56 of that Affidavit, the Applicant tabulated the amounts of moneys allegedly paid by the Respondent to the Applicant in the year 2014, which amounted to a total sum of Ksh. 73,200,000. The Applicant avers further in addition that in addition further sums were paid to the Respondent as follows:

<u>Period</u>	<u>Amount Paid</u>
(a) 30.07.2010 – 31.03.2011	Ksh.6,252,561
(b) 5.08.2011 - 11.05.2012	Ksh.29,478,000
(c) 24.07.2012 - 28.02.2013	<u>Ksh. 12,700,000</u>
Total	<u>Ksh. 48,430,561.</u>

hence a total payment of **Ksh. 121, 638, 561.00**. The Applicant avers that the Respondent has not acknowledged any of these payments in the said Bill of Cost which he taxed.

7. For the foregoing reasons the Applicant prays for the setting aside of all the taxations aforesaid and consequences arising therefrom, and the leave to file a reference out of time.

The Response

8. The motion is opposed by the Respondent vide a Notice of Preliminary Objection dated 27.10.16 and a Replying Affidavit sworn by Robinson Onyango Malombo on 27.10.16.

9. The Respondent's case is that the said Application being in the nature of an Omnibus Application is fatally and incurably defective as it seeks various prayers that stem from both the Civil Procedure Rules and the Advocates (Remuneration) Order. The said prayers sought in particular prayers (c), (d) and (e) are not made in the alternative of each other and are governed by different rules which are adjudicated by different judicial principles; that this Court having entered Judgment on 13th April, 2016, became *functus officio* and the said Application cannot therefore be entertained; that the Miscellaneous Cause herein was brought under Section 51(2) of the Advocates Act Cap 16 Laws of Kenya, which is a complete and self-governing code and the Client/Applicant cannot therefore import the provisions of the Civil Procedure Act, Rules and/or the Constitution which are inapplicable in this matter; that without prejudice to the generality of the foregoing prayer (e) of the said Application seeks enlargement of time within which to file a Reference yet the said Application is not anchored under paragraph 11(4) of the Advocates Remuneration Order which is the relevant provision in respect to enlargement of time; that even assuming the said Application was anchored under paragraph 11(4) of the Advocates (Remuneration) Order, prayer (e) is premature and cannot be granted as the Client/Applicant has not filed an objection as required by paragraph 11(1). The Client/Applicant must first seek leave of the Court to be allowed to file its objection out of time as required by paragraph 11(1) and (2) of the Advocates (Remuneration) Order after which he can file his Reference; that in view of the foregoing, this Court lacks jurisdiction to entertain this Application as it can only be drawn in issues of taxation by way of a Reference made under paragraph 11 of the Advocates (Remuneration) Order; that the issues raised in the said Application by the Client/Applicant were already raised and canvassed by its previous Advocates in their Notice of Motion Application dated 11th August, 2016, filed in Miscellaneous Application No. 209 of 2015 which was consolidated with Miscellaneous Application No. 210 of 2015. This matter and several others have since been consolidated with the above mentioned files.

10. The Respondent avers that on 9th September, 2016, this Court delivered its Ruling and dismissed the said Application. The Client/Applicant in prayer (e) has sought the exact same prayers as sought in the Application that was dismissed noting that it relates to all Bills taxed by the Advocates/Respondent's firm; that in view of the sentiments above, the prayers sought in (e) and (f) above are for all intents and purposes *res-judicata*; that even assuming the said Application was properly before this Court, which it is not, the said

Application has been filed over 5 months after delivery of Judgment of which the Client/Applicant was fully aware. The said delay is inordinate, inexcusable and unreasonable by any standards.

11. Further the Respondent states that the said Amended Notice of Motion is incompetent, fatally and incurably defective and a gross abuse of the Court process and ought to be dismissed with costs. The Respondent avers that the Applicant has narrated a 'purported' chronological events in what transpired in Judicial Review Application No. 41 of 2012, without disclosing the source of his information. The Respondent states that the Applicant is mischievously trying to argue the Reference through the back door and should first wait for leave to be allowed to file a Reference out of time before divulging into such issues. In response to paragraph 56 and 57 of the Supporting Affidavit the Respondent denies ever receiving the aforesaid amounts in respect of the Bills which he taxed and avers that bank statements are not proof of payments and that payments are done by way of vouchers. And that what he claimed is what was taxed and this did not include any moneys allegedly paid to him by vouchers. The Respondent avers that what he claimed is what was taxed and this did not include any moneys allegedly paid to him through bank statements.

Submissions

12. The Applicant was represented by three learned counsel led by Mr. Paul Buti, Mr. Mohamed and Mr. Ondego, while the Respondent's learned counsel was Mr. Gomba.

13. Mr. Buti submitted that this Court has jurisdiction to grant prayer nos. (c), (d) (e) and (f) as sought in the application dated 24th October 2016. Counsel stated that the taxation of costs is part of the execution process under the Civil Procedure Rules. Therefore, an application to review, vary and set aside a Decree by a taxing officer can be brought before the Court using the provisions of the Civil Procedure Rules. Counsel cited **Labh Singh Harman Singh Ltd vs. Attorney General & 2 others [2016] eKLR** Murithi J in allowing the application to extend the time to file a Reference to the Certificate of Costs opined that:

"...It is clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. Indeed, section 94 of the Civil Procedure Act provides as a general rule that execution of orders of the court should await the confirmation of the costs by taxation unless the Court grants leave for execution before taxation of costs.

Section 94 of the Civil Procedure Act is in the following terms:

"94. Execution of decree of High Court before costs ascertained

Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation."

Moreover, section 89 of the Civil Procedure Act provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs. Section 89 of the Act is in terms as follows:

"89. Miscellaneous proceedings

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction."

It follows, in my view, that the provisions of the Civil Procedure Act with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the Court from the taxation of a Bill of Cost by a Taxing Officer of the Court under the Advocates' Remuneration Order.

This position accords with the interests of justice that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates' Remuneration Order, which is the procedure provided for such determination. Otherwise such references would be rendered nugatory."

14. Mr. Buti submitted that the Court can set aside the Judgment entered on 13th April 2016 in favor of O. M. Robinson & Company Advocates in the sum of Kshs. 232, 116, 814.20, and all consequential orders as the said decision was made on errors of principle. The application made for summary Judgment within the same miscellaneous cause is a nullity and therefore the same cannot stand. Counsel cited **Kipkorir Tito & Kiara Advocates vs. Deposit Protection Fund [2005] eKLR 528**, where the Court of Appeal held as follows concerning interference with the taxing officer's discretion in matters of taxation:

"Where there has been an error in principle, the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional circumstances."

Counsel further submitted that there is an error in principle in the decision of the taxing master when she awarded the certificate of costs without considering the nature of instructions the advocates had executed taking into account that the **High Court Miscellaneous Civil Application No.41 of 2012** from which the bill of costs arose is still pending and has not been heard. Counsel submitted that the decree in

this matter could only be issued after the institution of suit by way of Plaintiff in a different Cause as per Section 48 of the Advocates Act. Section 51 of the Advocates Act can only be invoked where there is proof of retainer. It was the duty of the Applicant to satisfy the Court that there was no dispute between him and the client on the issues relating to retainer before Judgment could be entered in his favor. Mr. Buti submitted that this mandatory duty was not discharged by the Applicant in the Notice of Motion dated 21st March 2016. Counsel cited **Oruko and Associates vs. Brollo Kenya Ltd. HCCC No. 1465/02** Nyamu J held:

"While I agree with the counsel for the applicant that under Section 51(2) a certificate of the taxing master is final; it is only final as to the amount of the costs. The wording of the sub-section is clear as to when judgment can be entered by the Court. Judgment under this section can only be entered where there is a proof of a retainer and the retainer is not disputed."

15. Mr. Buti submitted that upon institution of a suit and service, Section 49 of the Advocates requires sufficient time be given for defence to be filed by the Applicants if there is no agreement as to costs. Counsel submitted that no suit was filed and subsequently no Plaintiff was served upon the Client/ Applicant herein. The subject Bill of Costs was taxed on the pretext that High Court Miscellaneous Civil Application No.41 of 2012 from which the Bill arose was heard by this court on 27th June 2012 when that suit was still pending and has not been heard. The Respondent misled the court when at its item No.26 of the said Bill, it claims for a getting up for trial fee, which trial it further states was held on 27th June 2012 when the Respondent's firm was at all times fully aware that no hearing had taken place in High Court Misc. Application No. 41 of 2012 which is still pending. Mr. Buti referred to **Gichuki King'ara & Company Advocates vs. Mugoya Construction & Engineering Limited [2012]**, eKLR where the Court held that:

"Since the retainer lasts till the work is done then the respondents should patiently do the work to its completion and then tax the bill of costs. Their claim to be paid for the work done to date contradicts the principle that the retainer is one entire contract to be remunerated after completion, and amounts to seeking payment on a quantum merit basis. To allow the taxation at this stage would result in allowing another taxation at or even before the conclusion of the business for which the respondents were retained..... For the above reasons, I find no reason advanced for the taxation to precede completion of the work assigned, and that the taxation herein was premature, and the advocate/client bill of costs dated 17th July, 2009 is hereby struck out with costs as prayed."

16. Mr. Buti submitted that the Applicant intends to challenge the quantum of the Advocate Bill of Costs taxed at Kshs. 232,116,814.20 and the application for reference has high chances of success. Counsel submitted that the Applicant will be prejudiced if it is not given an opportunity to challenge the decision of the taxing master considering that the taxed amount is a colossal sum of public money.

17. Mr. Buti further submitted that the Applicant had abandoned prayers a, b and c, and was now only concerned with prayers d, e and f, stating that their application is hinged on the allegation that the bill of costs was prematurely taxed.

18. As regards Application No. 187, Mr. Buti submitted that this was a bill of proceedings arising from the Court of Appeal which ought not to have been taxed at the High Court.

19. Mr. Mohamed submitted on the procedure adopted by the Advocate/Respondent in recovery of the costs. He relied on Section 51 of the Advocates Act. Sections 48 and 49 requires an advocate to file a plaintiff to recover taxed costs. In this matter the Applicant only filed a Miscellaneous Application and not a plaintiff. On that account counsel submit that the Judgment be set aside.

20. Mr. Ondego associated entirely with submissions of Mr. Buti and Mohamed. Administration of justice requires that matters be decided based on their merits and that is why they filed the current application.

21. Mr. Gomba relied on Replying Affidavit and filed a Preliminary Objection on 27.10.16. In response to the Bill of Costs taxed on 11.3.16 Counsel submitted that the taxation was done by the Deputy Registrar of this Court and conceded that in Miscellaneous 187/2015 the taxation was improper. The Deputy Registrar lacked jurisdiction because the matter arose from an appeal. The rest of the bills, according to Mr. Gomba, were properly taxed.

22. Mr. Gomba attacked the Application, stating that it is brought under wrong orders and rules of the Civil Procedure Rules. It is an omnibus application. Mr. Gomba submitted that the application ought to have been brought under Rule 11 of the Advocates Act (Remuneration Order). Further, counsel submitted there were no reasons given for delay as to why the Applicants never filed their documents in respect to the Bill of Costs which were taxed. In respect to the process under Section 48 and 51 of the Advocates Act, counsel submitted that under that that Section one can file a Miscellaneous Application to obtain a Judgment. Therefore, the process which was used was regular. Mr. Gomba urged the Court to dismiss the application.

23 In his response Mr. Buti submitted that they are seeking orders to set aside all Judgments in consolidated files. However, he conceded that if there were to be a denial of setting aside of Judgment on account of *res judicata* then only two files would be affected being 209/2015 and 210 of 2015.

The Determination

(i) Whether the application is properly anchored in law

24. The application before the Court is brought under **Order 8 rule 8; Order 10 rule 11 and Order 45 (1)(2) and (3) of the Civil Procedure Rules and Sections 3, 3A and 3B of the Civil Procedure Act and Articles 25(c), 51 and 159 (2) of the Constitution of Kenya**. Order 8 rule 8 of the Civil Procedure Rules deals with the procedure for making applications for amendments of pleading; Order 10 rule 11 deals with setting aside of default Judgments while Order 45 deals with review proceedings.

25. The Articles of the constitution cited appears meant to add spice to the application. These are constitutional pronouncements dealing with substantive rights to fair hearing (Article 25 (c). Article 51 deals with rights of persons detained, held in custody or imprisonment. (It is difficult to see the relevance of this Article to this application) while Article 159 (2) deals with procedures to ensure justice is served to all and without due delay or without considerations of procedural technicalities.

26. It is to be noted that Mr. Buti learned counsel for the Applicant abandoned all other prayers in the application which sought remedies of review or setting aside of the Judgment herein. Counsel submitted that they were only interested in prayers (d), (e) and (f) which sought the extension of time to allow for the filing of a reference to the High Court. Clearly the application should have been filed under rule 11 of the Advocates Remuneration (Amended) Order, 2014 Sub-rule 1 thereof states 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.”

Under sub-rule 4 the High Court has the power in its discretion by order to enlarge the time fixed by sub-section (1). It therefore means that rule 11 of the Advocates Remuneration (Amended) Order 2014 is the principal anchoring section for the leave to file a reference out of time. There is no reference to the said rule 11 in this application. Not even in parties' submissions have counsel referred to it.

23. In my view, the said section is a substantive provision of the law upon which the relief sought herein must be anchored. The Applicant cited provisions of the law which ceased to apply as soon as the Applicants abandoned prayers (a) to (d) of the application. The attempt by the Applicant to cite Section 3, 3A and 3B of the Civil Procedure Act, and Articles of the constitution is an omnibus attempt to bring the application to an ambit of any law, statutory or constitutional, in the hope that such fishing expedition, which it is, will net at least one, if not many fish. It has been said, and I agree, that procedure is the hand maiden of justice, and where there is a clear procedure granted for seeking substantive justice, such procedure cannot be ignored. It is the finding of this Court that the application before the Court is not anchored properly in law and fails to satisfy the grant of the orders sought. Without anchoring the leave sought to file reference out of time under the said rule 11 of the Advocates Remuneration (Amended) Order 2014, that prayer cannot issue. However, that is not the end of the matter. This is a Court of justice and it has inherent powers to administer justice, and so I go to the second issue.

(ii) Whether Civil Application No. 187 of 2015 was properly taxed before this Court

24. The Applicant alleged anomalies that were attendant to the Bill of Costs in reference to **Misc. Civil Application No. 187 of 2015**, in which the Respondent firm has been issued with a Certificate of Costs in the sum of **Ksh. 208,347,100.30**. This claim was also the subject of **Judicial Review No. 50 of 2016**, consolidated with other similar matters in **Judicial Review No. 30 of 2016**. The said Bill of Costs was exhibited at Pages 54 to 63 of the application. It was filed in Court on the 4th August 2015. From item No. 1 of that Bill, the Advocate states that his Bill arises from proceedings in the **Court of Appeal**, being **Civil Appeal No. 283 of 2007, filed in the Court of Appeal**. The said appeal in the **Court of Appeal** arose from proceedings in the **High Court at Mombasa**, in **Misc. Application No. 695 of 2003** in which judgment thereon was delivered by Hon. Khaminwa J. on the 16th June 2006. From the outset, it is apparent that this Bill of Costs was filed in the High Court of Kenya at Mombasa, and taxed by the Deputy Registrar of that Court. This fact is not denied, and is in fact admitted by the Respondent. However, the law is that that a Bill of Costs in Proceedings conducted in the Court of Appeal should at all times and always be filed in the Court of Appeal, in the Appeal from where such costs arise, and is taxed by the Registrar or Deputy Registrar of that Court. The law is that *any dispute arising from the determination of the Registrar upon taxation of the Bill of Costs in the Court of Appeal may be referred by any Party to a single Judge, of that Court, and, a single judge may adjourn the hearing of any such issue as is referred to him for the determination of the full Court of three Judges*. Therefore, the taxation of a Bill of Costs on proceedings held, heard and fully determined by the Court of Appeal can only be taxed in that Court and not by the Deputy Registrar of the High Court. The purported taxation of a Bill of costs arising out of a Court of Appeal matter in the High Court is a nullity and of no consequence whatsoever. The Deputy Registrar of the High Court *had no jurisdiction*, and none is vested in such Deputy Registrar of the High Court to tax a Bill of Costs relating to proceedings conducted in the Court of Appeal.

25. It is the finding of this Court that taxation of Civil Appeal No. 187 of 2015 was unprocedural and unlawful, and the same is hereby set aside and avoided together with all consequential proceedings.

(iii) Whether the taxation in Misc. Civil Appeal No. 284 was lawful

26. The Applicant's counsel submitted that the proceedings in Application No. 41 of 2012 from which the Bill of Coasts in Civil Application No. 284 of 2015 arose were incomplete proceedings and so therefore that the Applicant could not tax his Bill of Costs before the matter was concluded. The Applicant referred the Court to *item No. 26* of that Bill of Costs where the Advocate claims a sum of *Kshs. 50,000, 000.00* under the head of *“Fees for getting up for trial”*. The *date of this trial* is given as the 27th June 2012. The Applicant submitted that there was no hearing of *Misc. Civil Application No. 41 of 2012* on that alleged date of *27th June 2012* or at any other date at all as claimed by Advocate. The Applicant challenges the items of taxation as it would do in an actual reference.

29. The allegation that the proceedings in Application No. 41 of 2012 were incomplete were denied by the Respondent. I have carefully considered the issue. The question the Court may ask is this: at what stage do pleadings come to an end; and who is responsible for concluding pleadings and bringing matters to an end? It is alleged that Application No. 41 of 2012 is still on going. However, none of the Applicant's submissions contain evidence of the current state of the proceedings or which firm of advocates took over from the Respondent. If there is currently an advocate on record on the said application, then the Respondent would be obligated to wait until the matter is concluded and to file his bill of costs after the case is concluded. The Respondent denied these allegations and there was no evidence adduced in Court to show that the said suit is still on going. This Court is not satisfied that the taxation in Misc. Civil Application No. 284 was premature. The allegations are unsupported and are accordingly dismissed.

(iv) Whether the Respondent was paid moneys he failed to disclose

30. The Applicant submitted that the Respondent had already been paid a total of Kshs. 121,638,561.00/= this allegation was denied by the Respondent who submitted that any money payment can only be evidenced by way of payment vouchers duly executed. The Applicant attached bank statements which showed that upto 73,000,000/= may have been paid to the Respondent. These allegations have been denied, and this Court cannot accept them as true. From the proceedings before the Court it is evident that the Respondent has been in a relationship with the Applicant for a very long time during which period he must have been paid money in fees. At the same time the Court cannot dismiss such an allegation out rightly. This Court has already set aside and avoided taxation in civil Application No. 187 of 2015 in which the Respondent was awarded Kshs. 208,347,100.30 in taxation. The Court has directed a fresh taxation of the Bill of Costs. I think it is in the forum of the fresh taxation that the Applicant herein may stake its right to a set off after proving that indeed the Respondent had been paid part professional fees as alleged.

Final Orders

31. From the foregoing paragraphs of this Ruling it is the finding of this Court that the application before the Court is not merited in so far as it challenges the taxation in Misc. Civil Application No. 284 of 2015. It is also the finding of this Court that the application is not anchored properly in law and cannot therefore be the basis to challenge any taxations herein. However, this Court cannot allow a blatant wrong to be done. This is in respect of Misc. Civil Application No. 187 of 2015. The taxation of the Bill of Costs in that matter was a nullity ab-initio, and this Court has no option but to set aside the taxed award of Kshs. 208,347,100.30. The taxation in Misc. Civil Application No. 284/2015 remains unchallenged.

32. In the upshot the application succeeds and fails as stated above. Each party to bear own costs.

Dated, Signed and Delivered at Mombasa this 6th day of

November, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Buti and Mr. Mohamed for Applicant

Mr. Gomba for Respondent

Mr. Kaunda Court Assistant